ASHOK DEBBARMA @ ACHAK DEBBARMA
v.
STATE OF TRIPURA
(Criminal Appeal Nos. 47-48 of 2013)

MARCH 4, 2014.

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

PENAL CODE, 1860: ss.326, 436 and 302 r/w s.34 – Murder – 30-35 members in a group set on fire a number of houses in a village – Shot dead 15 persons and seriously injured 4 persons – 11 persons charge sheeted for the offences u/ss.326, 436 and 302 r/w s.34 – But charges framed only against 5 persons – Out of them, 3 accused acquitted for want of evidence and two accused including appellant held guilty of charged offences – Conviction and death sentence of appellant – On appeal, held: Courts below appreciated the evidence of PWs regarding involvement of appellant in the incident, including the fact that he had fired at various people, which led to the killing of relatives of PW10 and PW13 – The brother of PW-10 had died on the spot with bullet injuries – His version that he had seen the appellant firing from his fire arm remained wholly unshaken – The fact that the fire arms were used in commission of the crime was fully corroborated by medical evidence – PW10 and PW13 identified the appellant in open Court and such identification was not shaken or contradicted – Since the appellant was known to the witnesses and was identified by face, the fact that no Test Identification Parade was conducted at the time of investigation was of no consequence – The answers given by appellant while examining him u/s.313, fully corroborated the evidence of PW10 and PW13 and, therefore, the offences levelled against the appellant stood proved and the courts below rightly found him guilty – Regarding sentence, courts below put the entire elements of crime on the appellant and

treated those elements as aggravating circumstances so as to award death sentence – The crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not be thrown upon the appellant alone – Appellant was a tribal, stated to be a member of the extremist group raging war against the minority settlers, apprehending perhaps they might snatch away their livelihood and encroach upon their properties, and possibly such frustration and neglect led them to take arms – Viewed in that perspective, it is not a rarest of rare case for awarding death sentence – Considering the gravity of the crime and the factors like extreme social indignation, death sentence is altered to that of imprisonment for life and the term of imprisonment as 20 years is fixed without remission, over and above the period of sentence already undergone.

ARMS ACT, 1959: s.27(3) – Held: Was declared unconstitutional in **State of Punjab v. Dalbir Singh***.*

Code of Criminal Procedure, 1973:

Test identification parade: Object of – Discussed.

s.161 – Statements made to the police during investigation are not substantive piece of evidence and the statements recorded u/s.161 CrPC can be used only for the purpose of contradiction and not for corroboration – If the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded u/s.161 CrPC.

s.313 – Object of – Discussed.

CRIMINAL LAW: Reasonable doubt – Held: An accused has a profound right not to be convicted of an offence which is not established by the evidential standard of proof "beyond

reasonable doubt" – Law cannot afford any favourite other than truth and to constitute reasonable doubt, it must be free from an overemotional response – Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions – Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt.

EVIDENCE ACT, 1872: s.138 – Held: s.138 specifically states that witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. Consequently, there is no scope u/s.138 to start with cross-examination of a witness, who has not been examined-in-chief, an error committed by the trial Court.

SENTENCE/SENTENCING:

Death sentence – Mitigating circumstances – Counsel's ineffectiveness – Held: Right to get proper and competent assistance is the facet of fair trial – It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution – When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the Court independently reweighs the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence – Applying the test to the facts of this case, it cannot be said that the accused was not given proper legal assistance by the counsel appeared before the trial Court as well as before the High Court.

Death sentence – Proportionality of sentence – Three tests laid down are crime test, criminal test and RR test, not

the "balancing test", while deciding the proportionality of the sentence – To award death sentence, crime test has to be fully satisfied and there should be no mitigating circumstance favouring the accused, over and above the RR test.

The prosecution case was that an information was received on the fateful day, that the extremists had set on fire a number of houses at Jarulbachai village and people had been shot dead and injured grievously. Altogether 11 persons were charge sheeted for the offences under Sections 326, 436 and 302 r/w Section 34, IPC and also Section 27(3) of the Arms Act, 1959. But charges were framed only against 5 persons under Sections 326, 436 and Section 302 r/w Section 34, IPC and also Section 27(3) of the Arms Act, 1959. Out of them, 3 accused were acquitted for want of evidence and two accused including appellant were held guilty of charged offences. The appellant was awarded death sentence. The High Court set aside conviction under Section 27(3) of the Arms Act, 1959, however, upheld conviction under other offences and the death sentence. The instant appeal was filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD: 1. The High Court is right in holding that the appellant was not guilty under Section 27(3) of the Arms Act, 1959, in view of the law declared in ****State of Punjab v. Dalbir Singh* **wherein Section 27(3) of the Arms Act was declared unconstitutional. The facts clearly indicated that 15 persons were brutally and mercilessly killed and the houses of villagers with all household belongings and livestock were buried to ashes. PW1, an injured person, had given a detailed picture of what had happened on the fateful day and he was not cross-examined by the defence. The evidence of PW1 was also fully corroborated by PW2. PW18, the officer in charge of Police Station had visited th[illegible]t**

information at the Camp. At about 4.00 a.m. the next day, he received a complaint from PW2. By the time, he had already started investigation after getting information from the Camp and on his personal visit to the site. In other words, the police machinery had already been set in motion on the basis of the information PW18 had already got and, it was during the course of investigation, he had received the complaint from PW2. Though the complaint received from PW2 was treated as the First Information Report, the fact remained that even before that PW18 had started investigation. Consequently, written information (Ex.1) received from PW2, at best, could be a statement of PW2 made in writing to the police during the course of investigation. Of course, it can be treated as a statement of PW2 recorded under Section 161 Cr.P.C and the contents thereof could be used not as the First Information Report, but for the purpose of contradicting PW2. [para 11] [308-E-F; G-H; 309-A-D]

***State of Punjab v. Dalbir Singh* (2012) 3 SCC 346: 2012 (4) SCR 608 – relied on.**

2. PW20, the DSP (CID) was later entrusted with the investigation because of the seriousness of the crime. PW20 visited the place of occurrence and noticed that the entire hutments were gutted by fire, 35 families were affected by fire, 15 persons had been killed and four seriously injured. PW20, during investigation, received 15 post-mortem reports from the doctor-PW9 who conducted the post-mortem on the dead bodies. PW20 had also forwarded one fire cartridge case to ballistic expert for his opinion and, he received the expert opinion to the effect that it was around 7.62 mm ammunition. PW20 also deposed that the fire arm was AK47 rifle. PW20 also asserted that the appellant was a person who was known to the locality and he remained as an absconder from the day of the occurrence. The evidence

of PW20 as well as the evidence tendered by PW9 indicated that the cartridge seized from the site was found to be of 7.62 mm ammunition and the bullets were fired from an automatic fire arm like SLR and, in the instant case, the fire arm used was nothing but an AK 47 rifle. [para 12] [309-E-H]

3. Evidence of PWs 6, 7 and 8, Medical Officers indicated that many of the persons, who had sustained gunshot injuries, were treated in the hospital by them and they had submitted their reports which were also marked in evidence. The fact that the fire arms were used in commission of the crime was fully corroborated by the evidence of PW20 read with evidence of PWs 6 to 9. [para 13] [310-B-C]

4. PW10 clearly stated in his deposition that the appellant as well as the other convict (since absconding) were firing with fire arms, due to which, his brother died on the spot with bullet injuries. PW10 has further deposed that there were around 30-35 members in the group, who had, either set fire to the huts or opened fire from their fire arms. PW10, in his cross-examination, deposed that he had stated before the police that he had seen the other convict as well as the appellant opening the fires, which statement was not effectively cross-examined. PW10's version that he had seen the appellant firing from his fire arm remained wholly unshaken. PW10 asserted in his cross-examination that he had stated before the police that his brother died due to bullets fired by the appellant. PW11 has also deposed that the extremists had killed 15 persons, injured large number of persons and 23 houses were gutted in fire. PW11, of course, did not name the appellant as such, but has fully corroborated the evidence tendered by PW10. PW11's evidence reinforced the evidence of PW10 that the appellant was one of those persons who had attacked the villag

houses and injured or killed large number of men, women and children. PW14, a resident of the locality also corroborated the evidence of PW11. . PW13 was one of the persons who got injured in the incident, lost both his son and wife in the firing occurred on the fateful day. PW13 was examined by the police on the night of the incident but, of course, he did name the appellant then, consequently, the appellant's name did not figure in the FIR. PW13, in his evidence, deposed that his wife aged around 30 years and his daughter aged about 5 years, had died in the incident. PW13 deposed that the miscreants had set fire to his house and when he wanted to come out of his house, 10-12 miscreants with fire arms fired at him and he sustained injuries. PW13 identified the accused in the Court. The trial Court and the High Court have rightly appreciated their evidence and the involvement of the appellant in the incident, including the fact that he had fired at various people, which led to the killing of relatives of PW10 and PW13. Since the accused persons were known to the witnesses and they were identified by face, the fact that no Test Identification Parade was conducted at the time of investigation, is of no consequence. The primary object of the Test Identification Parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the Test Identification Parade is really to find whether or not the suspect is the real offender. If the witnesses are trustworthy and reliable, the mere fact that no Test Identification Parade was conducted, itself, would not be a reason for discarding the evidence of those witnesses. PW10 and PW13 have identified the accused in open Court which is the substantive piece of evidence and such identification by the eye-witnesses has not been shaken or contradicted. The trial Court examined in detail the oral evidence tendered by those witnesses, which was accepted by the

High Court and there was no error in the appreciation of the evidence tendered by those witnesses. [Para 14 to 17] [310-D-H; 311-A-F; 312-B-D, E-G]

Kanta Prashad v. Delhi Administration **AIR 1958 SC 350: 1958 SCR 1218;** *Harbhajan Singh v. State of Jammu & Kashmir* **(1975) 4 SCC 480;** *Jadunath Singh and another v. State of UP* **(1970) 3 SCC 518: 1971 (2) SCR 917;** *George & Ors. v. State of Kerala and Anr.* **(1998) 4 SCC 605: 1998 (2) SCR 303;** *Malkhansingh v. State of M.P.* **(2003) 5 SCC 746: 2003 (1) Suppl. SCR 443 – relied on.**

5. The mere fact that the appellant was not named in the statement made before the police under Section 161 Cr.P.C. would not make the evidence of PW10 and PW13 tendered in the Court unreliable. Statements made to the police during investigation were not substantive piece of evidence and the statements recorded under Section 161 CrPC can be used only for the purpose of contradiction and not for corroboration. If the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded under Section 161 CrPC. PW10 lost his real brother and PW13 lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who were all the miscreants and their names. The witnesses may be knowing the persons by face, not their names. Therefore, the mere fact that they had not named the accused persons in Section 161 statement, at that time, that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy. [para 18] [312-G-H; 313-A-D]

6. The object of Section 313 CrPC is to empower the Court to examine the accused after evidence of the prosecution has been taken so that

an opportunity to explain the circumstances which may tend to incriminate him. The object of questioning an accused person by the Court is to give him an opportunity of explaining the circumstances that appear against him in the evidence. In the instant case, the accused was examined in the Court by the Additional Sessions Judge. One of the question put to the accused was that from the deposition of PW10, PW11, PW13, it had come out in evidence that it was due to the firing of the accused and his associates, some persons had sustained severe bullet injuries, to which the answer given by the accused was "Yes". In other words, he has admitted the fact that, in the incident, those persons had sustained severe bullet injuries by the firing of the accused and his associates. Further, for the question, that from the evidence of those witnesses and other information, at that night, named victims were killed by the bullets of fire arms and fire, the accused kept silent. Under Section 313 statement, if the accused admits that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. The answers given by the accused while examining him under Section 313, fully corroborated the evidence of PW10 and PW13 and hence the offences levelled against the appellant stand proved and the trial Court and the High Court have rightly found him guilty for the offences under Sections 326, 436 and 302 read with Section 34 IPC. [Para 19, 20, 21, 23] [313-E-G; 314-F-H; 315-A-B, 613-B-C]

State of Maharashtra v. Sukhdev Singh and Anr. **(1992) 3 SCC 700: 1992(3) SCR 480;** *Narain Singh v. State of Punjab* **(1963) 3 SCR 678;** *Mohan Singh v. Prem Singh and Anr.* **(2002) 10 SCC 236: 2002 (3) Suppl. SCR 5;** *Devender Kumar Singla v. Baldev Krishan Singla* **(2004) 9 SCC 15;** *Bishnu Prasad Sinha and Anr. v. State of Assam* **(2007) 11 SCC 467: 2007 (1) SCR 916 - relied on.**

ELEMENTS OF CRIME

7. He appellant alone could not have organized and executed the entire crime. Eleven persons were originally charge-sheeted out of 30-35 group of persons who, according to the prosecution, armed with weapons like AK47, Dao, Lathi, etc., had attacked the villagers, fired at them and set ablaze their huts and belongings. The High Court, while confirming the death sentence recognized the accused as one of the "perpetrators of the crime", not the sole, and then stated that they all acted in most cruel and inhuman manner and committed the offences. Offences were committed by other so-called perpetrators of the crime as well, but they could not be apprehended or charge-sheeted. The appellant alone or the accused absconding, though found guilty, were not solely responsible for all the elements of the crime, but other perpetrators of the crime also, who could not be apprehended. The Courts below put the entire elements of crime on the accused and treated those elements as aggravating circumstances so as to award death sentence, which cannot be sustained. [Para 26] [316-H; 317-A-B, D-G]

REASONABLE DOUBT AND RESIDUAL DOUBT

8. An accused has a profound right not to be convicted of an offence which is not established by the evidential standard of proof "beyond reasonable doubt". Law cannot afford any favourite other than truth and to constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. [para 27] [317-G-H; 318-A-C]

9. In Indian criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as fire arms, dao, lathi etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only 11 persons were charge-sheeted and, out of which, charges were framed only against 5 accused persons. Even out of those 5 persons, 3 were acquitted, leaving the appellant and another, who is absconding. Court, in such circumstances, could have entertained a "residual doubt" as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of rare category. [para 28] [318-F-H; 319-A-B]

Krishnan and another v. State represented by Inspector of Police **(2003) 7 SCC 56: 2003 (1) Suppl. SCR 771;** *Ramakant Rai v. Madan Rai and Ors.* **(2002) 12 SCC 395 – relied on.**

Commonwealth v. John W. Webster **5 Cush. 295, 320 (1850);** *Donald Gene Franklin v. James A. Lynaugh, Director, Texas Department of Corrections* **487 US 164 (1988) : 101 L Ed 2d 155;** *California v. Brown* **479 U.S. 541 – referred to.**

10. The prosecution has to prove its case beyond reasonable doubt, but not with "absolute certainty". But, in between "reasonable doubt" and "absolute certainty",

a decision maker's mind may wander possibly, in a given case, he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". So far as the instant case was concerned, whether the appellant alone could have executed the crime single handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering around 35. All element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor. [para 31] [320-C-F]

COUNSEL'S INEFFECTIVENESS:

11. Right to get proper and competent assistance is the facet of fair trial. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 Cr.P.C. provides for legal assistance to the accused on State expenditure. Right to get proper legal assistance plays a crucial role in adversarial system, since access to counsel's skill and knowledge is necessary to accord the accused an ample opportunity to meet the case of the prosecution. The Court, in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the Court independently reweighs the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence. Applying the test to the facts of this case, it cannot be said that the accused w

legal assistance by the counsel appeared before the trial Court as well as before the High Court. There is clinching evidence in this case of the involvement of the appellant. The evidence tendered by the eye-witnesses is trustworthy and reliable. True, PW17 should not have been subjected to cross-examination without being put to chief-examination. Section 138 of the Evidence Act specifically states that witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. Consequently, there is no scope under Section 138 of the Evidence Act to start with cross-examination of a witness, who has not been examined-in-chief, an error committed by the trial Court. [paras 33, 35-37] [321-D, F-G; 322-E-F; 323-C-H]

Madhav Hayawadanrao S. Hoskot v. State of Maharashtra **(1978) 3 SCC 544: 1979 (1) SCR 192;** *State of Haryana v. Darshana Devi and Ors.* **(1979) 2 SCC 236: 1979 (3) SCR 184;** *Hussainara Khatoon and Ors. (IV) v. Home Secretary, State of Bihar, Patna* **(1980) 1 SCC 98: 1979 (3) SCR 532;** *Ranjan Dwivedi v. Union of India* **(1983) 3 SCC 307: 1983 (2) SCR 982 – relied on.**

Charles E. Strickland, Superintendent, Florida State Prison v. David Leroy Washington **466 US 668 (1984) – referred to.**

12. Participation and involvement of the appellant, in the instant crime, have been proved beyond reasonable doubt. At the time of commission of the offence, he was 30 years of age, now 45. Facts would clearly indicate that he is one of the members of group of extremist persons, waging war against the linguistic group of people in the State of Tripura. Persons like the appellant armed with sophisticated weapons like AK 47, attacked unarmed and defenceless persons, which included women and children. Prosecution has stated that the minority

community in the State of Tripura is often faced with some extremists' attacks and no leniency be shown to such persons, at the peril of innocent people residing in the State of Tripura. [Para 38] [324-H; 325-A-C]

13. Three tests were laid down – crime test, criminal test and RR test, not the "balancing test", while deciding the proportionality of the sentence. To award death sentence, crime test has to be fully satisfied and there should be no mitigating circumstance favouring the accused, over and above the RR test. The hallmark of a sentencing policy, it is often said, that sufficiently guides and attracts the Court is the presence of procedures that require the Court to consider the circumstances of the crime and the criminal before it recommends sentence. It is extremely difficult to lay down clear cut guidelines or standards to determine the appropriate sentence to be awarded. Even the ardent critics only criticize, but have no concrete solution as such for laying down a clear cut policy in sentencing. Only safeguard, statutorily and judicially provided is to give special reasons, not merely "reasons" before awarding the capital punishment. [paras 39, 40] [325-C-G]

14. Few circumstances which favoured the accused in the instant case, to hold it as not a rarest of rare case, which are that the appellant alone could not have executed such a crime, which resulted in the death of 15 persons and leaving so many injured and setting ablaze 23 houses, that is the entire elements of the crime could not have been committed by the appellant alone. Further, the appellant is a tribal, stated to be a member of the extremist group raging war against the minority settlers, apprehending perhaps they might snatch away their livelihood and encroach upon their properties, possibly such frustration and neglect might have led them to take arms, thinking they are being marg

by the society. Viewed in that perspective, this is not a rarest of rare case for awarding death sentence. All the same, considering the gravity of the crime and the factors like extreme social indignation, crimes against innocent villagers, who are a linguistic minority, which included women and children, it would be in the interest of justice to apply the principles laid down in **Swamy Shradananada. The death sentence is altered to that of imprisonment for life and the term of imprisonment as 20 years is fixed without remission, over and above the period of sentence already undergone, which would meet the ends of justice. [paras 41, 42] [326-B-G]

Sukhwant Singh v. State of Punjab **(1995) 3 SCC 367: 1995 (2) SCR 1190;** *Tej Prakash v. State of Haryana* **(1996) 7 SCC 322: 1996 (7) SCC 322;** *Santosh Kumar Satisbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** ***Swamy Shradananada (2) v. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93 – relied on.**

Tahsildar Singh and another v. State of U.P. **AIR 1959 SC 1012: 1959 Suppl. SCR 875;** *Shashidhar Purandhar Hegde and another v. State of Karnataka* **(2004) 12 SCC 492: 2004 (5) Suppl. SCR 536;** *Dana Yadav alias Dahu and others v. State of Bihar* **(2002) 7 SCC 295: 2002 (2) Suppl. SCR 363;** *Shamu Balu Chaugule v. State of Maharashtra* **(1976) 1 SCC 438;** ***S.** Harnam Singh v. State (Delhi Admn)* **(1976) 2 SCC 819: 2009 (7) SCR 653;** *Ranvir Yadav v. State of Bihar* **(2009) 6 SCC 595;** *Hate Singh Bhagat Singh v. State of Madhya Bharat* **AIR 1953 SC 468 – referred to.**

Case Law Reference:

1959 Suppl. SCR 875	**referred to**	**Para 7**
2004 (5) Suppl. SCR 536	**referred to**	**Para 7**
2002 (2) Suppl. SCR 363	**referred to**	**Para 8**

(1976) 1 SCC 438	**referred to**	**Para 8**
(2009) 6 SCC 595	**referred to**	**Para 8**
AIR 1953 SC 468	**referred to**	**Para 8**
2012 (4) SCR 608	**relied upon**	**Para 11**
1958 SCR 1218	**relied upon**	**Para 16**
(1975) 4 SCC 480	**relied upon**	**Para 16**
1971 (2) SCR 917	**relied upon**	**Para 16**
1998 (2) SCR 303	**relied upon**	**Para 16**
2003 (1) Suppl. SCR 443	**relied upon**	**Para 17**
1992 (3) SCR 480	**relied upon**	**Para 21**
(1963) 3 SCR 678	**relied upon**	**Para 21**
2002 (3) Suppl. SCR 5	**relied upon**	**Para 22**
(2004) 9 SCC 15	**relied upon**	**Para 22**
2007 (1) SCR 916	**relied upon**	**Para 22**
2003 (1) Suppl. SCR 771	**relied upon**	**Para 27**
(2002) 12 SCC 395	**relied upon**	**Para 27**
1979 (1) SCR 192	**relied upon**	**Para 33**
1979 (3) SCR 184	**relied upon**	**Para 33**
1979 (3) SCR 532	**relied upon**	**Para 33**
1983 (2) SCR 982	**relied upon**	**Para 33**
1995 (2) SCR 1190	**relied upon**	**Para 37**
1996 (7) SCC 322	**relied upon**	**Para 37**
2009 (9) SCR 90	**relied upon**	**Para 40**
2008 (11) SCR 93	**relied**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 47-48 of 2013.

From the Judgment & Order dated 05.09.2012 of the High Court of Gauhati Bench at Agartala in Criminal Reference No. 2 of 2005 and Criminal Appeal (J) No. 94 of 2005.

Venkita Subramoniam T.R., for the Appellant.

Gopal Singh, Ritu Raj Biswas for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with a tragic incident in which a group of Armed Extremists at Jarulbachai village in the night of 11.2.1997, set fire to twenty houses belonging to a group of linguistic minority community of Bengal settlers, in which 15 persons lost their lives, which included women and children and causing extensive damage to their properties.

2. The Takarajala Police Station, West Tripura got information about the incident at about 11.00 p.m. on 11.2.1997 from Jarullabachai DAR Camp stating that extremists had set on fire a number of houses at Jarulbachai village and that the people had been shot dead and injured grievously. Information so received was entered into the General Diary at the Takarajala Police Station in the form of Entry No.292 dated 11.2.1997. PW18 (Officer-in-Charge) of Takarajala Police Station visited the Jarullabachai DAR Camp, cordoned off the area, and conducted search. Most of the houses of the village were found gutted by fire. On the very night of the occurrence, as many as 13 dead bodies were found lying at various places and three persons were found lying injured. A formal written information, as regards the occurrence, was received by the investigating officer from one Gauranga Biswas (PW2) from the place of occurrence. Based on the written information, which was so received at the place of occurrence, Takarajala Police

Station Case No.12/97 under Sections 148/149/302/326/307/436 IPC read with Section 27(3) of the Arms Act, 1959 was registered. Later, more number of dead bodies were found and number of dead persons increased to 15, so also the number of injured persons. Dead bodies as well as injured persons were taken to GB Hospital at about 4.00 p.m. on 12.2.1997. Inquests were held on the dead bodies and post-mortem examinations were also conducted. PW.18, the Investigating Officer, seized vide seizure list (Ex.11), two empty cartridges and some ashes from the place of occurrence. Looking at the serious nature of the evidence, investigation was handed over to the Criminal Investigation Department (CID) and PW20 (a DSP) was entrusted with the investigation.

3. PW20, on completion of the investigation, filed a charge-sheet under Sections 148/149/302/326/307/436 IPC read with Section 34 IPC and 27(3) of the Arms Act, 1959 read with Section 34 IPC against 11 persons, including (1) Rabi Deb Barma, (2) Gandhi Deb Barma, (3) Mantu Deb Barma, (4) Sambhuram Deb Barma, (5) Budhraj Deb Barma. Charge-sheet was also filed against some other accused, who were found absconding, namely, (1) Subha Deb Barma, (2) Sandhya Deb Barma, (3) Samprai Deb Barma, (4) Falgoon Deb Barma, (5) Bijoy Deb Barma, (6) Budh Deb Barma, (7) Mangal Deb Barma, (8) Sankar Deb Barma, (9), Kaphur Deb Barma, (10) Sandhyaram Deb Barma alias Phang and (11) Ashok Deb Barma (i.e. the Appellant herein). Out of the 11 persons named in the charge-sheet, chargers were framed against five persons under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC, which included the Appellant herein. All the above-mentioned persons pleaded not guilty and claimed to be tried.

4. The prosecution, in order to establish its case, examined 20 witnesses. Two accused persons, namely, Gandhi Deb Barma and Ashok Deb Barma alias Ashok Achak (i.e. the Appellant herein) were examined und

and, in their examinations, they denied to have committed the alleged offences. Due to want of evidence, the trial Court acquitted three persons vide its order dated 23.4.2005 under Section 232 CrPC and only two accused persons, namely, Gandhi Deb Barma and the Appellant herein were called upon in terms of Section 232 CrPC to enter on their defence and, accordingly, the defence adduced evidence by examining two witnesses.

5. The Additional Sessions Judge, West Tripura, Agartala, having found the Appellant and Gandhi Deb Barma guilty of the offences under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC, declared both the accused guilty of the offences aforementioned and convicted them accordingly vide judgment dated 7.11.2005, on which date Gandhi Deb Barma was absent since he was absconding. Judgment was, therefore, pronounced by the Sessions Judge in the absence of the co-accused in terms of Section 353(6) CrPC. The Additional Sessions Judge then on 10.11.2005, after hearing the prosecution as well as the accused on the question of sentence, passed an order sentencing the Appellant to death on his conviction under Sections 148/149/302/326/307/436 IPC read with Section 27(3) of the Arms Act, 1959.

6. The Additional Sessions Judge in terms of provisions contained in Section 366 (1) CrPC referred the matter to the High Court for confirmation of death sentence awarded to the Appellant, which was numbered as Criminal Reference No.02/ 2005. The Appellant also preferred Criminal Appeal (J) 94/ 2005. Both the Appeals as well as the Reference were heard by the High Court. The High Court vide its judgment and order dated 5.9.2012 set aside the conviction of the Appellant under Section 27(3) of the Arms Act, 1959. However, the death sentence under Section 302 IPC read with Section 34 IPC, in addition to the sentence passed for offence under Sections 326 and 436 read with Section 34 IPC, was sustained, against which these Appeals have been preferred.

7. Shri T.R. Venkita Subramoniam, learned counsel appearing for the Appellant, submitted that the prosecution has miserably failed to establish beyond reasonable doubt the involvement of the Appellant in the incident in question. Learned counsel pointed out that even though 20 witnesses were examined, only two witnesses viz. PW10 and PW13 in their deposition in the Court had mentioned the name of the Appellant, which is nothing but an improvement of the prosecution case, especially when the Appellant was not named in the FIR. Learned counsel also pointed out that PW10 and PW13 had not mentioned the name of the Appellant in their statements made to the Police under Section 161 CrPC. Learned counsel placed reliance on the judgment of this Court in *Tahsildar Singh and another v. State of U.P.* AIR 1959 SC 1012 and *Shashidhar Purandhar Hegde and another v. State of Karnataka* (2004) 12 SCC 492 and submitted that the omission to mention the name of the Appellant in the FIR as well as in the Section 161 statement was a significant omission which may amount to contradiction and the evidence of those witnesses should not have been relied upon for recording conviction.

8. Learned counsel also pointed out that the prosecution completely erred in not conducting the Test Identification Parade. Consequently, no reliance could have been placed on the statement of witnesses stating that they had seen the Appellant participating in the incident. Placing reliance on the judgment of this Court in *Dana Yadav alias Dahu and others v. State of Bihar* (2002) 7 SCC 295, learned counsel pointed out that ordinarily if the accused is not named in the FIR, his identification by the witnesses in Court should not be relied upon. Learned counsel also submitted that the High Court has committed an error in taking note of the fact that the Appellant was absconding immediately after the incident. Such a presumption should not have been drawn by the Court, especially when the question regarding abscondance was not put on the Appellant in the statement re[illegible]g

him under Section 313 CrPC. Learned counsel placed reliance on the judgment of this Court in *Shamu Balu Chaugule v. State of Maharashtra* (1976) 1 SCC 438, *S. Harnam Singh v. State (Delhi Admn.)* (1976) 2 SCC 819, *Ranvir Yadav v. State of Bihar* (2009) 6 SCC 595 and *Hate Singh Bhagat Singh v. State of Madhya Bharat* AIR 1953 SC 468. Learned counsel submitted that, in any view, this is not a case which falls in the category of rarest of rare case warranting capital punishment.

9. Learned counsel submitted that the appellant is a tribal coming from lower strata of the society, totally alienated from the main stream of the society and such extremist's upsurge might have occurred due to neglect and frustration. Further, it was pointed out that, seldom, people like the appellant get effective legal assistance and while applying the RR test, the question whether the appellant had got proper legal assistance, should also be examined. Learned counsel, after referring to few judgments of the U.S. Supreme Court, submitted that the Court, while considering the question of death sentence, should also examine whether there is any "residual doubt" over the guilt of the accused.

10. Shri Gopal Singh, learned counsel for the State, highlighted the manner in which the entire operation was executed by a mob consisting of 30 to 35 persons. Learned counsel submitted that they mercilessly fired at women and children and others with latest arms and ammunitions by killing as many as 15 persons, leaving large number of persons injured. Learned counsel pointed out that they set ablaze various huts in which poor and illiterate persons were living. Many of the persons who participated in the incident were known to the locals and the prosecution has examined as many as 20 witnesses, of which the evidence tendered by PW10 and PW13 was very crucial so far as the involvement of the Appellant is concerned. Learned counsel pointed out that the Courts have rightly believed the evidence of the above-mentioned witnesses and the mere fact that the Appellant's

name did not figure in the initial complaint or in the statement under Section 161 CrPC would not absolve him from the guilt, since the involvement of the appellant has been proved beyond reasonable doubt. Learned counsel also submitted that there is no necessity of conducting the Test Identification Parade since the accused persons were known to the witnesses. Learned counsel also submitted that all relevant incriminating questions were put by the Court to the accused while he was examined under Section 313 CrPC and the answers given by the accused would be sufficient to hold him guilty of the charges levelled against him. Learned counsel also submitted that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence adduced and the Court rightly awarded death sentence, which falls under the category of rarest of rare case.

11. We may indicate that though the trial Court as well as the High Court have found that both Gandhi Deb Barma and the Appellant were guilty of the various offences levied against them, we are in this case concerned with the Appeal filed by Ashok Deb Barma, who has also been awarded death sentence by the trial Court, which was confirmed by the High Court. At the outset, we may point out that the High Court is right in holding that the Appellant is not guilty under Section 27(3) of the Arms Act, 1959, in view of the law declared by this Court in *State of Punjab v. Dalbir Singh* (2012) 3 SCC 346, wherein this Court held that Section 27(3) of the Arms Act is unconstitutional. The fact that such dastardly acts referred to earlier were committed in the Jarulbachai village in the night of 11.2.1997, is not disputed. The question that we are called upon to decide is with regard to the complicity of the accused/ Appellant, who was found guilty by the trial Court as well as by the High Court. The facts would clearly indicate that, in this case, 15 persons were brutally and mercilessly killed and the houses of villagers with all household belongings and livestock were buried to ashes. PW1, an injured person, had given a detailed picture of what had happened on the f s

not cross-examined by the defence. The evidence of PW1 was also fully corroborated by PW2. PW18, the officer-in-charge of Takarajala Police Station, West Tripura, as already indicated, had visited the site since he got information at the Jarullabachai DAR Camp. At about 4.00 a.m. the next day, he had received the complaint from PW2, by the time, he had already started investigation after getting information from Jarullabachai DAR Camp and on his personal visit to the site. In other words, the police machinery had already been set in motion on the basis of the information PW18 had already got and, it was during the course of investigation, he had received the complaint from PW2. Though the complaint received from PW2 was treated as the First Information Report, the fact remains that even before that PW18 had started investigation. Consequently, written information (Ex.1) received from PW2, at best, could be a statement of PW2 made in writing to the police during the course of investigation. Of course, it can be treated as a statement of PW2 recorded under Section 161 Cr.P.C and the contents thereof could be used not as the First Information Report, but for the purpose of contradicting PW2.

12. PW20, the DSP (CID), as already indicated, was later entrusted with the investigation because of the seriousness of the crime. PW20 visited the place of occurrence and noticed that the entire hutments were gutted by fire, 35 families were affected by fire, 15 persons had been killed and four seriously injured. PW20, during investigation, received 15 post-mortem reports from Dr. Pijush Kanti Das of IGM Hospital (PW9), who conducted the post-mortem on the dead bodies. PW20 had also forwarded on 29.4.2011 one fire cartridge case to ballistic expert for his opinion and, on 19.5.1997, he received the expert opinion of the same date to the effect that it was around 7.62 mm ammunition. PW20 has also deposed that the fire arm was AK47 rifle. PW20 has also asserted that the Appellant was a person who was known to the locality and he remained as an absconder from the day of the occurrence. The evidence of PW20 as well as the evidence tendered by PW9 would clearly

indicate that the cartridge seized from the site was found to be of 7.62 mm ammunition and the bullets were fired from an automatic fire arm like SLR and, in the instant case, the fire arm used was nothing but an AK 47 rifle.

13. Evidence of PWs6, 7 and 8, Medical Officers posted in G.B. Hospital at Agartala, would indicate that many of the persons, who had sustained gunshot injuries, were treated in the hospital by them and they had submitted their reports which were also marked in evidence. The fact that the fire arms were used in commission of the crime was fully corroborated by the evidence of PW20 read with evidence of PWs 6 to 9.

14. We may now refer to the crucial evidence of some of the witnesses who had stated the involvement of the Appellant in the instant case. PW10 has clearly stated in his deposition that the accused as well as Gandhi Deb Barma (since absconding) were firing with fire arms, due to which, his brother died on the spot with bullet injuries. PW10 has further deposed that there were around 30-35 members in the group, who had, either set fire to the huts or opened fire from their fire arms. PW10, in his cross-examination, deposed that he had stated before the police that he had seen Gandhi Deb Barma as well as the Appellant opening the fires, which statement was not effectively cross-examined. PW10's version that he had seen the Appellant firing from his fire arm remained wholly unshaken. PW10 asserted in his cross-examination that he had stated before the police that his brother died due to bullets fired by the Appellant. PW11 has also deposed that the extremists had killed 15 persons, injured large number of persons and 23 houses were gutted in fire. PW11, of course, did not name the appellant as such, but has fully corroborated the evidence tendered by PW10. PW11's evidence reinforces the evidence of PW10 that the Appellant is one of those persons who had attacked the villagers and set fire to the houses and injured or killed large number of men, women and children. PW14, a resident of the locality, has also corrob[illegible] of PW11.

15. PW13 is one of the persons who got injured in the incident, lost both his son and wife in the firing occurred on the fateful day. PW13, it is reported, was examined by the police on the night of the incident but, of course, he did name the appellant then, consequently, the appellant's name did not figure in the FIR. PW13, in his evidence, deposed that his wife, Saraswati, aged around 30 years and his daughter, Tulshi aged about 5 years, had died in the incident. PW13 deposed that the miscreants had set fire to his house and when he wanted to come out of his house, 10-12 miscreants with fire arms fired at him and he sustained injuries. PW13 identified the accused in the Court.

16. We have gone through the oral evidence of PW10 and PW13 and, in our view, the trial Court and the High Court have rightly appreciated their evidence and the involvement of the Appellant in the above incident, including the fact that he had fired at various people, which led to the killing of relatives of PW10 and PW13. We are of the view that since the accused persons were known to the witnesses and they were identified by face, the fact that no Test Identification Parade was conducted at the time of investigation, is of no consequence. The primary object of the Test Identification Parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the Test Identification Parade is really to find whether or not the suspect is the real offender. In *Kanta Prashad v. Delhi Administration* AIR 1958 SC 350, this Court stated that the failure to hold the Test Identification Parade does not make the evidence of identification at the trial inadmissible. However, the weight to be attached to such identification would be for the Court to decide and it is prudent to hold the Test Identification Parade with respect to witnesses, who did not know the accused before the occurrence. Reference may also be made to the judgment of this Court in *Harbhajan Singh v. State of Jammu & Kashmir* (1975) 4 SCC 480, *Jadunath Singh and another v. State of*

UP (1970) 3 SCC 518 and *George & others v. State of Kerala and another* (1998) 4 SCC 605.

17. Above-mentioned decisions would indicate that while the evidence of identification of an accused at a trial is admissible as substantive piece of evidence, would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused. In *Malkhansingh v. State of M.P.* (2003) 5 SCC 746, this Court clarified that the Test Identification Parade is not a substantive piece of evidence and to hold the Test Identification Parade is not even the rule of law, but a rule of prudence so that the identification of the accused inside the Court room at the trial, can be safely relied upon. We are of the view that if the witnesses are trustworthy and reliable, the mere fact that no Test Identification Parade was conducted, itself, would not be a reason for discarding the evidence of those witnesses. This Court in *Dana Yadav alias Dahu* (supra) has examined the points on the law at great length and held that the evidence of identification of an accused in Court by a witness is substantive evidence, whereas identification in Test Identification Parade is, though a primary evidence, but not substantive one and the same can be used only to corroborate the identification of the accused by witness in the Court. So far as the present case is concerned, PW10 and PW13 have identified the accused in open Court which is the substantive piece of evidence and such identification by the eye-witnesses has not been shaken or contradicted. The trial Court examined in detail the oral evidence tendered by those witnesses, which was accepted by the High Court and we find no error in the appreciation of the evidence tendered by those witnesses.

18. The mere fact that the Appellant was not named in the statement made before the police under Section 161 CrPC and, due to this omission, the evidence of PW10 and PW13 tendered in the Court is unreliable, cannot be sustained. Statements made to the police during

substantive piece of evidence and the statements recorded under Section 161 CrPC can be used only for the purpose of contradiction and not for corroboration. In our view, if the evidence tendered by the witness in the witness box is creditworthy and reliable, that evidence cannot be rejected merely because a particular statement made by the witness before the Court does not find a place in the statement recorded under Section 161 CrPC. Police officer recorded statements of witnesses in an incident where 15 persons lost their lives, 23 houses were set ablaze and large number of persons were injured. PW10 lost his real brother and PW13 lost his daughter as well as his wife and in such a time of grief, they would not be in a normal state of mind to recollect who were all the miscreants and their names. The witnesses may be knowing the persons by face, not their names. Therefore, the mere fact that they had not named the accused persons in Section 161 statement, at that time, that would not be a reason for discarding the oral evidence if their evidence is found to be reliable and creditworthy.

19. Learned counsel appearing for the accused has raised the question that incriminating questions were not put to the accused while he was examined under Section 313 CrPC. The object of Section 313 CrPC is to empower the Court to examine the accused after evidence of the prosecution has been taken so that the accused is given an opportunity to explain the circumstances which may tend to incriminate him. The object of questioning an accused person by the Court is to give him an opportunity of explaining the circumstances that appear against him in the evidence. In the instant case, the accused was examined in the Court on 23.4.2005 by the Additional Sessions Judge, West Tripura, Agartala, which, *inter alia,* reads as follows :-

Question : It transpires from the evidence of PW No.10, 11 and 13 that they had recognized you amongst the extremists. Is it true?

Answer : False.

Question : It transpires from the evidence of the above witnesses that Dulal, Ajit, Saraswati and Hemender sustained severe bullet injuries by the firing of you and your associates?

What do you get to say regarding this?

Answer : Yes

Question : It is evident from the evidence of these witnesses and other information that at that night Sachindra Sarkar, Archana Garkar, Dipak Sarkar, Gautam Sarkar, Shashi Sarkar, Prosenjit Sarkar, Saraswati Biswas, Tulsi Biswas, Narayan Das, Mithu Das, Bitu Das, Khelan Sarkar, Sujit Sarkar, Bipul Sarkar and Chotan Sarkar were killed by the bullets of fire arms and fire.

What do you get to say regarding this?

Answer : ..... (Blank).

20. The second question put to the accused was that, from the deposition of PW10, PW11, PW13, it had come out in evidence that it was due to the firing of the accused and his associates, Dulal, Ajit, Saraswati and Hemender had sustained severe bullet injuries, to which the answer given by the accused was “Yes”. In other words, he has admitted the fact that, in the incident, Dulal, Ajit, Saraswati and Hemender had sustained severe bullet injuries by the firing of the accused and his associates. Further, for the question, that from the evidence of those witnesses and other information, at that night, Sachindra Sarkar, Archana Garkar, Dipak Sarkar, Gautam Sarkar, etc. were killed by the bullets of fire arms and fire, the accused kept silent.

21. We are of the view that, under Section 313 statement, if the accused admits that, from the evidence of various witnesses, four persons sustained severe bullet injuries by the firing by the accused and his associates, that admission of guilt in Section 313 statement cannot be brushed aside. This Court in *State of Maharashtra v. Sukhdev Singh and another* (1992) 3 SCC 700 held that since no oath is administered to the accused, the statement made by the accused under Section 313 CrPC will not be evidence *stricto sensu* and the accused, of course, shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 CrPC. But, Sub-section (4) says that the answers given by the accused in response to his examination under Section 313 CrPC can be taken into consideration in such an inquiry or trial. This Court in *Hate Singh Bhagat Singh* (supra) held that the answers given by the accused under Section 313 examination can be used for proving his guilt as much as the evidence given by the prosecution witness. In *Narain Singh v. State of Punjab* (1963) 3 SCR 678, this Court held that when the accused confesses to the commission of the offence with which he is charged, the Court may rely upon the confession and proceed to convict him.

22. This Court in *Mohan Singh v. Prem Singh and another* (2002) 10 SCC 236 held that the statement made in defence by accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 CrPC cannot be made the sole basis of his conviction. In this connection, reference may also be made to the judgment of this Court in *Devender Kumar Singla v. Baldev Krishan Singla* (2004) 9 SCC 15 and *Bishnu Prasad Sinha and another v. State of Assam* (2007) 11 SCC 467. The above-mentioned decisions would indicate that the statement of the accused under Section 313 CrPC for the admission of his guilt or confession as such cannot be made the sole basis for finding the accused guilty, the reason being he is not making the

statement on oath, but all the same the confession or admission of guilt can be taken as a piece of evidence since the same lends credence to the evidence led by the prosecution.

23. We may, however, indicate that the answers given by the accused while examining him under Section 313, fully corroborate the evidence of PW10 and PW13 and hence the offences levelled against the Appellant stand proved and the trial Court and the High Court have rightly found him guilty for the offences under Sections 326, 436 and 302 read with Section 34 IPC.

24. We shall now consider whether this is one of the rarest of rare case, as held by the trial Court and affirmed by the High Court, so as to award death sentence to the accused.

25. In this case, altogether 11 persons were charge-sheeted for the offences under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC, but charges were framed only against 5 persons under Sections 326, 436 and 302 read with Section 34 IPC and also Section 27(3) of the Arms Act, 1959 read with Section 34 IPC. For want of evidence, three accused persons Budhrai Deb Barma, Mantu Deb Barma and Subhuram Deb Barma were acquitted on 23.4.2005 under Section 232 CrPC and only two accused persons, Appellant and Gandhi Deb Barma were called upon in terms of Section 232 CrPC to enter on their defence. Out of 11 accused, we are left with only two accused persons who were found guilty, out of whom Gandhi Deb Barma is now absconding, hence, we are concerned only with the Appellant. We will first examine whether the appellant was solely responsible for all the elements of crime.

ELEMENTS OF CRIME

26. Appellant alone could not have organized and executed the entire crime. Eleven persons were or[illegible]d

out of 30-35 group of persons who, according to the prosecution, armed with weapons like AK47, Dao, Lathi, etc., had attacked the villagers, fired at them and set ablaze their huts and belongings. The High Court while affirming the death sentence, stated as follows:

> "The perpetrators of the crime, including the present appellant, acted in most cruel and inhuman manner and murders were committed in extremely brutal, grotesque and dastardly manner, which is revolting and ought to be taken to have vigorously shaken the collective conscience of the society. The victims, all innocent, were helpless when they were put to death or grievously injured or when their houses and belongings were burnt to ashes. The case at hand, therefore, squarely falls in the category of 'rarest of rare cases', where death penalty could be the only adequate sentence."

The High Court, therefore, while confirming the death sentence recognized the accused as one of the "perpetrators of the crime", not the sole, and then stated that they all acted in most cruel and inhuman manner and committed the offences. Offences were committed by other so-called perpetrators of the crime as well, but they could not be apprehended or charge-sheeted. Appellant alone or the accused absconding, though found guilty, are not solely responsible for all the elements of the crime, but other perpetrators of the crime also, who could not be apprehended. The Courts below put the entire elements of crime on the accused and treated those elements as aggravating circumstances so as to award death sentence, which cannot be sustained.

REASONABLE DOUBT AND RESIDUAL DOUBT

27. An accused has a profound right not to be convicted of an offence which is not established by the evidential standard of proof "beyond reasonable doubt". This Court in *Krishnan and another v. State represented by Inspector of Police* (2003) 7

SCC 56, held that the doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth and to constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. In *Ramakant Rai v. Madan Rai and others* (2002)12 SCC 395, the above principle has been reiterated.

28. In *Commonwealth v. John W. Webster* 5 Cush. 295, 320 (1850), Massachusetts Court, as early as in 1850, has explained the expression "reasonable doubt" as follows:

> "Reasonable doubt ... is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction."

In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as fire arms, dao, lathi etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only 11 persons were charge-sheeted and out of which, charges were framed only against 5 acc ut

of those 5 persons, 3 were acquitted, leaving the appellant and another, who is absconding. Court, in such circumstances, could have entertained a "residual doubt" as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of rare category.

29. 'Residual doubt' is a mitigating circumstance, sometimes, used and urged before the Jury in the United States and, generally, not found favour by the various Courts in the United States. In *Donald Gene Franklin v. James A. Lynaugh, Director, Texas Department of Corrections* 487 US 164 (1988) : 101 L Ed 2d 155, while dealing with the death sentence, held as follows:

> "Petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any "residual doubts" it might have had about his guilt. Petitioner uses the phrase "residual doubts" to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. Brief for Petitioner 14. The plurality and dissent reject petitioner's "residual doubt" claim because they conclude that the special verdict questions did not prevent the jury from giving mitigating effect to its "residual doubt[s]" about petitioner's guilt. *See ante* at 487 U. S. 175; *post* at 487 U. S. 189. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions "beyond a *reasonable* doubt." App. 15 (emphasis added). Because of this instruction, the jury might not have thought that, in sentencing petitioner, it was free to demand proof of his guilt beyond *all* doubt.

30. In *California v. Brown* 479 U.S. 541 and other cases, the US Courts took the view, ""Residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing."

31. We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with "absolute certainty". But, in between "reasonable doubt" and "absolute certainty", a decision maker's mind may wander possibly, in a given case, he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering around 35. All element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor.

COUNSEL'S INEFFECTIVENESS:

32. Can the counsel's ineffectiveness in conducting a criminal trial for the defence, if established, be a mitigating circumstance favouring the accused, especially to escape from the award of death sentence. Counsel for the appellant, without causing any aspersion to the defence counsel appeared for the accused, but to only save the accused from the gallows,

pointed out that the records would indicate that the accused was not meted out with effective legal assistance. Learned counsel submitted that the defence counsel failed to cross examine PW1 and few other witnesses. Further, it was pointed out that the counsel also should not have cross examined PW17, since he was not put to chief-examination. Learned counsel submitted that appellant, a tribal, coming from very poor circumstances, could not have engaged a competent defence lawyer to conduct a case on his behalf. Placing reliance on the judgment of the US Supreme Court in *Charles E. Strickland, Superintendent, Florida State Prison v. David Leroy Washington* 466 US 668 (1984), learned counsel pointed out that, under Article 21 of our Constitution, it is a legal right of the accused to have a fair trial, which the accused was deprived of.

33. Right to get proper and competent assistance is the facet of fair trial. This Court in *Madhav Hayawadanrao S. Hoskot v. State of Maharashtra* (1978) 3 SCC 544, *State of Haryana v. Darshana Devi and Others* (1979) 2 SCC 236, *Hussainara Khatoon and others (IV) v. Home Secretary, State of Bihar, Patna* (1980) 1 SCC 98 and *Ranjan Dwivedi v. Union of India* (1983) 3 SCC 307, pointed out that if the accused is unable to engage a counsel, owing to poverty or similar circumstances, trial would be vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose engagement, the accused does not object. It is a constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in *Hussainara Khatoon* case (supra), this Court has held that this is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons, such as poverty, indigence or incommunicado situation.

34. The question raised, in this case, is with regard to

ineffective legal assistance which, according to the counsel, caused prejudice to the accused and, hence, the same may be treated as a mitigating circumstance while awarding sentence. Few circumstances pointed out to show ineffective legal assistance are as follows:

(1) Failure to cross-examine PW1, the injured first informant which, according to the counsel, is a strong circumstance of "ineffective legal assistance".

(2) The omission to point out the decision of this Court in *Dalbir Singh* (supra), wherein this Court held that Section 27(3) of the Arms Act was unconstitutional, was a serious omission of "ineffective legal advice", at the trial stage, even though the High Court has found the appellant not guilty under Section 27 of the Arms Act, 1959.

(3) Ventured to cross examine PW17, who was not put to chief-examination.

35. Right to get proper legal assistance plays a crucial role in adversarial system, since access to counsel's skill and knowledge is necessary to accord the accused an ample opportunity to meet the case of the prosecution. In *Charles E. Strickland* case (supra), the US Court held that a convicted defendant alleging ineffective assistance of counsel must show not only that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonable effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial. Court held that the defiant convict should also show that because of a reasonable probability, but for counsel's unprofessional errors, the results would have been different. The Court also held as follows:

"Judicial scrutiny of counsel's perfo y

deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case."

36. The Court, in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the Court independently reweighs the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.

37. When we apply the above test to the facts of this case, we are not prepared to say that the accused was not given proper legal assistance by the counsel appeared before the trial Court as well as before the High Court. As already discussed in detail, there is clinching evidence in this case of the involvement of the appellant. The evidence tendered by the eye-witnesses is trustworthy and reliable. True, PW17 should not have been subjected to cross-examination without being put to chief-examination. Section 138 of the Evidence Act specifically states that witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. Consequently, there is no scope under Section 138 of the Evidence Act to start with cross-examination of a witness, who has not been examined-in-chief, an error committed by the trial Court. In *Sukhwant Singh v. State of Punjab* (1995) 3 SCC 367, this Court held that after

amendment of CrPC, tendering of witness for cross examination is not permissible. Under the old Code, such tendering of witnesses was permissible, while the committing Magistrate used to record the statement of witnesses, which could be treated at the discretion of the trial Judge as substantial evidence of the trial. In that case, this Court further held as follows:

> "Section 138 Evidence Act, envisages that a witness would first be examined-in-chief and then subjected to cross examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is no meaning in tendering a witness for cross examination only. Tendering of a witness for cross examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief."

Later, in *Tej Prakash v. State of Haryana* (1996) 7 SCC 322, this Court, following its earlier judgment in *Sukhwant Singh* (supra), held as follows:

> "18. As far as Dr O.P. Poddar is concerned, he was only tendered for cross-examination without his being examined-in-chief. Though, Dr O.P. Poddar was not examined-in-chief, this procedure of tendering a witness for cross-examination is not warranted by law. This Court in *Sukhwant Singh* v. *State of Punjab* (1995) 3 SCC 367 held that permitting the prosecution to tender a witness for cross-examination only would be wrong and "the effect of their being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial". In the present case, however, non-examination of Dr O.P. Poddar is not very material because the post-mortem report coupled with the testimonies of Dr K.C. Jain PW 1 and Dr J.L. Bhutani PW 9 were sufficient to enable the courts to come to the conclusion about the cause of death."

38. Participation and involvement e

instant crime, have been proved beyond reasonable doubt. At the time of commission of the offence, he was 30 years of age, now 45. Facts would clearly indicate that he is one of the members of group of extremist persons, waging war against the linguistic group of people in the State of Tripura. Persons like the appellant armed with sophisticated weapons like AK 47, attacked unarmed and defenceless persons, which included women and children. Prosecution has stated that the minority community in the State of Tripura is often faced with some extremists' attacks and no leniency be shown to such persons, at the peril of innocent people residing in the State of Tripura.

39. We have laid down three tests – crime test, criminal test and RR test, not the "balancing test", while deciding the proportionality of the sentence. To award death sentence, crime test has to be fully satisfied and there should be no mitigating circumstance favouring the accused, over and above the RR test. The hallmark of a sentencing policy, it is often said, that sufficiently guides and attracts the Court is the presence of procedures that require the Court to consider the circumstances of the crime and the criminal before it recommends sentence.

40. Arbitrariness, discrimination and inconsistency often loom large, when we analyze some of judicial pronouncements awarding sentence. Of course, it is extremely difficult to lay down clear cut guidelines or standards to determine the appropriate sentence to be awarded. Even the ardent critics only criticize, but have no concrete solution as such for laying down a clear cut policy in sentencing. Only safeguard, statutorily and judicially provided is to give special reasons, not merely "reasons" before awarding the capital punishment In *Santosh Kumar Satisbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498, this Court highlighted the fact that the arbitrariness in sentencing under Section 302 may violate the idea of equal protection clause under Article 14 and the right to life under Article 21 of the Constitution. Many times, it may be remembered that the ultimate sentence turns on the facts and

circumstances of each case. The requirement to follow the three tests, including the necessity to state "special reasons" to some extent allay the fears expressed in *Santosh Kumar Satisbhushan Bariyar* case (supra).

41. We have already explained few circumstances which favoured the accused in the instant case, to hold it as not a rarest of rare case, which are that the appellant alone could not have executed such a crime, which resulted in the death of 15 persons and leaving so many injured and setting ablaze 23 houses, that is the entire elements of the crime could not have been committed by the appellant alone. Further, the appellant is a tribal, stated to be a member of the extremist group raging war against the minority settlers, apprehending perhaps they might snatch away their livelihood and encroach upon their properties, possibly such frustration and neglect might have led them to take arms, thinking they are being marginalized and ignored by the society. Viewed in that perspective, we are of the view that this is not a rarest of rare case for awarding death sentence. All the same, considering the gravity of the crime and the factors like extreme social indignation, crimes against innocent villagers, who are a linguistic minority, which included women and children, we feel it would be in the interest of justice to apply the principles laid down in *Swamy Shradananada (2) v. State of Karnataka* (2008) 13 SCC 767.

42. Consequently, while altering the death sentence to that of imprisonment for life, we are inclined to fix the term of imprisonment as 20 years without remission, over and above the period of sentence already undergone, which, in our view, would meet the ends of justice. Ordered accordingly.

43. The Appeals are, accordingly, disposed of.

D.G. Appeals disposed of.

UNION OF INDIA AND OTHERS
v.
MAJOR S.P. SHARMA AND OTHERS
(Civil Appeal Nos.2951-2957 of 2001)

MARCH 6, 2014.

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

Administrative law:

Doctrine of pleasure – Judicial review – Scope of – Termination of Armed Forces Personnel – Held: The order of termination passed against the Army personnel in exercise of pleasure doctrine is subject to judicial review – But while exercising judicial review, the Supreme Court cannot substitute its own conclusion on the basis of material on record – When the President in exercise of its constitutional power terminates the services of the Army officers, whose tenure of services are at the pleasure of the President and such termination is based on materials on record, then the Court in exercise of powers of judicial review should be slow in interfering with such pleasure of President exercising constitutional power – Analysis of entire facts of the case and the material produced in Court and an exhaustive consideration of the matter showed that the power of pleasure exercised by the President in terminating the services of the respondents did not suffer from any illegality, bias or malafide or based on any other extraneous ground, and the same cannot be challenged on the ground that it was a camouflage – The onus lay on the respondent-officers who alleged malafides – There was no credible evidence to hold that the order of termination was baseless or malafide – Constitution of India, 1950 – Doctrine of pleasure.

Constitution of India, 1950:

Art.311 – Applicability to Armed Forces Personnel – Held: Not applicable – Therefore, no enquiry as to whether the order was by way of punishment sine qua non for applicability of Art.311, was warranted.

Art.310(1) – Scope of – Held: No provision in any statute can curtail the provision of Art.310.

Army Act, 1959:

ss.18 and 19 – Held: Army Act cannot in any way override or stand higher than constitutional provisions contained in Art.309 and consequently no provision of Army Act could cut down the pleasure doctrine as enshrined in Art.310 – Constitution of India, 1950 – Arts.309, 310 – Doctrine of pleasure.

s.18 – Where continuance of Army officers in service is not practicable for security purposes and there is loss of confidence and potential risk to the security issue then such officers can be removed under pleasure doctrine – s.18 is in consonance with constitutional power conferred on President empowering the President to terminate his services brought to his notices – In such cases, the Army officers are not entitled to claim an opportunity of hearing – Constitution of India, 1950 – Arts.309, 310 – Doctrine of pleasure – Doctrine of natural justice.

Res judicata:

Reopening of issues through fresh round of litigation on discovery of a fact – Held: The discovery of a reinvestigated fact could be a ground of review in the same proceedings, but the same cannot be made basis for re-opening the issue through a fresh round of litigation – A fresh writ petition or Letters Patent Appeal which is in continuation of a writ petition cannot be filed collaterally to set aside the judgment of the same High Court rendered in earlier round of litigation upholding the termination order – The [illegible] *of*

litigation is based on a sound firm principle of public policy – It is not permissible for the parties to reopen the concluded judgments of the court as it would not only tantamount to merely an abuse of the process of the court but would have far reaching adverse affect on the administration of justice – It would also nullify the doctrine of stare decisis which cannot be departed from unless there are compelling circumstances to do so – The judgments of the court and particularly the Apex Court of a country cannot and should not be unsettled lightly – Doctrines of public policy – Doctrine of stare decisis.

Precedent:

Binding effect of – Held: Law declared by Supreme Court, being the law of the land, is binding on all courts/tribunals and authorities in India in view of Art.141 of the Constitution – The doctrine of stare decisis promotes a certainty and consistency in judicial decisions and promotes confidence of the people in the system of the judicial administration – Judicial propriety and decorum demand that the law laid down by the highest Court of the land must be given effect to – Violation of Fundamental Rights guaranteed under the Constitution have to be protected, but at the same time, it is the duty of the court to ensure that the decisions rendered by the court are not overturned frequently, that too, when challenged collaterally as that was directly affecting the basic structure of the Constitution incorporating the power of judicial review of this Court – An issue of law can be overruled later on, but a question of fact or, as in the instant case, the dispute with regard to the termination of services cannot be reopened once it has been finally sealed in proceedings inter-se between the parties up to the Supreme Court way back in 1980 – Constitution of India, 1950 – Art.141.

In 1980, respondents were found to be involved in the espionage racket and were dismissed from service by invoking the doctrine of pleasure as enshrined under Article 310 of the Constitution of India, 1950 coupled with

the powers to be exercised under Section 18 of the Army Act. The dismissal was unsuccessfully challenged before the High Court and the Supreme Court. In the meanwhile, a corrigendum came to be issued and the orders of dismissal were described as orders of termination. On account of the substituted termination order, a decision for deducting 5% of the gratuity amount was taken, which was communicated afresh. This resulted in a fresh ground of challenge. The Division bench of the High Court while refusing to interfere with the termination order allowed the appeal in relation to the post-retiral benefits and held that the proposed 5% cut-off was not in accordance with the Act/Rules. Several LPAs were filed by other officers relying on the Division Bench judgment extending the post-retiral benefits claimed a similar relief. When these appeals came up for hearing, the Division Bench of the High Court hearing the matter differed with the view on the issue of the applicability of doctrine of pleasure and maintainability of the writ petitions on the ground of malafides. Consequently, this question of law was referred to be a larger bench. The Full Bench held that an order under Section 18 of the Army Act invoking the doctrine of pleasure was subject to judicial review if it is assailed on malafides. It was held that the onus lay on the petitioner/person alleging malafides and to bring material on record to satisfy the court in order to justify the interference. Aggrieved, the Union of India filed the Special Leave Petition, which stood dismissed.

After the answer of reference, the pending appeals were taken up for decision by the High Court. On account of the answer given by the Full Bench, fresh petitions were filed by those officers whose petitions had been dismissed earlier upto this Court in 1980. Some writ petitioners, whose petitions had been dismissed by Single Judge, filed LPAs with applications for condonation of delay. Appeals we st

those judgments that were given in the second round of litigation proposing to refuse 5% of the terminal benefits.

Thereafter two writ petitions that were filed afresh, namely, in the case of Major SJ and HLS were heard separately and dealt with the principle of res judicata and constructive res judicata. The said writ petitions were held to be barred by law. The LPAs which were filed with applications for condonation of delay and also against the judgment proposing 5% cut-off in the terminal benefits were heard by another Division Bench. After almost 3 years, the Division Bench allowed the appeals. Therein, it was held that the proceedings initiated against the writ petitioners as also against other officers, who were appellants in the other LPAs, were vitiated as there was no material to support the impugned orders of termination which were camouflaged and thus, the same were subject to judicial review. Accordingly, by judgment dated 21.12.2000, the relief of consequential benefits was granted after setting aside the order of termination. The two officers, namely, SJ and HLS whose writ petitions had been dismissed on the ground of constructive res judicata, filed special leave petitions were finally dismissed by applying the principles of constructive res judicata.

The questions which have arisen in these appeals were: Whether the exercise of doctrine of pleasure under Section 18 of the Army Act read with Article 310 of the Constitution in absence of any material evidence against the respondent- officer and the non production of relevant records/files of these officers rendered the order of termination as illegal and invalid; whether the order of termination is arbitrary, capricious, unreasonable and violative of Articles 14,16,19 and 21 of the Constitution of India; whether the order of termination passed by the first appellant in absence of material evidence and improper

exercise of power by the first appellant amount to fraud being played on the respondent officers and are vitiated in the law on account of legal malafides and legal malice; whether the order of dismissal of the earlier writ petitions and confirmation of the same by this court amounts to "Doctrine of Merger" and operates as res judicata against the instant appeals.

Disposing of the appeals, the Court

HELD: 1. The provisions of Article 311 of the Constitution, admittedly, cannot be invoked in the case of employees/officers of Armed Forces. Article 311 relates to the domain of civilian employees/officers service jurisprudence. Since the protection of Article 311 cannot be claimed in the case of employees of armed forces, no enquiry as to whether the order is by way of a punishment, which is the sine qua non for applicability of Article 311, is warranted. The legal issue required to be considered by this Court in the context of the fact as to whether by virtue of anything contained in the language of Article 310 or the other provisions of the Constitution, the constitutional power under Article 310 can be construed to be limited to cases of termination simpliciter. [para 22] [358-C-E]

2. A perusal and scrutiny of all the materials showed that the High Court has committed grave error of record and there was total non-application of mind in recording the findings. From the record, it is evidently clear that the inquiry against the respondents were initiated by the Army Headquarters, Director of Military Intelligence. The file traveled from Chief of the Army Staff to Ministry of Defence with the strong recommendation to terminate the services of the respondents in the interest of security of the State as there was some material to show that these officers were involved in espionage cases. The

recommendation for termination of their services up to the Defence Ministry was finally approved by the Prime Minister who also happened to be the Defence Minister of India at that time. The file was then placed before the President of India who in exercise of the constitutional power terminated the services of these officers.The link file further revealed that confessional statements of officers were also recorded and strong prima facie case was found relating to the involvement of these officers in espionage activities and sharing information with the Pakistani intruders. [para 48, 49] [371-A-E]

3. On assessing the materials contained in link file and the notings showing the suggestions and recommendations up to the level of defence ministry and the Prime Minister, it cannot be held that the impugned order of termination of services have been passed without any material available on record. There is no dispute that order of termination passed against the Army personnel in exercise of 'pleasure doctrine', is subject to judicial review, but while exercising judicial review, this court cannot substitute its own conclusion on the basis of materials on record. The Court exercising the power of judicial review has certain limitations, particularly in the cases of this nature. The safety and security of the nation is above all/everything. When the President in exercise of its constitutional power terminates the services of the Army officers, whose tenure of services are at the pleasure of the President and such termination is based on materials on record, then this court in exercise of powers of judicial review should be slow in interfering with such pleasure of President exercising constitutional power. In a constitutional set up, when office is held during the pleasure of the President, it means that the officer can be removed by the Authority on whose pleasure he holds office without assigning any reason.

The Authority is not obliged to assign any reason or disclose any cause for the removal. Thus, it is not a case where the decisions to terminate the services of these officers were taken under the 'pleasure doctrine' without any material against the officers. On perusal of the link file it was further revealed that detailed investigation was conducted and all evidence recorded were examined by the Intelligence Department and finally the Authority came to the finding that retention of these officers were not expedient in the interest and security of the State. Sufficiency of ground cannot be questioned, particularly in a case where termination order is issued by the President under the pleasure doctrine. [Paras 50 to 52] [371-F-H; 372-A-F]

State of Rajasthan & Ors. vs. Union of India & Ors. **1977 (3) SCC 592: 1978 (1) SCR 1 – relied on.**

4. Article 309 empowers the appropriate legislature to regulate the recruitment and conditions of services of persons appointed in public services and posts in connection with the affairs of the Union or the State. But Article 309 is subject to the provisions of the Constitution. Hence, the Rules and Regulations made relating to the conditions of service are subject to Articles 310 and 311 of the Constitution. The Proviso to Article 309 confers powers upon the President in case of services and posts in connection with the affairs of the Union and upon the Governor of a State in connection with the services and posts connected with the affairs of the State to make rules regulating the recruitment and the conditions of services of the persons appointed. The service condition shall be regulated according to such rules. Article 310 provides that every person, who is a member of the defence service or of a civil service of the Union or All India Service, or any civil or defence force shall hold such posts during the

pleasure of the President. Similarly, every person who is a Member of the Civil Services of a State or holds any civil post under a State, holds office during the pleasure of the Governor of the State. The opening word of Article 310 "Except as expressly provided by this Constitution" makes it clear that a Government servant holds the office during the pleasure of the President or the Governor except as expressly provided by the Constitution. [Paras 55, 56] [376-C-H; 377-A]

5. Clauses (i) and (ii) of Article 311 impose restrictions upon the exercise of power by the President or the Governor of the State of his pleasure under Article 310 (1) of the Constitution. Article 311 makes it clear that any person who is a member of civil services of the Union or the State or holds civil posts under the Union or a State shall not be removed or dismissed from service by an authority subordinate to that by which he was appointed. Further, clause (ii) of Article 311 mandates that such removal or dismissal or reduction in rank of the members of the civil services of the Union or the State shall be only after giving reasonable opportunity of hearing in respect of the charges leveled against him. However, proviso to Article 311 (2) makes it clear that this clause shall not apply inter-alia where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry. The expression "except as otherwise provided in the Constitution" as contained in Article 310 (1) means this Article is subject only to the express provision made in the Constitution. No provision in the statute can curtail the provisions of Article 310 of the Constitution. [Paras 57, 58] [377-B-F]

6. The two Sections i.e. 18 and 19 are distinct and apply in two different stages. Section 18 speaks about the absolute discretion of the President exercising pleasure doctrine. No provisions in the Army Act curtail, control or

limit the power contained in Article 310(1) of the Constitution. Article 309 enables the legislature or executive to make any law, rule or regulation with regard to condition of services without impinging upon the overriding power recognized under Article 310 of the Constitution. The Army Act cannot in any way override or stand higher than Constitutional provisions contained in Article 309 and consequently no provision of the Army Act could cut down the pleasure tenure in Article 310 of the Constitution. There is no doubt, Article 309 has to be read subject to Articles 310 and 311 and Article 310 has to be read subject to Article 311. In fact the 'pleasure doctrine' is a Constitutional necessity, for the reasons that the difficulty in dismissing those servants whose continuance in office is detrimental to the State would, in case necessity arises to prove some offence to the satisfaction of the court, be such as to seriously impede the working of public service. There is no dispute with regard to the legal proposition that illegality, irrationality and procedural non-compliance are grounds on which judicial review is permissible. But the question is as to the ambit of judicial review. [Paras 59, 61 and 62] [378-A-F; 380-B-D]

State of Uttar Pradesh and others vs. Babu Ram Upadhayay **(1961) 2 SCR 679;** *Moti Ram Deka* **(1964) 5 SCR 683;** *B.P. Singhal vs. U.O.I.*, **(2010) 6 SCC 331 – relied on.**

7. Indisputably, defence personnel fall under the category where President has absolute pleasure to discontinue the services. Further as far as security is concerned, the safeguard available to civil servants under Article 311 is not available to defence personnel as judicial review is very limited. In cases where continuance of Army officers in service is not practicable for security purposes and there is loss of confidence and potential risk to the security issue then such officers can be removed under the pleasure doctrine[illegible]t,

Section 18 of the Army Act is in consonance with the constitutional powers conferred on the President empowering the President to terminate the services on the basis of material brought to his notice. In such cases, the Army officers are not entitled to claim an opportunity of hearing. The pleasure doctrine can be invoked by the President at any stage of enquiry on being satisfied that continuance of any officer is not in the interest of and security of the State. It is therefore not a camouflage as urged by the respondents. [Para 64] [383-F-H; 384-A-B]

8. The services of the respondents along with other permanent commissioned officers of the Indian Army were terminated, since they were found suspected to be involved in espionage activities. Aggrieved by the termination order, the respondents, except two, filed writ petitions before the High Court. These respondents challenged the said termination order as being illegal and malafide. The High Court by order dated 21.4.1980 dismissed the writ petitions and held that the termination was on account of pleasure doctrine.The Union of India has been consistently contesting these petitions and this Court has found substance in the argument of the appellants that the High Court while delivering the judgment dated 21.12.2000 overlooked this important legal aspect of finality coupled with the doctrine of res judicata. This aspect cannot be ignored and the issue of fact cannot be re-opened in the instant case as well as has been done under the impugned judgment by relying on certain material which the High Court described to have been fraudulently withheld from the courts. Fraud is not a term or ornament nor can it be presumed to exist on the basis of a mere inference on some alleged material that is stated to have been discovered later on. The discovery of a reinvestigated fact could have been a ground of review in the same proceedings, but the same cannot be made the basis for re-opening the issue

through a fresh round of litigation. A fresh writ petition or Letters Patent Appeal which is in continuation of a writ petition cannot be filed collaterally to set aside the judgment of the same High Court rendered in earlier round of litigation upholding the termination order. The High Court has committed a manifest error by not lawfully defining the scope of the fresh round of litigation on the principles of res judicata and doctrine of finality. To establish fraud, it is the material available which may lead to the conclusion that the failure to produce the material was deliberate or suppressed or even otherwise occasioned a failure of justice. This also, can be attempted if legally permissible only in the said proceedings and not in a collateral challenge raised after the matter has been finally decided in the first round of litigation. The judgment which had become final in 1980 also included writ petition filed by the respondent 'SPS'. Once, this Court had put a seal to the said litigation vide judgment dated 1.9.1980 then a second round of litigation by the same respondents including 'SPS' in another writ petition was misplaced. [paras 65, 67] [384-D-E; 385-F-H; 386-A-F]

9. The very genesis of an identical challenge relating to the same proceedings of termination on the pretext of a 5% cut in terminal benefits was impermissible apart from the attraction of the principle of merger. This aspect of finality, therefore, cannot be disturbed through a collateral challenge. The principle of finality of litigation is based on a sound firm principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end to litigation. The doctrine of res-judicata has been evolved to prevent such an anarchy. In a country governed by the rule of law, finality of judgment is absolutely imperative and great sanctity is attached to the finality of the jud t

permissible for the parties to reopen the concluded judgments of the court as it would not only tantamount to merely an abuse of the process of the court but would have far reaching adverse affect on the administration of justice. It would also nullify the doctrine of stare decisis a well established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so. The judgments of the court and particularly the Apex Court of a country cannot and should not be unsettled lightly. [Paras 68, 75, 76] [386-G; 388-E-H; 389-A]

Naresh Shridhar Mirajkar vs. State of Maharashtra & Anr. **AIR 1967 SC 1: 1966 SCR 744;** *Mohd. Aslam vs. Union of India* **AIR 1996 SC 1611: 1996 (3) SCR 782;** *Babu Singh Bains etc. versus Union of India and Ors. etc*., **AIR 1997 SC 116: 1996 (6) Suppl. SCR 120;** *Khoday Distilleries Limited & Anr. vs. The Registrar General, Supreme Court of India*, **(1996) 3 SCC 114: 1995 (6) Suppl. SCR 190;** *M. Nagabhushana vs. State of Karnataka & Ors*., **AIR 2011 SC 1113: 2011 (2) SCR 435 – relied on.**

10. Precedent keeps the law predictable and the law declared by this Court, being the law of the land, is binding on all courts/tribunals and authorities in India in view of Article 141 of the Constitution. The judicial system "only works if someone is allowed to have the last word" and the last word so spoken is accepted and religiously followed. The doctrine of stare decisis promotes a certainty and consistency in judicial decisions and this helps in the development of the law. Besides providing guidelines for individuals as to what would be the consequences if he chooses the legal action, the doctrine promotes confidence of the people in the system of the judicial administration. Even otherwise it is an imperative necessity to avoid uncertainty, confusion. Judicial propriety and decorum demand that the law laid down by the highest Court of the land must be given effect to.

[Para 77] [389-A-D]

11. Violation of Fundamental Rights guaranteed under the Constitution have to be protected, but at the same time, it is the duty of the court to ensure that the decisions rendered by the court are not overturned frequently, that too, when challenged collaterally as that was directly affecting the basic structure of the Constitution incorporating the power of judicial review of this Court. There is no doubt that this Court has an extensive power to correct an error or to review its decision but that cannot be done at the cost of doctrine of finality. An issue of law can be overruled later on, but a question of fact or, as in the present case, the dispute with regard to the termination of services cannot be reopened once it has been finally sealed in proceedings inter-se between the parties up to this Court way back in 1980. [Para 84] [393-B-D]

Rupa Ashok Hurra v. Ashok Hurra & Anr. **AIR 2002 SC 1771: 2002 (2) SCR 1006;** *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay* **AIR 1974 SC 2009: 1975 (1) SCR 1;** *Ambika Prasad Mishra v. State of U.P. & Anr*. **AIR 1980 SC 1762: 1980 (3) SCR 1159 – relied on.**

12. The term 'dismissal' in the original order was substituted by the term 'termination' issuing the corrigendum to ratify a mistake committed while issuing the order. In fact, the competent authority had taken a decision only to terminate, and therefore it was found necessary to issue the corrigendum. However, in view of such substitution of word 'dismissal' by the term 'termination', does not tilt the balance in favour of the respondents. More so, the proposed 5% deduction had been withdrawn, and therefore the issue did not survive. Analysing entire facts of the case and the material produced in Court and upon an exha

of the matter, the power of pleasure exercised by the President in terminating the services of the respondents did not suffer from any illegality, bias or malafide or based on any other extraneous ground, and the same cannot be challenged on the ground that it is a camouflage. The onus lay on the respondent-officers who alleged malafides. There was no credible evidence to hold that the order of termination is baseless or malafide. [Paras 85, 86] [393-D-H; 394-A]

Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhoy **(1970) 1 SCC 613: 1970 (3) SCR 830 – held inapplicable**

Union of India & Ors. vs. Ranbir Singh Rathaur & Ors. **(2006) 11 SCC 696: 2006 (3) SCR 193;** *Union of India vs. S.P. Sharma* **(2013) 10 SCC 150;** *Moti Ram Deka vs. North East Frontier Railways* **(1964) 5 SCR 683;** *Ram Sarup vs. Union of India* **AIR 1965 SC 247: 1964 (5) SCR 931;** *Chief of Army Staff vs. Major Dharam Pal Kukrety* **(1985) 2 SCC 412: 1985 (3) SCR 415;** *Gopal Krishnaji Ketkar vs. Mahomed Haji Latif & Ors*. **1968 (3) SCR 862;** *Ghaio Mall & Sons vs. State of Delhi & Ors*. **1959 SCR 1424;** *I.R. Coelho vs. State of Tamil Nadu* **(2007) 2 SCC 1: 2007 (1) SCR 706;** *Ravi Yashwant Bhoir vs. District Collector, Raigad & Ors*. **(2012) 4 SCC 407: 2012 (3) SCR 775;** *S.R. Bommai and Ors. vs. Union of India and Ors.,* **(1994) 3 SCC 1: 1994 (2) SCR 644;** *Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B. Jeejeebhoy* **(1970) 1 SCC 613: 1970 (3) SCR 830;** *Supreme Court Employees' Welfare Association vs. Union of India and Anr.* **(1989) 4 SCC 187: 1989 (3) SCR 488;** *Isabella Johnson (Smt.) vs. M.A. Susai(dead) by LRs.* **(1991) 1 SCC 494: 1990 (2) Suppl. SCR 213;** *Kishan Lal vs. State of J&K* **(1994) 4 SCC 422: 1994 (2) SCR 149;** *Jay Laxmi Salt Works (P) Ltd. vs. State of Gujarat* **(1994) 4 SCC 1;** *V. Rajeshwari (Smt) vs. T.C. Saravanabava* **(2004) 1 SCC 551: 2003 (6) Suppl. SCR 927;** *Maneka Gandhi vs. Union of India & Anr*. **(1978) 1 SCC 248: 1978 (2) SCR 621;** *Union*

of India & Ors. v. Ranbir Singh Rathaur & Ors., **(2006) 11 SCC 696: 2006 (3) SCR 193 – referred to.**

Case Law Reference:

2006 (3) SCR 193	**referred to**	**Para 16**
(2013) 10 SCC 150	**referred to**	**Para 19**
(2010) 6 SCC 331	**referred to**	**Para 20**
(1964) 5 SCR 683	**referred to**	**Para 20**
1964 (5) SCR 931	**referred to**	**Para 20**
1985 (3) SCR 415	**referred to**	**Para 23**
1968 (3) SCR 862	**referred to**	**Para 28**
1959 SCR 1424	**referred to**	**Para 28**
2007 (1) SCR 706	**referred to**	**Para 29**
(2010) 6 SCC 331	**relied on**	**Paras 30, 60**
2012 (3) SCR 775	**referred to**	**Para 31**
1994 (2) SCR 644	**referred to**	**Para 32**
1970 (3) SCR 830	**referred to**	**Para 35**
1989 (3) SCR 488	**referred to**	**Para 35**
1990 (2) Suppl. SCR 213	**referred to**	**Para 35**
1994 (2) SCR 149	**referred to**	**Para 35**
(1994) 4 SCC 1	**referred to**	**Para 37**
2003 (6) Suppl. SCR 927	**referred to**	**Para 38**
1978 (2) SCR 621	**referred to**	**Para 38**
1978 (1) SCR 1	**relied on**	**Para 53**
(1961) 2 SCR 679	**relied o**	

(1964) 5 SCR 683	**relied on**	**Para 59**
1966 SCR 744	**relied on**	**Para 60**
1996 (3) SCR 782	**relied on**	**Para 71**
1996 (6) Suppl. SCR 120	**relied on**	**Para 72**
1995 (6) Suppl. SCR 190	**relied on**	**Para 73**
2011 (2) SCR 435	**relied on**	**Para 74**
2002 (2) SCR 1006	**relied on**	**Para 78**
1975 (1) SCR 1	**relied on**	**Para 79**
1980 (3) SCR 1159	**relied on**	**Para 80**
1970 (3) SCR 830	**held inapplicable**	**Para 82**
2006 (3) SCR 193	**referred to**	**Para 83**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2951-2957 of 2001.

From the Judgment & Order dated 21.12.2000 of the High Court of Delhi at New Delhi in LPAs No. 4/87, 43/87, 139/87, 148/87, 21/88, 77/93 and 86/94.

Paras Kuhad, ASG, P.P. Rao, Kiran Suri, A.K. Panda, Jitin Chaturvedi, R. Balasubramaniam, Abhinav Mukherjee, B.V. Balram Das (A.C.), Amrita Sanghi, Aditi, Nar Hari Singh, Vikas Mehta, Major K. Ramesh, Archana Ramesh, Dr. Kailash Chand, Akshat Kulshrestha, Swarendu Chatterjee, Surajit Bhaduri, Kameshwar Gumber, Koshima Arora, Kiran Mathur, Dr. Kailash Chand, Dipak Bhattacharya, S. Shekhar, Harman Guliani, Dr. Vipin Gupta, Ritika Gambhir, A.J. Amith for the Appearing parties.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. These appeals have been filed against the common judgment and order dated 21.12.2000 passed by Delhi High Court in L.P.A. Nos. 4, 43, 139, 148 of 1987, 21 of 1988, 77 of 1993 and 86 of 1994. By the said judgment, the High Court allowed the appeals preferred by the respondents and quashed not only their termination orders but also the General Court Martial (hereinafter referred to as 'GCM') proceedings held against Captain Ashok Kumar Rana and Captain R.S. Rathaur.

2. Before we proceed with the matter, it would be appropriate to highlight the factual background and brief history of the case.

In February 1971, Gunner Sarwan Dass was cultivated by Pakistan Intelligence. In 1972 Captain Ghalwat and Gunner Sarwan Dass crossed the international border. In 1973 Captain Ghalwat and Gunner Sarwan Dass were posted in Babina (M.P.). In 1974 Gunner Aya Singh was cultivated by Gunner Sarwan Dass for Pak Intelligence. Captain Nagial was then cultivated by Aya Singh for Pak Intelligence. In 1975 for the first time the espionage racket came to be noticed. Aya Singh and Sarwan Dass were arrested. In 1976-77 pursuant to the investigation, three more jawans were arrested. They corroborated the involvement of Sarwan Dass. Sarwan Dass and Aya Singh on further interrogation disclosed the names of Captain Ghalwat and Captain Nagial. In 1976-77 Captain Ghalwat and Captain Nagial were tried by GCM and were convicted. Ghalwat was cashiered and given 14 years' RI. Nagial was given 7 years' RI and was also cashiered. In addition, 12 jawans were tried and they were given RI of various descriptions and were dismissed from services. Aya Singh and Sarwan Dass were also among the 12 jawans tried and held guilty. Later in 1978 it was discovered that Aya Singh was holding back certain relevant information relating to espionage activities under certain alleged threat and pressure. Wife of Aya Singh claimed to be killed. Reeling u[illegible]e

circumstances, he made further disclosures wherein he named Captain Rathaur and Captain A.K. Rana; disclosed that he had been receiving threats that if he disclosed anything his wife would be killed. Accordingly, in 1978 Captain Rathaur and Captain A.K. Rana were interrogated. As a result, 42 army personnel i.e. 19 officers, 4 junior commissioned officers (JCOs) and 19 other ranks (ORs), were arrested.

Out of the 19 officers, 3 officers were tried by GCM, two were convicted, namely, Captain Ranbir Singh Rathaur and Captain A.K. Rana, and one was acquitted. Captain Ranbir Singh Rathaur and Captain A.K. Rana were sentenced to RI for 14 years each and were cashiered. Against 13 officers, disciplinary actions were initiated. However, a decision was taken not to try them and an administrative order under Section 18 of the Army Act, 1950 (in short "the Army Act") was passed terminating their services.

3. The present appeals arise out of the order passed way back in 1980 terminating the services of the respondents herein which were brought invoking the doctrine of pleasure as enshrined under Article 310 of the Constitution of India, 1950 (hereinafter referred to as the 'Constitution') coupled with the powers to be exercised under Section 18 of the Army Act. Initially, the orders of dismissal were passed on 11.1.1980, which were assailed in nine writ petitions that were dismissed by the High Court of Delhi on 21.4.1980. The special leave petitions against these writ petitions came to be dismissed by this Court on 1.9.1980.

4. In the meanwhile, a corrigendum came to be issued, as a result whereof, the orders of dismissal were described as orders of termination. On account of the substituted termination order, a decision for deducting 5% of the gratuity amount was taken, which was communicated afresh. These orders made a fresh ground of challenge before a learned Single Judge of the Delhi High Court. The learned Single Judge dismissed the petition by a detailed judgment dated 22.3.1985.

Simultaneously, one Captain R.S. Rathaur had filed a Writ Petition No.1577 of 1985 under Article 32 of the Constitution before this Court, which stood dismissed refusing to re-open the issues already decided.

5. Against the order of the learned Single Judge dated 22.3.1985, several Letters Patent Appeals were filed. One of the appeals, being LPA No.116 of 1985, filed by one N.D. Sharma, was decided vide judgment dated 19.8.1986 upholding the order of termination approving the applicability of the doctrine of pleasure. However, at the same time, the appeal was partly allowed in relation to the post-retiral benefits keeping in view the provisions under the Army Act and Rules and it was found that the proposed 5% cut-off was not in accordance with the Act/Rules applicable therein.

6. Several LPAs were filed by other officers relying on the Division Bench judgment extending the post-retiral benefits, and a plea for similar relief was raised.

7. When these appeals came up for hearing, the Division Bench of the Delhi High Court hearing the matter differed with the view on the issue of the applicability of doctrine of pleasure and maintainability of the writ petitions on the ground of malafides vide order dated 15.5.1991. Consequently, this question of law was referred to be decided by a larger bench.

8. The Full Bench so constituted to answer this reference held that an order under Section 18 of the Army Act invoking the doctrine of pleasure was subject to judicial review if it is assailed on malafides. It was held that the onus lay on the petitioner/person alleging malafides and to bring material on record to satisfy the court in order to justify the interference. Aggrieved, the Union of India filed the Special Leave Petition, which stood dismissed.

9. It appears that after the answer of reference, the pending appeals were taken up for decision b n

account of the answer given by the Full Bench, fresh petitions were filed by those officers whose petitions had been dismissed earlier upto this Court as referred to hereinabove, in 1980. Some writ petitioners, whose petitions had been dismissed by learned Single Judge, filed Letters Patent Appeals with applications for condonation of delay. Appeals were also filed against those judgments that were given in the second round of litigation proposing to refuse 5% of the terminal benefits referred to hereinabove. These categories of petitions were described by the Division Bench hearing the matter in its order dated 2.5.1995, as under :-

"LPA 77/93 & CM 823/95

In these batch of cases, we find there are at least two LPAs which are directed against the Judgments of dismissal of the writ petitions holding that the particular issue cannot be gone into in writ jurisdiction. Learned counsel for the appellants in those two cases rely upon the Full Bench Judgment and the recent Supreme Court Judgment to contend that the issue can be gone into by the Court. They have also wanted us to call for certain records from the respondents and in regard to those records, respondents are claiming privilege and that is a matter to be decided.

There is another group of cases in which fresh writ petitions are filed on the ground that notwithstanding the dismissal of the earlier writ petitions or dismissal of the S.L.Ps, fresh writ petitions are maintainable inasmuch as it is only now that the Full Bench and the Supreme Court have decided that the particular issue can be gone into by the High Court. In that batch of cases the question of *res judicata* falls for consideration.

There is yet another group of cases where writ petitions were dismissed by the learned Single Judges on the ground that the Court cannot go into the issue and the

LPAs were preferred with application for condonation of delay with delay of more than 9 years.

There is yet another group of cases where writ petitions were filed against some latter orders passed by the Government imposing a cut of 5% from the pension and upon dismissal of the writ petitions challenging the said orders, LPAs have been filed and in those appeals the appellants want to take up the issue, that the Court can go into the validity of the order of dismissal order once again.

Inasmuch as there are four classes of cases, we are of the view that first we should decide the batch where fresh writ petitions are filed, and in case we hold that fresh writ petitions are maintainable, then the question of going into the privilege claimed by the respondents will have to be decided. If the fresh writ petitions are held to be maintainable, then the batch wherein appeals are filed with delay condonation applications can also be taken up for consideration. In one case the question of laches is to be decided whereas in another the question of sufficient cause for condonation of delay fall for consideration. In the matters challenging the orders imposing cut in pension, it will be for the parties to watch the view the court may take in other three batches mentioned above so that they can pursue one or the other remedies which the Court will be able to accept.

Therefore, we will first take up fresh writ petitions filed after the passing of the full Court Judgment and the Supreme Court Judgment."

10. Thereafter two writ petitions that were filed afresh, namely, in the case of Major Subhash Juneja and Harish Lal Singh, were heard separately and dealt with the principle *of res judicata* and constructive *res judicata.* The said writ petitions were held to be barred by law vide judgment dated 8.3.1996. The other connected petitions also ap n

dismissed as not maintainable by another Division Bench vide order dated 7.9.1992.

11. The Letters Patent Appeals which were filed with applications for condonation of delay and also against the judgment proposing 5% cut-off in the terminal benefits were heard by another Division Bench that reserved the judgment on 14.8.1998 by passing the following order:

> "LPA Nos.4/87, 43/87, 139/87, 148/87, 21/88, 77/93, 86/94 and C.W. Nos.3063/95, 4082/95:
>
> Synopses have been placed on record. Mr. Tikku states that by 17.8.1998, photocopy of the relevant record will be made available to Court. Originals have been shown to us.
>
> Judgment reserved."

12. The Division Bench that went on to reserve the said judgment delivered it after almost 3 years and allowed the appeals. Therein, it was held that the proceedings initiated against the writ petitioners as also against other officers, who were appellants in the other LPAs, were vitiated as there was no material to support the impugned orders of termination which were camouflaged and thus, the same were subject to judicial review. Accordingly, vide judgment dated 21.12.2000, the relief of consequential benefits was granted after setting aside the order of termination. The relevant part thereof is extracted herein:

> "On a consideration of all the facts and circumstances we are of the view that there is no other conclusion possible except to say that the orders which are the subject matter of the writ petitions and in the Letters Patent Appeals are merely camouflage and orders have been passed for extraneous reasons under the cloak of innocuous form of orders of termination. To give an air on verisimilitude the

> respondents had held the Court Martial proceedings which are wholly void.
>
> Accordingly, we declare that the proceedings initiated against the petitioners in the two writ petitions are void in law and the orders passed against the other officers, the appellants in L.P.As. are vitiated being without any material and being camouflage. Having dropped the idea not to conclude Court Martial proceedings knowing fully well that the officers were likely to be acquitted, without producing relevant record before the concerned authority orders of termination were passed flouting all norms. The appellants in the L.P.A's and the petitioners in the two writ petitions are entitled to all the consequential benefits. We also hereby declare that the orders passed against the appellants in the L.P.As are void in law and the conviction and sentence by the GCMs against the writ petitioners are void in law. Consequently, the judgments of the learned Single Judge which are subject matter in Latent Patent Appeals are set aside and the writ petitions in those cases are allowed and the Letters Patent Appeals stand allowed and the two writ petitions also stand allowed. All the writ petitions stand allowed to the above extent indicated and other reliefs prayed for cannot be considered by this Court and it is for the law makers to attend to the same. There shall be no order as to costs."

13. Another relevant event in this journey of judicial conflict which is worth mentioning is that two officers, namely, Subhash Juneja and Harish Lal Singh, whose writ petitions had been dismissed on the ground of constructive *res judicata,* filed special leave petitions that were converted to Civil Appeal Nos. 1931 and 1932 of 1997 and were finally dismissed by a three-Judge Bench of this Court vide order dated 23.4.2003, which is quoted as under:

> "The grievance of the appellants that is sought to be agitated in these appeals is alread[illegible]er

judgment of the Delhi High Court in a Writ Petition filed by the appellants themselves. The appellants herein challenged the said judgment by filing Special Leave Petitions and those Special Leave Petitions having been dismissed by this Court, the contentions raised by them have been finally decided against the appellants herein.

The appellants are now trying to re-agitate those issues because the High Court in some other case has taken a different view. Mr. Yogeshwar Prasad, the learned senior counsel appearing for the appellants states that these cases should be heard along with the cases of Union of India which are pending against the latter view of the High Court. We find no reason to do so. **The contention of the appellant raised was rightly dismissed by the High Court in the impugned judgment by applying the principles of constructive res judicata.** The appeals are accordingly dismissed."

(Emphasis added)

14. Thus, it can be seen from the narration of facts hereinabove that with regard to some of the officers, who were involved in this very incident, the evidence which had already been assessed by the High Court, had been looked into and it was found that the doctrine of pleasure had been upheld in the earlier round of litigation and, therefore, the matter stood foreclosed and could not be reopened. The adjudication, therefore, between the Union of India who is the present appellant and the officers who were involved in the same set of incidents had attained finality up to this Court. It was in this background that the Union of India filed the appeals in the year 2001 against the judgment dated 21.12.2000 referred to hereinabove. The judgment dated 21.12.2000 in relation to all the four sets of litigations that have been referred to by the High Court in its order dated 2.5.1995 is, therefore, extracted hereinabove.

15. The appeals filed by the Union of India, pending before this Court against the judgment dated 21.12.2000, were split into two parts by the order of this Court dated 14.2.2006, which is extracted herein:

"C.A. Nos.2949-2950/2001:

Arguments heard.

Judgment reserved.

The entire original record including the administrative receipts be called for either by FAX or by telephonic message immediately by the Registrar (Judicial).

C.A.Nos.2951-2957/2001:

De-linked.

These matters shall be heard separately. List after four months."

16. Accordingly, the arguments were heard and judgment was reserved in the matter arising out of the two writ petitions filed by Ranbir Singh Rathaur and Ashok Kumar Rana alongwith which delinked seven LPAs were also disposed of even though it was observed by this Court that they arose out of the same incident. This Court vide judgment dated 22.3.2006 in the case of *Union of India & Ors. vs. Ranbir Singh Rathaur & Ors.,* (2006) 11 SCC 696 reversed the judgment of the High Court dated 21.12.2000 vis-a-vis the two writ petitions and held as follows:

"On a bare reading of the High Court's order and the averments in the writ petitions, one thing is crystal clear that there was no definite allegation against any person who was responsible for the so-called manipulation. It is also not clear as to who were the parties in the writ petitions filed. In the grounds indica[illegible]s

it was stated that there is no bar or impediment on the High Court reviewing the petitioner's case as also connected cases to ***enquire*** *into the validity of the acts done against the writ petitioner. Therefore, it was an accepted* ***position that the writ petitioners wanted review of the High Court's order, which is clearly impermissible.*** *No ground for seeking such review apparently was made out. In any event* ***we feel*** *that* ***the High Court's approach is clearly erroneous.*** *The present appellants in the counter-affidavit* ***filed had raised a preliminary objection as regards the maintainability of the writ petitions*** *and had requested the High Court to grant further opportunity if the necessity so arises to* ***file a*** *detailed counter-affidavit after the preliminary objections were decided.* ***The High Court in fact in one of the orders clearly indicated that the preliminary objections were to be decided first.*** *But strangely it did not do so. It reserved the judgment and delivered the final judgment after about three years. There is also dispute as to whether the relevant documents were produced. What baffles us is that in the High Court, records with original documents were shown to it and the Bench wanted the copies to be filed.* ***In the impugned judgment the High Court proceeded on the basis as if only a few pages of the files were shown. If that was really the case, there was no necessity for the High Court to direct the present appellants to file copies. If after perusal of the documents the High Court felt that these were not sufficient the same would have been stated. But that does not appear to have been done****. The High Court also had not discussed as to how the matters which stood concluded could he reopened in the manner done. No sufficient grounds have been even indicated as to why the High Court felt it necessary to do so.* ***To say that though finality had been achieved, justice stood at a higher pedestal is not an answer to the basic question as to whether the High Court was competent to reopen the*** A B C D E F G H

whole issue which had become concluded*. The persons whom the High Court felt were responsible for alleged manipulation or* ***persons behind false implication were not impleaded as parties. Newspaper reports are not to be considered as evidence.*** *The authenticity of the newspaper reports was not established by the writ petitioners. Even otherwise, this could not have been done in a writ petition, as disputed questions of fact were apparently involved. The matters which the High Court found to have been established were really not so. The conclusions were based on untested materials, and the writ petitioners had not established them by evidence. Since the High Court has not dealt with the matter in the proper perspective we feel that it would be proper for the High Court to rehear the matter. The High Court shall first decide the preliminary objections raised by the present appellants about the non-maintainability of the writ petitions. Normally such a course is not to be adopted. But in view of the peculiar facts involved, it would be the appropriate course to be adopted in the present case. Therefore, we remit the matter to the High Court for fresh hearing. We make it clear that whatever we have observed should not be treated to be the conclusive findings on the subject-matter of controversy. The appeals are allowed without any order as to costs. Since the matter is pending since long, we request the High Court to dispose of the matter as early as practicable, preferably within four months from the date of receipt of the judgment. No costs. "* (Emphasis added) A B C D E F

17. On remand, the High Court dismissed the writ petitions vide judgment dated 20.12.2007 and the same has been placed on record by the appellants. G

18. So far these appeals are concerned, the High Court by the impugned common order dated 21.12.2000, not only quashed the termination orders but also court-martial proceedings held against some of the H

19. The Division Bench of this Court, after hearing the counsel appearing for the parties and legal contentions urged, formulated the following points for consideration by a larger bench [*Union of India vs. S.P. Sharma,* (2013) 10 SCC 150)]:-

"31. With reference to the aforesaid rival factual and legal contentions urged, the following points would arise for consideration in these appeals:

31.1. Whether the orders of termination passed by the first appellant in absence of material evidence and improper exercise of power by the first appellant amount to fraud being played on the respondent officers and are vitiated in law on account of legal malafides and legal malice?

31.2. Whether the order of dismissal of earlier writ proceedings and confirming the same by this Court vide order dated 1-9-1980 in relation to the same respondent officers in C.As. Nos. 2951, 2954, 2955, 2956 and 2957 of 2001 amounts to doctrine of merger and operates as res judicata against the present appeals?

31.3. Whether the exercise of doctrine of pleasure under Section 18 of the Army Act read with Article 310 of the Constitution by the first appellant in the absence of any material evidence against the respondent officers and non-production of the relevant records/files of these officers render the orders of termination as illegal and invalid?

31.4. Whether the order of termination is arbitrary, capricious, unreasonable and violative of Articles 14, 16, 19 and 21 of the Constitution of India?

31.5. Whether the impugned judgment and order of the High Court is vitiated either on account of erroneous reasoning or error in law and warrant interference by this Court?"

20. The learned Additional Solicitor General at the very

outset submitted that issues involving security of the State were extremely complex and the issue related to the expediency and desirability of retaining officers in the Army who had become security suspects. The instant cases of the respondent officers were examined at various levels in the Army Headquarters as also in the Central Government and the final decision to exercise the power to pass an order of termination was taken by it under Section 18 of the Army Act. Learned counsel relied upon the judgment of this Court in *B.P. Singhal vs. Union of India & Ors.* (2010) 6 SCC 331 and contended that the parameters that are required to be taken into consideration for exercise of power under Article 310 of the Constitution are varied. Several of these parameters entail evaluation of issues relevant to the security of the State. The factors that form the basis of exercise of power under Article 310 of the Constitution cannot be said to be objective parameters that are amenable to judicially manageable standards. The reasons that form the basis of exercise of power under Article 310 can extend to varied levels of subjective assessments and evaluations in entailing expert knowledge as to issues of security of the State. In that view of the matter it is submitted that exercise of power of judicial review would accord great latitude to the bona fide evaluation made by the competent authorities in the course of discharge of the duties. The correctness of the opinion formed or the sufficiency of material forming the basis of their decision to pass an order of termination would not be subjected to judicial scrutiny of either the High Court or this Court. Further, placing strong reliance upon *B.P. Singhal case*, (supra) it is contended by the learned Additional Solicitor General that exercise of power of judicial review under Article 310 is extremely narrow and is limited to only one parameter, namely, violation of fundamentals of constitutionalism. The standard of judicial review which applies to the case of exercise of executive or statutory or quasi-judicial power cannot be extended to the case of judicial review of constitutional power under Article 310. Learned counsel submitted that the fact that Article 311 does not apply to the case s

of armed forces, the power under Article 309 also cannot be exercised for limiting the ambit of Article 310. The Army Act is an enactment under Article 309. The aforesaid legal principle has been followed consistently in all subsequent decisions of this Court. In this connection learned counsel relied upon the judgment of this Court in *Moti Ram Deka vs. North East Frontier Railways* (1964) 5 SCR 683. Further, the Constitution Bench of this Court in *Ram Sarup* vs. *Union of India*, AIR 1965 SC 247 with reference to Article 33 of the Constitution, has laid down limitations provided on the applicability of fundamental rights guaranteed to the officers/employees of the Army under Articles 14, 16 and 21 of the Constitution and under Section 21 of the Army Act. He has further contended that each of the provisions of the Army Act also carries the sanction of Parliament against the applicability of all other fundamental rights contained under Part III of the Constitution to the extent to which the rights contained in the fundamental rights are inconsistent with the provisions of the Army Act. The aforesaid enunciation of law has again been followed consistently by this Court in subsequent decisions.

21. The learned Additional Solicitor General further contended that in a matter of civilian employees, Article 311 represents a limitation over the absoluteness of pleasure doctrine contained in Article 310. In *Moti Ram Deka* (supra) and in the subsequent cases, this Court laid down that Article 311 introduces a twofold procedural safeguard in favour of an employee/officer in relation to the exercise of pleasure doctrine. However, Article 311 applies only in cases of punishment and not otherwise. The availability of the safeguards provided for under Article 311 is contingent upon and limited to cases where the power of termination of services of an employee/officer is exercised by the disciplinary authority by way of punishment. The applicability of Article 311 of the Constitution being dependent on the factum of the order of termination being in the nature of a punishment, judicial review undertaken in case of civilian employees entails the necessity for and the power

of determining as to whether the order impugned is in the nature of a punishment or not. The doctrine of "foundation", "camouflage" and the principles of judicial review, encompassing the necessity and the power of determining, whether the order impugned is by way of a punishment is thus a direct emanation and a logical corollary of the nature of enquiry warranted when Article 311 applies to a case.

22. Since the provisions of Article 311 of the Constitution admittedly do not apply to these cases, it relates to the domain of civilian employees/officers service jurisprudence, which is controlled by Article 311, cannot be invoked in the case of employees/officers of armed forces. Since the protection of Article 311 cannot be claimed in the case of employees of armed forces, no enquiry as to whether the order is by way of a punishment, which is the sine qua non for applicability of Article 311, is warranted. The legal issue requires to be considered by this Court in the context of the fact as to whether by virtue of anything contained in the language of Article 310 or the other provisions of the Constitution, the constitutional power under Article 310 can be construed to be limited to cases of termination simpliciter. It is contended on behalf of the appellants that neither the language of Article 310 nor any other provision of the Constitution warrants adoption of such a narrow construction. Further, the learned Additional Solicitor General has contended that this Court has consistently held that the ambit of the doctrine of pleasure, contained under Article 310, is an absolute power, save to the extent provided otherwise by an express provision of the Constitution. The only express limitation on the power of Article 310 exists under the Constitution in relation to the tenure of certain constitutional functionaries such as the Hon'ble Judges of the High Court and the Supreme Court. He further contends, placing reliance upon ***Moti Ram Deka (supra)*** that this Court has laid down the legal principle; that the ambit of Article 310 is circumscribed only by the provisions of Article 311 and that even Article 309 does not circumscribe the said power. The conf n

the President of India under Article 310 is in absolute terms. Therefore, there is no basis for suggesting that the power under Article 310 ought to be construed as excluding the power to dismiss an employee or officer for misconduct. The very fact that Article 310 makes the tenure subject to the absolute pleasure of the President means that the President can exercise the said power for any reason and without assigning any cause or reason and this is precisely what has been laid down by this Court in ***B.P. Singhal (supra)***. He further contends that the power under Article 310 also encompasses the power to dismiss an employee or officer for misconduct and Article 311 is inapplicable in respect of an employee or officer of the armed forces. It is further submitted that in case of armed forces scrutiny of an order passed under Article 310 would neither warrant an enquiry as to the foundation of the order nor an enquiry as to whether the order is in the nature of punishment. Therefore, he submits that the necessary corollary thereof would be that the competent authority is also free to abandon any statutory procedure at any stage and take resort to the constitutional power under Article 310 by the President to terminate the services of an employee/officer of the armed forces. The ambit of such power cannot be circumscribed with reference to the concepts that govern the exercise of the power in relation to civilian employees/officers.

23. Learned Additional Solicitor General put reliance on *Chief of Army Staff* vs. *Major Dharam Pal Kukrety*, (1985) 2 SCC 412 where this Court has also upheld the competent authority's power to switch over to its power under Section 18 of the Army Act upon abandonment of the GCM proceedings against its employees/officers. The authorities are competent to take recourse to their statutory power under Section 19 in a case where the court martial exercise initiated by them becomes futile. It cannot be contended by the officer that where alternative powers under the statute can be resorted to in such situations the authority cannot resort to its constitutional power under Article 310 but pass an order of termination against the

officer of the Army. Such provision of the statutory power including Section 19 of the Army Act can be said to be subject to the limitations of the scheme of the Army Act. Power under Article 310, which is constitutional power, is wider and certainly cannot be subjected to the constraints flowing from the scheme of the Army Act. It is further contended that this Court has examined the legality and validity of similar orders of termination in exercise of power under Article 310 of the Constitution by the President upholding the orders of termination passed in exercise of the aforesaid constitutional statutory provisions.

24. Shri P.P. Rao, learned senior counsel appearing for respondent Major S.P. Sharma, firstly brought to our notice the sequence of the events happened so far as this respondent is concerned. According to the learned counsel in spite of unblemished career and academic experience Major Sharma was arrested in 1979 and was lodged in a cell and was denied the basic facilities. The said respondent represented to the Chief of Army Staff and Deputy Chief of Army Staff-GOC about the inhuman treatment. However, in 1979 a charge report was handed over to the respondent on 14.04.1979 for which he was arrested. It was alleged by the respondent that the army authorities released false, defamatory and fabricated press release stating that the respondent was the ring leader of the group with 15 others and was spying for Pakistan, having received huge sum in Indian currency for passing of information to Pakistan about the Indian Army. A second charge report was handed over to the respondent. Later on a summary of evidence was commenced on the basis of false allegation.

Mr. Rao, then contended that about 27 prosecution witnesses were examined and all of them spoke about his honesty and integrity and uprightness. Learned senior counsel submitted that when the charges against the present respondent were not substantiated he was released from arrest and suspended from duties. He was grante[illegible]at he was recalled for duty and an ord[illegible]d

11.01.1980 was served and handed over to the respondent. Subsequently, by a corrigendum the order of dismissal of the respondent was substituted by an order of termination.

25. Mr. Rao, has not disputed the fact that the said respondent Major S.P. Sharma filed a writ petition being W.P. No.418 of 1980 challenging the order of dismissal dated 11.01.1980. The said writ petition was dismissed by a Division Bench of the Delhi High Court and against the said order the respondent preferred a Special Leave Petition before this Court being 7225 of 1980 which was also dismissed. When the order of dismissal attained finality, the respondent was served with a show cause notice as to why a cut-off 5% in the retirement gratuity and Death-Cum-Retirement Gratuity be not imposed as his service was not satisfactory. The respondent Sharma again challenged the said notice by filing a writ petition in the High Court being W.P. No.1643 of 1982. In the said Writ Petition the respondent also challenged the order dated 03.03.1980 by which the dismissal was substituted by an order of termination. The said writ petition was dismissed by the High Court on 22.03.1985 holding that the said order of termination is a termination simpliciter without being any stigma attached. The said order was challenged by the respondent by filing LPA No.77 of 1993. The matter then travelled to a Full Bench and finally concluded by the impugned order passed by the Division Bench of the Delhi High Court.

26. Mr. P.P. Rao, learned senior counsel advanced his argument on the points formulated by this Court and submitted that the second writ petition cannot, at any stretch of imagination, be held to be barred by the principles of *res judicata*. Learned counsel further submitted that by issuing an order of termination in place of dismissal, the entire finding recorded by the Court while considering the order of dismissal got washed off, hence there can be no *res judicata.*

27. Mr. Rao then drew our attention to the counter affidavit

filed by the appellant Union of India before the High Court and submitted that if the offence was so grave then the respondent should have been punished instead of dismissal from service.

28. Mr. Rao vehemently argued by giving reference to the finding recorded by the High Court that non-production of records and the materials which are the basis for passing the order of termination is wholly illegal, arbitrary and unjustified. He reiterated that for the non-production of materials and records in spite of being directed by the Court, adverse inference has to be drawn. According to the learned senior counsel, withholding of documents by the constitutional authority and the Government is a serious matter and, therefore, the High Court has rightly held the order of termination bad in law. In this regard learned counsel referred and relied upon the decisions of this Court in *Gopal Krishnaji Ketkar vs. Mahomed Haji Latif & Ors*. 1968 (3) SCR 862 and *Ghaio Mall & Sons vs. State of Delhi & Ors.,* 1959 SCR 1424.

29. On the question of *doctrine of pleasure,* Mr. Rao firstly contended that the constitutional provisions contained in Article 309, 310 and 311 are subject to Article 14 of the Constitution. According to the learned counsel, Article 14, 15 and 21 constitute the core values and such right cannot be taken away on the plea of doctrine *of pleasure.* In this connection he relied on *I.R. Coelho vs. State of Tamil Nadu,* (2007) 2 SCC 1.

30. Mr. Rao then contended that Article 33 of the Constitution is in the nature of exception but it does not abrogate the fundamental rights. In other words, Article 33 does not speak about the basic structure of the Constitution. Learned counsel relied upon the decision of this Court in *B.P. Singhal vs. U.O.I.*, (2010) 6 SCC 331.

31. Mr. Rao then contended that Article 33 in any event shall be given restricted interpretation for the reason that any law which restricts the fundamental rights shall be strictly interpreted. In this connection learne

(1974) 1 SCC 645: *Bhut Nath Mete* vs. *State of West Bengal.* Mr. Rao addressed on legal malice and malice in law and referred a decision of this Court in *Ravi Yashwant Bhoir* vs. *District Collector, Raigad & Ors*., (2012) 4 SCC 407.

32. Mr. Rao submitted that only notings were produced before the High Court but the material on the basis of which opinion was formed was not produced. The detailed summary of evidence, different memos and other documents produced in the court martial proceeding were also not produced before the High Court. Learned counsel submitted that those notings produced before the High Court are not material, rather advisory material. Learned counsel referred to some of the paragraphs of the judgment rendered in *S.R. Bommai and Ors. vs. Union of India and Ors.,* (1994) 3 SCC 1.

Learned counsel lastly submitted that although 5% cut in gratuity has been withdrawn by the appellant, the termination has to be held as bad.

33. Mr. Deepak Bhattacharya, learned counsel appearing on behalf of Major Ajwani in C.A. No.2953 of 2001, firstly submitted that the order of termination under Section 18 of the Army Act is a colourable exercise of power which is arbitrary, capricious and unreasonable. Learned counsel submitted that the pleasure doctrine is the residual executive power under Section 53 of the Constitution and hence amenable to judicial review to ensure that the same follows the satisfaction of the President after due application of mind and without any arbitrary, capricious and un-reasonable exercise of power. According to the learned counsel the respondent Major Ajwani was arrested and kept in solitary confinement without being informed of any reason for the same and, thereafter, criminal proceedings were initiated against him. It was contended that the criminal proceedings against him was abandoned without informing him any reason for the same and finally he was illegally terminated under Section 18 of the Army Act.

34. On the question of *res judicata,* learned counsel submitted that there is no pleading of *res judicata* ever raised by the appellant. However, learned counsel adopted the argument advanced by Mr. P.P. Rao on the question of *res judicata.*

35. Mrs. Kiran Suri, learned counsel appearing for Capt. Arun Sharma and Capt. J.S. Yadav in C.A.No.2954 of 2001 and C.A.No. 2957 of 2001, firstly submitted that there is no decision on merit in the earlier writ petition and, therefore, the question of application of *res judicata* does not arise. The writ petition was dismissed since the pleasure doctrine was invoked and it is open to judicial review. Learned counsel relied upon the decision of this Court in *Mathura Prasad Bajoo Jaiswal vs. Dossibai N.B. Jeejeebhoy* (1970) 1 SCC 613; *Supreme Court Employees' Welfare Association vs. Union of India and Anr.* (1989) 4 SCC 187; *Isabella Johnson (Smt.) vs. M.A. Susai(dead) by LRs.* (1991) 1 SCC 494 and *Kishan Lal vs. State of J&K* (1994) 4 SCC 422. Learned counsel then contended that the issue involved in the later proceedings was not an issue in the earlier proceedings inasmuch as the later writ petition was filed challenging the subsequent order converting the order of dismissal to order of termination and also a notification as to cut of gratuity.

36. Mrs. Suri then submitted that the order in the first proceeding is an order which has been the result of suppression of documents/facts by the appellant when these facts/documents were only within the knowledge of the appellant. Hence suppression of facts and documents would not entitle the appellant to raise the technical plea of *res judicata* and to take advantage of the same. It was contended that the appellant is under the public duty to disclose the true facts to the court which has not been done and it will amount to obtaining the order by fraud.

37. On the issue of doctrine of pleasure Mrs. Suri submitted that exercise of doctrine of pleasure i[illegible]y

material evidence against the respondent and non-production of relevant records of these officers render the order of termination as illegal and invalid. Learned counsel submitted that the justiciability of an action by the executive government is open to challenge on the ground of malafide and also that the formation of opinion is on irrelevant material. Learned counsel in this regard referred to a decision of this Court in the case of *B.P. Singhal* (supra) and *Jay Laxmi Salt Works (P) Ltd. vs. State of Gujarat* (1994) 4 SCC 1. Lastly, it was contended that the President has been misled without producing the relevant material and on the basis of false and misleading noting, order was obtained which amount to fraud and legal malafide.

38. Mr. A.K. Panda, learned senior counsel appearing on behalf of respondent Capt. V.K. Diwan in C.A. No.2956 of 2001, made his submission with regard to the interpretation of Articles 309, 310 and 311 of the Constitution. According to the learned counsel Article 310 is not controlled by any legislation, on the contrary it is contended that Article 310 is subject to Article 309 or 311 of the Constitution. It was contended that the respondent would have been exonerated had the court-martial proceedings been continued. But just to avoid court martial the appellant took recourse to terminate the services by applying the 'pleasure' doctrine. On the point of *res judicata* learned counsel relied upon the decision in the case of *V. Rajeshwari (Smt) vs. T.C. Saravanabava,* (2004) 1 SCC 551 and *Maneka Gandhi vs. Union of India & another,* (1978) 1 SCC 248.

39. Mr. Panda, learned senior counsel further contended that in spite of the several opportunities given by the Delhi High Court, the appellants failed to produce any material against the present respondents to satisfy the Court that the termination was justified. Learned counsel submitted that the High Court has carefully analysed all the facts of the case and recorded a finding that the termination was wholly *malafide* and devoid of any substance.

40. Mr. Kameshwar Gumber, learned counsel appearing on behalf of Ex.Major R.K. Midha (now deceased) in C.A. No. 2952 of 2009, at the very outset submitted that although the respondent is dead now, the instant appeal is contested only with an object to restore the honour and to remove the stigma cast on him and the family. Learned counsel, however, admitted that the family of the deceased respondent has been getting all pensionary benefits.

41. Ms. Amrita Sanghi, learned counsel appearing for the respondent in C.A. No.2955 of 2001 on the issue of *res judicata*, firstly contended that the earlier writ petition filed by the respondent challenging the order of dismissal was dismissed up to this Court without going into the merit of the case and the issue of *malafide* was not discussed. It was contended that the second writ petition challenging the order of termination and the show cause notice for deducting 5% of the gratuity was on the basis of a fresh cause of action inasmuch as the dismissal of writ petition up to this Court put an end to the proceedings of dismissal until the Government came out with the order of termination with ulterior motives. Learned counsel then contended that this Court in the order dated 17.11.1994 in Special Leave Petition agreed with the Full Bench and the matter was sent back to the High Court for decision on merit. It was for the first time the appellant-Union of India made out a case that petitioners had been caught doing espionage activity and thus considered a security suspect. Adopting the argument of Mr. P.P. Rao, learned senior counsel submitted that Article 33 of the Constitution does not contemplate restricting or abrogating the basic structure of the Constitution or the core values of the Constitution.

42. First of all, we shall deal with the following important points formulated by this Court referred hereinabove i.e.

(a) Whether the exercise of doctrine of pleasure under Section 18 of the Army Act read with Article 310 of the Constitution in absence of any ma[illegible]st

the respondent- officer and the non production of relevant records/files of these officers rendered the order of termination as illegal and invalid?

(b) Whether the order of termination is arbitrary, capricious, unreasonable and violative of Articles 14,16,19 and 21 of the Constitution of India.

(c) xxxxxxxx

(d) Whether the order of termination passed by the first appellant in absence of material evidence and improper exercise of power by the first appellant amount to fraud being played on the respondent officers and are vitiated in the law on account of legal malafides and legal malice?

43. All these three points are interconnected and, therefore, will be discussed together. Admittedly, the Division Bench while hearing the matter called for the relevant records from the appellant and same were produced in the Court. The Division Bench took notice of those files and observed:-

"55. The respondents had submitted for our perusal four thin files without proper pagination and indexing.

56. From a reading of the files one could see that the proposal had come from the Army Headquarters Directorate of Military Intelligence for termination of services of certain officers under Section 18 of the Army act, 1950 and that was accepted by the concerned Ministry. The circumstances under which the Directorate Military Intelligence formed the opinion has not been disclosed. A single sheet file has been submitted to show that on 17.12.1980 there was a review of the decision taken earlier and it appears from a note typed out without any signature of any authority, that the very Director of the Military Intelligence who proposed action have been a party to the review meeting. From the records produced no authority can come to any conclusion on the decision to

be taken by the authorities concerned for terminating service of the officers. We wanted to satisfy ourselves about the basis on which the action was proposed by the Directorate Military Intelligence. Apparently, the Directorate of Military Intelligence though that they are not obliged in law to produce any record before the Court and the decision of the Directorate Military Intelligence cannot be scrutinised by this Court.

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129. It has now become absolutely necessary to Notice the records produced by the respondents. When one the learned addl. Solicitor General submitted that though the respondents had claimed privilege they had no objection to place all the records for the perusal of this Court to satisfy whether the respondents had acted in accordance with law. It is a little disturbing to note that respondents instead of producing the relevant records pertaining to the officers involved in the cases had just produced three flaps. No numbers are given. On flap contains three sheets. The first sheet is mentioned as Index sheet. Index sheet itself mentions that there is only one page in the file. The other sheet contains a note which states that all the cases have been thoroughly reviewed at Army Headquarters. The other sheet shows that the matter was discussed in a meeting held in the Home Secretary's Room on 1.10.1980.

130. The next flap is empty. The same note, as found in the earlier flap, is found pinned on to the flap itself. In the third flap there are 15 sheets. The first sheet is typed as Index Sheet. It states that "this file contains a total of 12 pages". When there are 14 sheets besides the Index Sheet and in some sheets both sides are typed. Therefore, the flap contains 12 p[illegible].

These sheets also do not give us any relevant material to form an opinion about the action taken by the respondents. Therefore, - the irresistible conclusion is that the respondents have suppressed the material records from this Court and are not willing to part with or produce the same for perusal of the Court. It cannot be pretended by the respondents that there are no other files available with them except the three flaps produced before this Court, as in the written notes submitted by the learned Addl. Solicitor General reference is made to file No. 9, 10, 18, 1, 2 and pages of the files are also given in the written notes, some files containing more than 600 pages."

44. On the basis of the aforesaid findings, the Division Bench held that the respondent-appellant has not placed any material justifying their action. The Court has, therefore, concluded its findings in para 168 of the judgment which is reproduced hereunder:-

"168. The whole of the bundle of facts in the instant batch of cases would appear to be a pot boiler to project the image of the Military Intelligence Directorate, leaving us at the end with the cliff hanger without any iota of materials to form an opinion about the involvement of the appellants and the petitioners. They have chosen not to produce the entire records without realising their constitutional obligation. Just to make an apology they have produced some flaps as if they constitute all the records in the case. In a system where rule of law reigns supreme the deportment of the respondents cannot at all be tolerated. Justice Holmes of the Supreme Court of the United States of America Speaking for the Supreme Court in Wisconsin vs. Illinois, 281 US 179.

"The State "must... yield to an authority that is paramount to the State".

45. Mr. Paras Kuhad, learned Additional Solicitor General

assailed the aforesaid finding as being incorrect and submitted that all the relevant materials were produced before the Court and after hearing was concluded, all those original papers were returned back to the appellant. The appellant had submitted the photocopy of all the relevant material.

46. During the course of hearing, Learned Additional Solicitor General produced before us all those files and documents which were produced before the High Court. The Additional Solicitor General also produced the link file as directed by us.

47. Mrs. Kiran Suri, learned senior counsel appearing in one of the Civil Appeal No.2954 of 2001, submitted a note wherein she has mentioned that on 3.1.2001 the Advocate received back the following original file from the High Court as per the receipt produced by the appellant in L.P.A. No.43 of 1987 and other connected matters.

(i) GCM proceedings in respect of Capt. A.K. Rana IC 23440H (Page 1-615)

(ii) GCM Proceedings in respect of Capt R.S. Rathaur IC 23720 N (Page 1- 577)

(iii) File containing analysis of Espionage cases in the respect of all the Appellants. (Page 1-13)

(iv) Brief of Samba spy Cases (Page 1-6)

(v) File showing approval of Chief of Army Staff in respect of all cases. (Page 1-9)

(vi) File showing approval of Govt, of India in respect of all the cases. (Page 1-12)

(vii) File showing note from PMO's Office regarding review note of re[illegible]f Home Secretary (Page 1-2)

48. We have minutely perused all the records including notings along with link file produced by the Additional Solicitor General. On perusal and scrutiny of all those materials we are of the view that the High Court has committed grave error of record and there is total non-application of mind in recording the aforesaid findings. From the record, it is evidently clear that the inquiry against these respondents were initiated by the Army Headquarters, Director of Military Intelligence. The file traveled from Chief of the Army Staff to Ministry of Defence with the strong recommendation to terminate the services of the respondents in the interest of security of the State as there was some material to show that these officers were involved in espionage cases. The recommendation for termination of their services up to the Defence Ministry was finally approved by the Prime Minister who also happened to be the Defence Minister of India at that time. The file was then placed before the President of India who in exercise of the constitutional power terminated the services of these officers.

49. The link file further reveals that confessional statements of Captain Rana and other officers were also recorded and strong *prima facie* case was found relating to the involvement of these officers in espionage activities and sharing information with the Pakistani intruders.

50. On assessing the materials contained in link file and the notings showing the suggestions and recommendations up to the level of defence ministry and the Prime Minister, it cannot be held that the impugned order of termination of services have been passed without any material available on record. There is no dispute that order of termination passed against the Army personnel in exercise of 'pleasure doctrine', is subject to judicial review, but while exercising judicial review, this court cannot substitute its own conclusion on the basis of materials on record. The Court exercising the power of judicial review has certain limitations, particularly in the cases of this nature. The safety and security of the nation is above all/everything. When

the President in exercise of its constitutional power terminates the services of the Army officers, whose tenure of services are at the pleasure of the President and such termination is based on materials on record, then this court in exercise of powers of judicial review should be slow in interfering with such pleasure of President exercising constitutional power. In a constitutional set up, when office is held during the pleasure of the President, it means that the officer can be removed by the Authority on whose pleasure he holds office without assigning any reason. The Authority is not obliged to assign any reason or disclose any cause for the removal.

51. Thus, it is not a case where the decisions to terminate the services of these officers were taken under the 'pleasure doctrine' without any material against the officers. On the contrary, as noticed above, charges were leveled that these officers were involved in certain espionage activities.

52. In the instant case, on perusal of the link file it is further revealed that detailed investigation was conducted and all evidence recorded were examined by the Intelligence Department and finally the Authority came to the finding that retention of these officers were not expedient in the interest and security of the State. In our view, sufficiency of ground cannot be questioned, particularly in a case where termination order is issued by the President under the pleasure doctrine.

53. A Constitution Bench of this Court in the case of the *State of Rajasthan & Ors. vs. Union of India & Ors.* 1977 (3) SCC 592, while considering a constitutional power of the President under Article 356 of the Constitution observed:-

> "81. A challenge to the exercise of power to issue a proclamation under Article 352 of the Constitution would be even more difficult to entertain than to one under Article 356(1) as all these considerations would then arise which Courts take into account when the Executive, which alone can have all the necessary informat

such an issue, tells Courts that the nation is faced with a grave national emergency during which its very existence or stability may be at stake. That was the principle which governed the decision of the House of Lords in *Liversidge v. Anderson*. The principle is summed up in the salutary maxim: *Salus Populi Supreme Lex.* And it was that principle which this Court, deprived of the power to examine or question any materials on which such declarations may be based, acted in *Additional District Magistrate, Jabalpur v. Shivakant Shukla* We need not go so far as that when we have before us only a proclamation under Article 356(1).

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87. Courts have consistently held issues raising questions of mere sufficiency of grounds of executive action, such as the one under Article 356(1) no doubt is to be non-justiciable. The amended Article 356(5) of the Constitution indicates that the Constitution-makers did not want such an issue raising a mere question of sufficiency of grounds to be justiciable. To the same effect are the provisions contained in Articles 352(5), 360(5). Similarly, Articles 123(4), 213(4), 239 B(4) bar the jurisdiction of courts to examine matters which lie within the executive discretion. Such discretion is governed by a large element of policy which is not amenable to the jurisdiction of courts except in cases of patent or indubitable malafides or excess of power. Its exercise rests on materials which are not examinable by courts. Indeed, it is difficult to imagine how the grounds of action under Article 356(1) could be examined when Article 74(2) lays down that "the question whether any, and if so, what advice was tendered by the Ministers to the President, shall not be inquired into in any court".

54. In order to appreciate the application of constitutional provisions in respect of defence services, it would be appropriate to quote Articles 309, 310 and 311 of the Constitution. These articles read as under:-

"Article 309:- Recruitment and conditions of service of persons serving the Union or a State Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State: Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

Article 310:- Tenure of office of persons serving the Union or a State

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, e

State, any contract under which a person, not being a member of a defence service or of an all India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period, that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

Article 311:- Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State

(1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed: Provided further that this clause shall not apply

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry;

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

55. Article 309 empowers the appropriate legislature to regulate the recruitment and conditions of services of persons appointed in public services and posts in connection with the affairs of the Union or the State. But Article 309 is subject to the provisions of the Constitution. Hence, the Rules and Regulations made relating to the conditions of service are subject to Articles 310 and 311 of the Constitution. The Proviso to Article 309 confers powers upon the President in case of services and posts in connection with the affairs of the Union and upon the Governor of a State in connection with the services and posts connected with the affairs of the State to make rules regulating the recruitment and the conditions of services of the persons appointed. The service condition shall be regulated according to such rules.

56. Article 310 provides that every person, who is a member of the defence service or of a civil service of the Union or All India Service, or any civil or defence force shall hold such posts during the pleasure of the President. Similarly, every person who is a Member of the Civil Services of a State or holds any civil post under a State, holds office during the pleasure of the Governor of the State. It is worth to mention here that the opening word of Article 310 y

provided by this Constitution" makes it clear that a Government servant holds the office during the pleasure of the President or the Governor except as expressly provided by the Constitution.

57. From bare perusal of the provisions contained in Article 311 of the Constitution, it is manifestly clear that clauses (i) and (ii) of Article 311 impose restrictions upon the exercise of power by the President or the Governor of the State of his pleasure under Article 310 (1) of the Constitution. Article 311 makes it clear that any person who is a member of civil services of the Union or the State or holds civil posts under the Union or a State shall not be removed or dismissed from service by an authority subordinate to that by which he was appointed. Further, clause (ii) of Article 311 mandates that such removal or dismissal or reduction in rank of the members of the civil services of the Union or the State shall be only after giving reasonable opportunity of hearing in respect of the charges leveled against him. However, proviso to Article 311 (2) makes it clear that this clause shall not apply *inter-alia* where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

58. The expression "except as otherwise provided in the Constitution" as contained in Article 310 (1) means this Article is subject only to the express provision made in the Constitution. No provision in the statute can curtail the provisions of Article 310 of the Constitution. At this juncture, I would like to refer Sections 18 and 19 of the Army Act as under:-

> "18. Tenure of service under the Act – Every person subject to this Act shall hold office during the pleasure of the President.
>
> 19. Termination of service by Central Government. Subject to the provisions of this Act and the rules and regulations made there under the Central Government may dismiss, or remove from the service, any person subject to this Act.

59. The aforesaid two Sections i.e. 18 and 19 are distinct and apply in two different stages. Section 18 speaks about the absolute discretion of the President exercising pleasure doctrine. No provisions in the Army Act curtail, control or limit the power contained in Article 310(1) of the Constitution. Article 309 enables the legislature or executive to make any law, rule or regulation with regard to condition of services without impinging upon the overriding power recognized under Article 310 of the Constitution. A Constitution Bench of this Court in *State of Uttar Pradesh and others vs. Babu Ram Upadhayay,* (1961) 2 SCR 679, held that the Constitution practically incorporated the provisions of Sections 240 and 241 of the Government of India Act, 1935 in Articles 309 and 310 of the Constitution. But the Constitution has not made "the tenure of pleasure" subject to any law made by the legislature. On the other hand, Article 309 is expressly made subject to the provisions of Article 310 which provides for pleasure doctrine. Hence, it can safely be concluded that the Army Act cannot in any way override or stand higher than Constitutional provisions contained in Article 309 and consequently no provision of the Army Act could cut down the pleasure tenure in Article 310 of the Constitution. In another Constitution Bench Judgment of this Court in *Moti Ram Deka* case (1964) 5 SCR, 683, their Lordships observed that Article 309 cannot impair or affect the pleasure of the President conferred by Article 310. There is no doubt, Article 309 has to be read subject to Articles 310 and 311 and Article 310 has to be read subject to Article 311.

60. In the case of *B.P. Singhal* (supra), a Constitution Bench of this Court has elaborately discussed the application and object of the doctrine of pleasure and considered most of the earlier decisions rendered by this Court. Some of the paragraphs are worth to be quoted herein below:-

> **"22.** There is a distinction between the doctrine of pleasure as it existed in a feudal set-up and the doctrine of pleasure in a democracy governe[illegible]n

a nineteenth century feudal set-up unfettered power and discretion of the Crown was not an alien concept. However, in a democracy governed by rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do what it pleases. The doctrine of pleasure does not mean a licence to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority will necessarily and obviously be exercised reasonably and for the public good.

33. The doctrine of pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The degree of need for reason may vary. The degree of scrutiny during judicial review may vary. But the need for reason exists. As a result when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however necessarily be read as being subject to the "fundamentals of constitutionalism". Therefore in a constitutional set-up, when an office is held during the pleasure of any authority, and if no limitations or restrictions are placed on the "at pleasure" doctrine, it means that the holder of the office can be removed by the authority at whose pleasure he holds office, at any time, without notice and without assigning any cause.

34. The doctrine of pleasure, however, is not a licence to act with unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure. In other words, "at pleasure" doctrine enables the removal of a person holding

office at the pleasure of an authority, summarily, without any obligation to give any notice or hearing to the person removed, and without any obligation to assign any reasons or disclose any cause for the removal, or withdrawal of pleasure. The withdrawal of pleasure cannot be at the sweet will, whim and fancy of the authority, but can only be for valid reasons."

61. In fact the 'pleasure doctrine' is a Constitutional necessity, for the reasons that the difficulty in dismissing those servants whose continuance in office is detrimental to the State would, in case necessity arises to prove some offence to the satisfaction of the court, be such as to seriously impede the working of public service.

62. There is no dispute with regard to the legal proposition that illegality, irrationality and procedural non-compliance are grounds on which judicial review is permissible. But the question is as to the ambit of judicial review. This court in Civil Appeal filed by the respondents challenging the order of termination passed under Section 18 of the Army Act observed that the order of termination can be challenged only on the ground of malafide. It was further observed that it is for the person alleging malafide to make out a prima facie case. For better appreciation, the order passed by this Court is quoted herein below.

"1. Special leave granted.

2. Heard both sides. According to us, all that the impugned judgment holds is that an order passed under Section 18 of the Army Act can be challenged on the ground of malafides. This statement of law is unexceptional. However, it is for the person who challenges it on the ground of malafides, to make out a prima facie case in that behalf. It is only if he discharges the said burden, that the Government is called upon to show that it is not passed in the malafide exerci e

doing so, the Government is not precluded from claiming the privilege in respect of the material which may be in its possession and on the basis of which the order is passed. The Government may also choose to show the material only to the court. With regard to the pleadings in respect of the challenge to the order on the ground of malafides, no particular formula can be laid down. The pleadings will depend upon the facts of each case.

3. The appellants are permitted to withdraw from the appeal-memo, pp. 221 to 232 which according to the learned Solicitor General have been annexed to the memo inadvertently.

4. The appeals are disposed of accordingly with no order as to costs."

63. The Full Bench of the Delhi High Court while answering the reference has observed in paragraphs 37 and 38 which is quoted hereunder:-

"37. Undoubtedly, the power under Section 18 cannot be ordinarily invoked for dealing with cases of misconduct and the other provisions in the Army Act dealing with the various kinds of misconduct have to be invoked for dealing with such cases. This power under Section 18 must be used sparingly only when it is expedient to deal with such cases under the other provisions of the Army Act. In view of the sensitive nature of cases involving security of State that may come up in the case of armed forces it cannot be said that in no case of misconduct section 18 can be invoked. There may be cases where security of State is involved and it may not be expedient to continue with the inquiry provided under the Army Act for dealing with misconduct. It appears that it is specifically for this reason that section 18 has been incorporated in the Army Act despite the fact that Article 310 of the Constitution already provided that tenure of an Army personnel would be at the

pleasure of the President. This is a power given to the Supreme Commander of the Armed Forces, i.e. the President of India to be invoked in such cases where inquiry in other form is not advisable and is inexpedient. This power is similar to second proviso (a), (b) & (c) of Article 311 (2) which provides for dispensing with the inquiry in certain cases even in the case of civil service. The safeguard provided for a government servant by clause (2) of Article 311 is taken away when second proviso to Article 311(2) becomes applicable. The Supreme Court in Tulsi Ram Patel's case (supra) observed that "the second proviso has been mentioned in the Constitution as a matter of public policy and in public interest for public good." The Supreme Court further observed that much as it may seem harsh and oppressive to a government servant, the court must repel the temptation to be carried away by feelings of commiseration and sympathy in such cases. Therefore, even if an order under Section 18 for removing a defense personnel for misconduct is passed if it is found that there were sufficient reasons for resorting to Section 18, the same would not be open to challenge on merits. The Supreme Court in Chief of Army Staff & Anr. v. Major Dharam Pal Kukrety, 1985 CriLJ 913, has held that even after Court Martial proceedings had been concluded, the finding of the general court martial having not been confirmed by the Chief of Army Staff, further retention of the Army personnel being undesirable, the Chief of Army Staff could resort to Rule 14, indicating thereby that even after resorting to court martial proceedings if it is found inexpedient to continue with the Court Martial proceedings it was open to resort to proceedings under Section 19 of the Army Act. The Supreme Court observed:

"The crucial question, therefore, is whether the Central Government or the Chief of the Army Staff can have resort to Rule 1[illegible]s.

> Though it is open to the Central Government or the Chief of the Army Staff to have recourse to that rule in the first instance without directing trial by a court-martial of the concerned officer, there is no provision in the Army Act or in Rule 14 or any of the other rules of the Army Rules which prohibits the Central Government or the Chief of the Army Staff from resorting in such a case to Rule 14. Can it, however, be said that in such a case a trial by a court-martial is inexpedient or impracticable? The Shorter Oxford English Dictionary, Third Edition, defines the word 'inexpedient' as meaning "not expedient; disadvantageous in the circumstances, inadvisable, impolite". The same dictionary defines 'expedient' inter alias as meaning "advantageous; fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term 'expedient' inter alias as meaning 'characterized by suitability, practicality, and efficiency in achieving a particular end; fit, proper or advantageous under the circumstances."

38. That being the position even after resorting to court martial proceedings if it is found inexpedient to continue with the same it is always open to the respondent to resort to either section 18 or 19 of the Army Act."

64. Indisputably, defence personnel fall under the category where President has absolute pleasure to discontinue the services. Further in our considered opinion as far as security is concerned, the safeguard available to civil servants under Article 311 is not available to defence personnel as judicial review is very limited. In cases where continuance of Army officers in service is not practicable for security purposes and there is loss of confidence and potential risk to the security issue then such officers can be removed under the pleasure doctrine. As a matter of fact, Section 18 of the Army Act is in

consonance with the constitutional powers conferred on the President empowering the President to terminate the services on the basis of material brought to his notice. In such cases, the Army officers are not entitled to claim an opportunity of hearing. In our considered opinion the pleasure doctrine can be invoked by the President at any stage of enquiry on being satisfied that continuance of any officer is not in the interest of and security of the State. It is therefore not a camouflage as urged by the respondents.

65. The next question that arises for consideration is as to whether the order of dismissal of the earlier writ petitions and confirmation of the same by this court amounts to "Doctrine of Merger" and operates as *res judicata* against the present appeals. As discussed above, the services of the present respondents along with other permanent commissioned officers of the Indian Army were terminated, since they were found suspected to be involved in espionage activities. Aggrieved by the termination order, the present respondents, except Major R.K. Midha and Major N.R. Ajwani, filed writ petitions being C.W.P. Nos. 418, 419, 421, 424 and 425 of 1980 before the Delhi High Court. These respondents challenged the said termination order as being illegal and *malafide*. The High Court vide order dated 21.4.1980 dismissed the writ petitions. The Order dated 21.4.1980 reads as under:-

> "Dismissal from service is under Section 18 of the Army act which is complimentary to Article 310 of the Constitution. This means that the Officer held the tenure during the pleasure of the President. It has been contended that it was not in accordance with the provisions of the Act and that due procedure for dismissal for misconduct has not been followed. The impugned order does not say whether the dismissal is for misconduct or otherwise. It only sets out the pleasure doctrine. In this view of the matter, no case made out for interference. Dismissed."

66. Respondents then preferred special leave petitions against the aforesaid order dated 21.4.1980 being SLP Nos. 7225 and 7233 of 1980. A three-Judge Bench of this Court dismissed the special leave petition by order dated 1.9.1980. In the year 1982, the show cause notices dated 10.5.1982 were issued to the officers whose services were terminated informing them that their services were not considered satisfactory by the Pensionary Authority and, therefore, why not 5% of the gratuity or pension be deducted. On receipt of the said show cause notices, eight of the officers, whose services were terminated initiated the second round of litigation by filing writ petitions being C.W.P Nos. 1643-1646 of 1982, 1777 of 1982, 804 of 1982, 1666 of 1982 praying not only to quash the show cause notices, but also to quash the order of termination of their services. All those writ petitions were finally heard and came to be dismissed by the Delhi High Court vide judgment dated 22.3.1985. Aggrieved by the said order, the respondents filed Letters Patent Appeal before the Delhi High Court. The Division Bench of the High Court after hearing the appeal formulated questions of law and referred the same to the Full Bench by order dated 15.5.1991. The question of law framed by the Division Bench was "whether the order of termination passed by and in the name of President under Section 18 of the Army Act read with Article 310 of the Constitution invoking doctrine of pleasure of the President be challenged on the ground that it is camouflage and as such is violative of principles of natural justice and the fundamental rights guaranteed under Article 14 of the Constitution?".

67. From the above, it is clear that the Union of India has been consistently contesting these petitions and this Court has found substance in the argument of the appellants that the High Court while delivering the judgment dated 21.12.2000 overlooked this important legal aspect of finality coupled with the doctrine *of res judicata.* In our considered opinion, this aspect cannot be ignored and the issue of fact cannot be re-opened in the instant case as well as has been done under the

impugned judgment by relying on certain material which the High Court described to have been fraudulently withheld from the courts. In our opinion, fraud is not a term or ornament nor can it be presumed to exist on the basis of a mere inference on some alleged material that is stated to have been discovered later on. The discovery of a reinvestigated fact could have been a ground of review in the same proceedings, but the same cannot be in our opinion made the basis for re-opening the issue through a fresh round of litigation. A fresh writ petition or Letters Patent Appeal which is in continuation of a writ petition cannot be filed collaterally to set aside the judgment of the same High Court rendered in earlier round of litigation upholding the termination order. In our view, the High Court has committed a manifest error by not lawfully defining the scope of the fresh round of litigation on the principles of *res judicata* and doctrine of finality. To establish fraud, it is the material available which may lead to the conclusion that the failure to produce the material was deliberate or suppressed or even otherwise occasioned a failure of justice. This also, can be attempted if legally permissible only in the said proceedings and not in a collateral challenge raised after the matter has been finally decided in the first round of litigation. It is to be noticed that the judgment which had become final in 1980 also included writ petition no.418 of 1980 filed by the respondent S.P. Sharma. Once, this Court had put a seal to the said litigation vide judgment dated 1.9.1980 then a second round of litigation by the same respondents including S.P. Sharma in writ petition no. 1643 of 1982 was misplaced.

68. The very genesis of an identical challenge relating to the same proceedings of termination on the pretext of a 5% cut in terminal benefits was impermissible apart from the attraction of the principle of merger. This aspect of finality, therefore, cannot be disturbed through a collateral challenge.

69. In *Naresh Shridhar Mirajkar vs. State of Maharashtra & Anr.* AIR 1967 SC 1, this Court by a [illegible] down the law that when a Judge deals [illegible]

before him for his adjudication, he first decides the questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes up the matter before the appellate court.

70. A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning".

71. In the case of *Mohd. Aslam vs. Union of India*, AIR 1996 SC 1611, a writ petition under Article 32 of the Constitution was filed seeking reconsideration of the judgment rendered by this Court on the ground that the said judgment is incorrect. Rejecting the prayer, this Court held that Article 32 of the Constitution is not available to assail the correctness of the decision on merit or to claim its reconsideration.

72. In the case of *Babu Singh Bains etc. versus Union of India and others etc.,* AIR 1997 SC 116, this Court reiterated the settled principal of law that once an order passed on merit by this Court exercising the power under Article 136 of the Constitution has become final no writ petition under Article 32 of the Constitution on the self-same issue is maintainable. The principle of constructive *res judicata* stands fast in his way in his way to raise the same contention once over.

73. In *Khoday Distilleries Limited & Anr. vs. The Registrar General, Supreme Court of India,* (1996) 3 SCC 114, this Court re-iterated the view as under:

> "In a case like the present, where in substance the challenge is to the correctness of a decision on merits after it has become final, there can be no question of invoking Article 32 of the Constitution to claim reconsideration of the decision on the basis of its effect in accordance with law. Frequent resort to the decision in Antulay (AIR 1988 SC 1531) in such situations is wholly misconceived and impels us to emphasis this fact."

74. In *M. Nagabhushana vs. State of Karnataka & Ors.,* AIR 2011 SC 1113, this Court held that doctrine of *res-judicata* was not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. The main object of the doctrine is to promote a fair administration of justice and to prevent abuse of process of the court on the issues which have become final between the parties. The doctrine was based on two age old principles, namely, *'interest reipublicae ut sit finis litium*' which means that it is in the interest of the State that there should be an end to litigation and the other principle is *'nemo debet bis vexari si constat curiae quod sit pro una et eadem causa'* meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.

75. Thus, the principle of finality of litigation is based on a sound firm principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law inasmuch as there will be no end to litigation. The doctrine of *res-judicata* has been evolved to prevent such an anarchy.

76. In a country governed by the rule of law, finality of judgment is absolutely imperative and great sanctity is attached to the finality of the judgment and it is not permissible for the parties to reopen the concluded judgments of the court as it would not only tantamount to merely an abuse of the process of the court but would have far reaching adverse affect on the administration of justice. It would also nullify the doctrine of *stare decisis* a well established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so. The judgme[illegible]d

particularly the Apex Court of a country cannot and should not be unsettled lightly.

77. Precedent keeps the law predictable and the law declared by this Court, being the law of the land, is binding on all courts/tribunals and authorities in India in view of Article 141 of the Constitution. The judicial system "only works if someone is allowed to have the last word" and the last word so spoken is accepted and religiously followed. The doctrine of *stare decisis* promotes a certainty and consistency in judicial decisions and this helps in the development of the law. Besides providing guidelines for individuals as to what would be the consequences if he chooses the legal action, the doctrine promotes confidence of the people in the system of the judicial administration. Even otherwise it is an imperative necessity to avoid uncertainty, confusion. Judicial propriety and decorum demand that the law laid down by the highest Court of the land must be given effect to.

78. In *Rupa Ashok Hurra v. Ashok Hurra & Anr.*, AIR 2002 SC 1771, this Court dealt with the issue and held that reconsideration of a judgment of this Court which has attained finality is not normally permissible. A decision upon a question of law rendered by this Court was conclusive and would bind the court in subsequent cases. The court cannot sit in appeal against its own judgment.

79. In *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay,* AIR 1974 SC 2009, this Court held as under:

> "At the same time, it has to be borne in mind that certainty and continuity are essential ingredients of the rule of law. Certainty in law would be considerably eroded and suffer a serious setback if the highest court of the land readily overrules the view expressed by it in earlier cases, even though that view has held the field for a number of years. In quite a number of cases which come up before this

> Court, two views are possible, and simply because the Court considers that the view not taken by the Court in the earlier case was a better view of the matter would not justify' the overruling of the view. The law laid down by this Court is binding upon all courts in the country under Article 141 of the Constitution, and numerous cases all over the country are decided in accordance with the view taken by this Court. Many people arrange their affairs and large number of transactions also take place on the faith of the correctness of the view taken by this Court. It would create uncertainty, instability and confusion if the law propounded by this Court on the basis of which numerous cases have been decided and many transactions have taken place is held to be not the correct law. "

Thus, in view of above, it can be held that doctrine of finality has to be applied in a strict legal sense.

80. While dealing with the issue this court in *Ambika Prasad Mishra v. State of U.P. & Anr.*, AIR 1980 SC 1762, held as under:

> "6. It is wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority 'merely because it was badly argued, inadequately considered and fallaciously reasoned'".

81. The view has been expressed by a three-Judge Bench of this Court in these very proceedings while dismissing the special leave petitions of Subhash Juneja and Harish Lal Singh vide order dated 23.4.2003. This court applied the doctrine of finality of judgment and *res-judicata* and refused to reopen these very proceedings.

82. Mrs. Kiran Suri, learned counsel appearing for the respondent, put heavy reliance on a decision of this Court in the case of *Mathura Prasad Bajoo Jais* ai

N.B. Jeejeebhoy, (1970)1 SCC 613, for the proposition that question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court. Further by an erroneous decision if the court resumes jurisdiction which it does not possess under the Statute, the question cannot operate as *res judicata* between the same parties whether the cause of action in the subsequent litigation is same or otherwise. In our opinion, the aforesaid decision is of no help to the respondent for the simple reason that the facts and the law involved in the instant case and the earlier round of litigation are the same. In para 5 of the aforesaid judgment, this Court has laid down the principle, which reads as under:-

> **"5**. But the doctrine of res judicata belongs to the domain of procedure: it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties: the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding. The previous decision on a matter in issue alone is res judicata: the reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right

> claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision: the decision on law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be as res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceeding, nor when the earlier decision declares valid a transaction which is prohibited by law.

83. In the case arising out of these very proceedings reported in *Union of India & Ors. v. Ranbir Singh Rathaur & Ors.,* (2006) 11 SCC 696, this Court held:

> (a) That review of the earlier orders passed by this court was "impermissible": approach of the High Court of reopening the case was "erroneous"; the issue of maintainability of the petitions was of paramount importance:
>
> (b) The finding recorded by the High Court that the entire record was not produced by the Union of India was not factually correct;
>
> (c) To say that "justice stood at the higher pedestal" then the finality of litigation was not an answer enabling the court to reopen a finally decided case;
>
> (d) Persons behind the false ... ot impleaded as parties; and

(e) Newspaper reports/statement made by any officer could not be considered as evidence.

84. Violation of Fundamental Rights guaranteed under the Constitution have to be protected, but at the same time, it is the duty of the court to ensure that the decisions rendered by the court are not overturned frequently, that too, when challenged collaterally as that was directly affecting the basic structure of the Constitution incorporating the power of judicial review of this Court. There is no doubt that this Court has an extensive power to correct an error or to review its decision but that cannot be done at the cost of doctrine of finality. An issue of law can be overruled later on, but a question of fact or, as in the present case, the dispute with regard to the termination of services cannot be reopened once it has been finally sealed in proceedings *inter-se* between the parties up to this Court way back in 1980.

85. The term 'dismissal' in the original order was substituted by the term 'termination' issuing the corrigendum to ratify a mistake committed while issuing the order. In fact, the competent authority had taken a decision only to terminate, and therefore it was found necessary to issue the corrigendum. However, in view of such substitution of word 'dismissal' by the term 'termination', does not tilt the balance in favour of the respondents. More so, as pointed out by Mr. Paras Kuhad, learned ASG that the proposed 5% deduction had been withdrawn, and therefore the issue did not survive.

86. Analysing entire facts of the case and the material produced in Court and upon an exhaustive consideration of the matter, we are of the definite opinion that the power of pleasure exercised by the President in terminating the services of the respondents does not suffer from any illegality, bias or malafide or based on any other extraneous ground, and the same cannot be challenged on the ground that it is a camouflage. As discussed above, the onus lay on the respondent-officers who alleged malafides. No credible evidence or material produced

before the Court impels us to come to the conclusion that the order of termination is baseless or malafide.

87. For the reasons aforesaid, these appeals are allowed and the judgment and order passed by the Delhi High Court is set aside. Ordered accordingly. No costs.

D.G. Appeals allowed.

K. GUNAVATHI

v.

V. SANGEETH KUMAR & ORS.

(Civil Appeal No. 3342 of 2014)

MARCH 7, 2014.

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

Service law: Selection – Appointment of Computer Instructor – Filling up of post on the basis of the employment exchange seniority – One time measure – Held: High Court's direction in clarificatory order to fill up 175 existing vacancies of Computer Instructors on the basis of the employment exchange seniority was a conscious decision taken in departure from the settled position in law that recruitment to public service, normally, ought to be by open advertisement and requisitions through the employment exchange can at best be supplemental – Such departure was felt necessary due to the compulsive needs in the peculiar facts of the case – To all other vacancies, existing or future, as may be, the State may follow such policy as may be in force or considered appropriate.

In the year 1999, the Government of Tamil Nadu took a policy decision to offer computer science as an elective subject in the State Government higher secondary schools. To give effect to the said policy, the State Government awarded a five year contract to the Electronic Corporation of Tamil Nadu (ELCOT) to provide not only computer hardware and software but also the man power for conducting the classes. ELCOT, therefore, engaged Computer Instructors numbering 1332 in the first phase (1999) and 1062 in the second phase (2000). Such placements were made through different

employment agencies. After the contract with ELCOT ended in February, 2005, the State Government by a G.O. MS No. 187 dated 4.10.2006 notified its decision to create one post of Computer Instructor in every government higher secondary school of the State. A decision was also taken to regularize the services of the Computer Instructors appointed by ELCOT against the said posts subject to their clearing a special test to be held by the Teachers Recruitment Board. The minimum marks in order to be selected was fixed at 50%. Inbuilt in the said decision was to relax the educational qualifications for such Computer Instructors, namely, the B.Ed. degree which they did not possess. The said order was successfully challenged before the High Court in a batch of writ petitions by the B.Ed. degree holders. The Division Bench allowed the State's appeal on 22.08.2008 accepting the stand that the recruitment test proposed for serving Computer Instructors by waiving the eligibility requirement of B.Ed. degree was a one time exception and that all future recruitments would be made from eligible candidates having the B.Ed. qualification, based on employment exchange seniority, without any preference to the existing Computer Instructors. The said order of the Division Bench was challenged by the B.Ed. qualified teachers before the Supreme Court. While issuing notice on 13.10.2008, the Court passed an interim order to the effect that the appointment of Computer Instructors pursuant to the order dated 22.08.2008 of the Division Bench of the High Court would be subject to the result of the appeals. The recruitment test was held on 12.10.2008. However, contrary to the government decision that only those candidates who had secured 50% marks would be selected, in the result published, 1686 number of candidates were shown as selected out of which only 894 had secured 50% or more marks whereas the remaining 792 candidates had secured

between 35% and 50% marks. Based on the said selection the government proceeded to appoint a total of 1683 candidates. Out of the remaining 197 posts that remained vacant (1880-1683 = 197) 22 posts were covered by various interim orders of the High Court leaving the actual number of vacancies at 175. By order dated 09.07.2009, the Civil Appeal was disposed of holding that the special recruitment test held on 12.10.2008 pursuant to the High Court's order dated 22.08.2008, being a one time exception and dictated by sympathetic grounds insofar as the adhoc Computer Instructors working for long years were concerned, was justified. But, the decision/action of the government to reduce the minimum marks and the selection of candidates securing less than 50% marks was held to be arbitrary and was consequently not approved. However, the Supreme Court permitted the holding of another recruitment test (without insisting on a B.Ed. degree) for those failed candidates who had secured more than 35% but less than 50% marks. It was also made clear that the aforesaid recruitment test would again be a one time exception and same would be held also by issuing an advertisement besides permitting candidates sponsored by the employment exchange to take part therein. Several applications for clarification of the order dated 09.07.2009 came to be filed before the Supreme Court. The Court by order dated 19.11.2009 clarified the said order by permitting the State Government to recruit Vocational Computer Instructors for the existing 175 vacancies and future vacancies for the post of Computer Instructors through the Employment Exchange based on the seniority with the Employment Exchange as per the policy decision of the State Government as well as Government Orders applicable to appointment to the post of Computer Instructors.

Pursuant to the order dated 9.7.2009 read with the

clarificatory order dated 19.11.2009, a second recruitment test was held on 24.01.2010. The said test was, however, confined only to those Computer Instructors who had secured between 35-50% marks in the first recruitment test i.e. the "failed candidates" though in terms of the order dated 9.7.2009 there were three categories of candidates who were entitled to participate in the said recruitment test i.e. 'failed candidates', 'open market candidates' and 'employment exchange candidates'. The conduct of the recruitment test in a limited manner also did not come under challenge before any forum. Out of the 792 candidates (failed candidates) who had appeared in the second recruitment test only 125 secured 50% marks and above and 667 candidates once again failed. A writ petition was filed before the High Court to declare the second recruitment test as null and void due to certain anomalies in the answer key. The said writ petition was dismissed. On appeal, the appellate Bench of the High Court while rejecting the prayer for a fresh examination directed the Teachers Recruitment Board to reassess the merit of the candidates by eliminating 20 defective questions. Pursuant to the said exercise undertaken, only 15 out of the 667 failed candidates passed, thereby, reducing the number of failed candidates to 652. As the services of the said failed candidates were being allowed to continue instead of being terminated and as the selection for the resultant vacancies consequential to such termination was not being undertaken, the B.Ed. qualified candidates filed a contempt petition before the High Court alleging disobedience and contending that the vacancies (652) were required to be filled up on the basis of the employment exchange seniority. During the pendency of the said proceeding, the services of the 652 candidates (twice failed) were terminated. Against the said terminations, several writ petitions were filed wherein a common interim order dated 30.04.[illegible]y

holding that the petitioners have no right either to question their termination or to seek regularization. But till a regular process of selection is conducted by the Government, the schools cannot be left without Teachers and hence till a regular recruitment takes place, the writ petitioners shall continue; that as directed by the Division Bench by order dated 20.12.2012, the Government shall expedite the process of regular recruitment; and the method of recruitment was left to the Government to decide.

Aggrieved by the said directions, both the B.Ed. degree holders and the terminated teachers filed writ appeals. The writ petitions that were filed by the terminated Computer Instructors were heard alongwith the writ appeals. All such cases were disposed of by the impugned common order dated 18.09.2003. The instant appeals were filed challenging the validity of the said common order, particularly directions (vi) and (vii) of Para 53 which stated that the Government shall follow the present policy of recruitment of teachers, while appointing computer instructors viz. recruitment through Teachers Recruitment Board; and the writ petitioners-appellants were eligible to apply along with others pursuant to the notification issued by the Teacher Recruitment Board and the writ petitioners are not entitled for any kind of preference. However, they are at liberty to apply for age relaxation to apply for the recruitment and the request for age relaxation, if any, would be considered on merits.

Allowing the appeal, the Court

HELD: The order dated 19.11.2009 directing filling up of 175 existing vacancies and future vacancies of Computer Instructors on the basis of the employment exchange seniority was a conscious decision taken in departure from the virtually settled position in law that

recruitment to public service, normally, ought to be by open advertisement and requisitions through the employment exchange can at best be supplemental. Such departure was felt necessary due to the compulsive needs dictated by the peculiar facts of the case. At that point of time, out of the 1880 available posts 1683 posts had already been filled up by the adhoc and underqualified Computer Instructors already working leaving only 175 vacancies and an unknown number of further vacancies which was contingent on the result of the second recruitment test ordered by this Court as a one time measure. Both the recruitment tests, ordered by the High Court as well as this Court, were exclusive to the adhoc and unqualified persons leaving a large number of qualified candidates like the appellants out of the arena of consideration. What would be the extent of the 'adverse' effect on the failed teachers if the remaining appointments are to be made on the basis of employment exchange seniority cannot be determined with any degree of accuracy at this stage inasmuch as a large number of such persons had qualified in the meantime and by virtue of clause (v) of Para 53 of the impugned order, the names of the failed computer instructors who were earlier registered in the employment exchanges have been directed to be re-entered and their earlier seniority restored. While it is also correct that by ordering recruitment on the basis of employment exchange seniority other eligible candidates who could have taken part in the competitive examination would loose out, no such person has come before this court to persuade the Court to take the view that for the purpose of recruitment to the 652 posts of Computer Instructors the earlier order of this Court dated 19.11.2009 should not prevail. The directions (vi) and (vii) of the impugned order dated 18.09.2013 of the High Court are set aside and recruitment to the 652 vacant posts shall be made on the basis of employment exchange s

direction shall also govern the 175 existing vacancies covered by the order of this Court dated 19.11.2009 if the same continue to remain vacant as on date. To all other vacancies, existing or future, as may be, the State will be at liberty to follow such policy as may be in force or considered appropriate. [paras 25, 26, 27] [415-D-G; 416-B-F]

Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. *Visweshwara Rao & Ors.* **(1996) 6 SCC 216: 1996 (5) Suppl. SCR 73;** *Arun Kumar Nayak v. Union of India & Ors.* **(2006) 8 SCC 111: 2006 (6) Suppl. SCR 404;** *State of Orissa & Anr. v. Mamata Mohanty* **(2011) 3 SCC 436: 2011 (2) SCR 704 – relied on.**

Case Law Reference:

1996 (5) Suppl. SCR 73	**relied on**	**Para 25**
2006 (6) Suppl. SCR 404	**relied on**	**Para 25**
2011 (2) SCR 704	**relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3342 of 2014.

From the Judgment & Order dated 18.09.2013 of the High Court of Madras in WA No. 1307 of 2013.

WITH

C.A. Nos> 3344, 3345 and 3346 of 2014.

Hema Sampath, Nalini Chidambaram, A.K. Ganguly, Subramonium Prasad, AAG, G. Sivabalamurugan, Sandeep Kumar, L.K. Pandey, Namrata Sood, Varun Singh, Vikas Mehta, Geetha Kovilan, R. Prabhakaran, G.S. Mani, R. Sathish, M. Yogesh Kanna, Tushar Bakshi for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. What clearly has been a long drawn tussle between

under-qualified Computer Instructors appointed on ad-hoc basis (many of them have acquired the requisite qualification i.e. B.Ed. Degree in the meantime) and the B.Ed. qualified candidates who are yet to be appointed but claim to have been waiting for such appointment for long have surfaced once again, albeit, in a different manner. The challenge in these appeals is in respect of the directions of the Madras High Court in the common order under challenge dated 18.09.2013, particularly, direction No. (vi) and (vii) contained in para 53. To better comprehend the dimensions of the challenge para 53 of the impugned order is reproduced hereinbelow.

"53. Summary of conclusion :-

(i) The Government was correct and justified in terminating the services of failed computer instructors;

(ii) The failed computer instructors have no right to continue after the conclusion of second round of regularization process;

(iii) The writ petitioners have no right to continue even temporarily, pending regular recruitment;

(iv) The failed computer instructors are not eligible or entitled for regularization in view of the finding recorded by the Supreme Court in Civil Appeal No. 4187 of 2009;

(v) The names of the failed computer instructors (whose names were earlier registered in the Employment Exchange) should be re-entered in the Employment register of the concerned Employment Exchange and their earlier seniority also should be restored;

(vi) The Government shall follow the present policy of recruitment of teachers, while appointing computer instructors viz. recruitment through Teachers Recruitment Board;

(vii) The writ petitioners are eligible to apply along with others pursuant to the notification issued by the Teacher Recruitment Board. The writ petitioners are not entitled for any kind of preference. However, they are at liberty to apply for age relaxation to apply for the recruitment and the request for age relaxation, if any, would be considered on merits."

3. The reference to the recurrent dispute between the two warring groups seeking either to retain or obtain employment would necessarily require this Court to traverse the complex factual matrix once again notwithstanding the fact that in each of the challenges before the High Court as well as this Court a sequential narration of the relevant facts has been made. As, unless the same are repeated herein the issues will not crystallize and, therefore, there is no option but once again to recapitulate the events of the past.

4. Some time in the year 1999, the Government of Tamil Nadu took a policy decision to offer computer science as an elective subject to students of classes 11 and 12 in the government higher secondary schools of the State. To give effect to the said policy the State Government awarded a five year contract to the Electronic Corporation of Tamil Nadu (ELCOT) to provide not only computer hardware and software but also the man power for conducting the classes. ELCOT therefore engaged Computer Instructors numbering 1332 in the first phase (1999) and 1062 in the second phase (2000). Such placements were made through different employment agencies.

5. After the contract with ELCOT had ended in February, 2005, the State Government by a G.O. MS No. 187 dated 4.10.2006 notified its decision to create one post of Computer Instructor in every government higher secondary school of the State (1880 schools) in the payscale of Rs. 5500-175-9000/-. A decision was also taken to regularize the services of the Computer Instructors appointed by ELCOT against the said posts subject to their clearing a special test to be held by the

Teachers Recruitment Board. The minimum marks in order to be selected was fixed at 50%. Inbuilt in the said decision was to relax the educational qualifications for such Computer Instructors, namely, the B.Ed. degree which they did not possess. The aforesaid order was challenged before the Madras High Court in a batch of writ petitions by the B.Ed. degree holders which were allowed by order dated 13.03.2007. In the Writ Appeal before the Division Bench (Writ Appeal No. 1215/2007), the State Government took the stand that the recruitment test proposed for serving Computer Instructors by waiving the eligibility requirement of B.Ed. degree was a one time exception and that all future recruitments would be made from eligible candidates having the B.Ed. qualification, based on employment exchange seniority, without any preference to the existing Computer Instructors. The Division Bench of the High Court by order dated 22.08.2008 allowed the Writ Appeal in the above terms.

6. The aforesaid order of the Division Bench dated 22.08.2008 was challenged by the B.Ed. qualified teachers before this Court in Civil Appeal No. 4187 of 2009 (arising out of SLP(C) No. 25097 of 2008). While issuing notice on 13.10.2008, this Court had passed an interim order to the effect that the appointment of Computer Instructors pursuant to the order dated 22.08.2008 of the Division Bench of the High Court will be subject to the result of the appeals. The recruitment test was held on 12.10.2008. However, contrary to the government decision that only those candidates who had secured 50% marks would be selected, in the result published, 1686 number of candidates were shown as selected out of which only 894 had secured 50% or more marks whereas the remaining 792 candidates had secured between 35% and 50% marks. It also appears that based on the aforesaid selection the government proceeded to appoint a total of 1683 candidates. Out of the remaining 197 posts that remained vacant (1880-1683 = 197) 22 posts were covered by various interim orders of the High Court leaving the actual number of v e

figures mentioned above would be relevant in the light of the developments that took place subsequently which are being noted separately.

7. The fact that in the special recruitment test held on 12.10.2008 candidates who had secured between 35-50% marks were also selected and appointed were brought to notice of this Court in the pleadings in Civil Appeal No. 4187 of 2009. By order dated 09.07.2009, the aforesaid Civil Appeal was disposed holding that the special recruitment test held on 12.10.2008 pursuant to the High Court's order dated 22.08.2008, being a one time exception and dictated by sympathetic grounds insofar as the adhoc Computer Instructors working for long years are concerned, was justified. But, the decision/action of the government to reduce the minimum marks and the selection of candidates securing less than 50% marks was held to be arbitrary and was consequently not approved. However, this Court permitted the holding of another recruitment test (without insisting on a B.Ed. degree) for those candidates who had secured more than 35% but less than 50% marks (hereinafter referred to as the 'failed candidates'). It was also made clear that the aforesaid recruitment test would again be a one time exception and same would be held also by issuing an advertisement besides permitting candidates sponsored by the employment exchange to take part therein. It must also be specifically noticed that this Court by its order dated 09.07.2009 did not expressly issue any direction for cancellation of the appointments of the candidates who had secured less than 50% marks. However, such a conclusion would inevitably follow from the conclusion that the reduction of minimum marks was arbitrary and unjustified and the fact that all such failed candidates were permitted to appear in another recruitment test.

8. Several applications for clarification etc. of the order dated 09.07.2009 came to be filed before this Court. Of the said applications, I.A. No. 4 of 2009 filed by the State

Government would be of particular significance insofar as the present adjudication is concerned. The prayer made in the said I.A. are, therefore, extracted below.

> "(a) Clarify and permit the State Government to conduct examination to the candidates who have secured 35% to 49% marks in the examination and declare the results of the candidates who secured more than 50% marks as eligible candidates for appointment.
>
> (b) Clarify and permit the State Government to recruit Vocational Computer Instructors for the existing vacancies 175 and future vacancies for the post of Compute Instructors through the Employment Exchange based on the seniority with the Employment Exchange as per the policy decision and also as per the G.O. Ms. 290, School Education Department, dated 06.12.2007 and G.O. Ms. No. 66, School Education Department, dated 02.03.2009;
>
> (c) Direct the correction of the figures appearing in paras 10, 12 & 14 of the Judgment dated 09.07.2009 passed by this Hon'ble Court in C.A. No. 4187 of 2009 as "857 to read as 894 and 829 to read as 792"."

9. This Court, in para 11 of its order dated 19.11.2009 while observing that it was not inclined to alter or review its earlier order dated 09.07.2009, however, clarified the said order by permitting the State Government to:

> "(a) ....
>
> (i) ....
>
> (ii) recruit Vocational Computer Instructors for the existing 175 vacancies and future vacancies for the post of Computer Instructors through the Employment Exchange based on the seniority with

the Employment Exchange as per the policy decision of the State Government as well as Government Orders applicable to appointment to the post of Computer Instructors.

(b) …… ….. ….. …..”

10. It will be necessary to take note of the fact that prayer (b) in I.A. No. 4 of 2009 and clarification (a) (ii) in the order dated 19.11.2009 was made in the light of a government policy then in force as detailed in G.O. (MS) No. 290 dated 06.12.2007 and G.O. (MS) No. 66 dated 02.03.2009 issued by the School Education Department. Under the aforesaid G.Os. vacancies in the post of Computer Instructors were to be filled up on the basis of the seniority in the employment exchange.

11. Pursuant to the order of this Court dated 9.7.2009 read with the clarificatory order dated 19.11.2009, a second recruitment test was held on 24.01.2010. The said test, for reasons not known, was however confined only to those Computer Instructors who had secured between 35-50% marks in the first recruitment test i.e. the “failed candidates” though in terms of the order of this Court dated 9.7.2009 there were three categories of candidates who were entitled to participate in the said recruitment test i.e. ‘failed candidates’, ‘open market candidates’ and ‘employment exchange candidates’. The conduct of the recruitment test in a limited manner also did not come under challenge before any forum. Out of the 792 candidates (failed candidates) who had appeared in the second recruitment test only 125 secured 50% marks and above and 667 candidates once again failed. A writ petition i.e. WP No. 7567 of 2010 was filed before the Madras High Court to declare the second recruitment test as null and void due to certain anomalies in the answer key. The said writ petition was dismissed. In the appeal filed (Writ Appeal No. 837 of 2010), by order dated 20.12.2012, the appellate Bench of the High Court while rejecting the prayer for a fresh examination

had directed the Teachers Recruitment Board to reassess the merit of the candidates by eliminating 20 defective questions. Pursuant to the above exercise undertaken, only 15 out of the 667 failed candidates had passed, thereby, reducing the number of failed candidates to 652. As the services of the aforesaid failed candidates were being allowed to continue instead of being terminated and as the selection for the resultant vacancies consequential to such termination was not being undertaken, the B.Ed. qualified candidates filed a contempt petition before the High Court (Contempt Petition No. 1270 of 2013) alleging disobedience and contending that the vacancies (652) are required to be filled up on the basis of the employment exchange seniority. During the pendency of the said proceeding the services of the 652 candidates (twice failed) were terminated. Against the aforesaid terminations, several writ petitions were filed wherein a common interim order dated 30.04.2013 was passed by holding that:-

“(i) The petitioners have no right either to question their termination or to seek regularization. But till a regular process of selection is conducted by the Government, the schools cannot be left without Teachers and hence till a regular recruitment takes place, the writ petitioners shall continue.

(ii) As directed by the Division Bench of this Court, by order dated 20.12.2012, the Government shall expedite the process of regular recruitment.

(iii) On the question as to what method of recruitment the Government should follow, I would leave it to the Government to decide in the light of the various judgments of the Supreme Court and the Full Bench of this Court.”

12. Aggrieved by the aforesaid directions, both the B.Ed. degree holders and the terminated teachers had filed Writ Appeals which were numbered as W.A. No. 1307 of 2013 and W.A.Nos.1088 and 1089 of 2013 res it

petitions that were filed by the terminated Computer Instructors were heard alongwith the writ appeals. All such cases were disposed of by the impugned common order dated 18.09.2003. It is the validity of the aforesaid common order, particularly directions (vi) and (vii) contained in para 53 thereof (extracted above), that has been assailed in the present appeals. Three of the civil appeals (arising out of SLP(C) Nos. 36170/2013, 33677/2013 and 35624/2013) have been filed by the B.Ed. degree holders whereas the fourth civil appeal (arising out of SLP(C) No. 5044/2014) is by a terminated teacher who seeks to make a common ground with the B.Ed. degree holders as the said appellant had in the meantime obtained a B.Ed. degree.

13. The challenge to the directions contained in para 53 (vi) and (vii) of the impugned order being based on the appellants' perception of true purport and effect of the clarification made by this Court by order dated 19.11.2009 under paragraph 11(a) (ii) (already extracted) the same will require consideration, particularly, in the light of the stand taken by the State in its counter affidavit dated 31.1.2014 filed before this Court. The above, we may indicate, is the scope of the adjudication in the cases before us.

14. In the order dated 19.11.2009 this Court had made it clear that it is in no way inclined to alter or review the earlier decision dated 09.07.2009. The aforesaid order dated 09.07.2009 did not deal with the vacancies (175) that had existed after 1683 out of the 1880 posts were filled up during the pendency of Civil Appeal No. 4187 of 2009; neither did the said order deal with the manner of filling up of any of the posts that would require to be filled up in case any of the failed candidates, once again, were to be unsuccessful in the special recruitment test ordered by this Court as a one time measure by the order dated 09.07.2009. It is in these circumstances that the I.A. in question was filed by the State of Tamil Nadu on 16.09.2009 setting out the relevant GOs, namely, GO (MS) No.

290 dated 06.12.2007 and No. 66 dated 02.03.2009 under which the vacant posts were to be filled up through the employment exchange. In para 7 of the I.A. it was specifically mentioned that by means of the present application the State "**seeks a clarification and a direction that it may be permitted to conduct the examinations for the unsuccessful candidates and the remaining vacancies viz. 175 candidates may be permitted to be recruited as per the seniority in the employment exchange. In addition to the above after the tests in respect of the candidates who secured marks between 35% and 50% are concluded such of the candidates who secure less than 50% marks would be declared ineligible for consideration and such vacancies would also be permitted to be filled in the order of seniority in the employment exchange**." This Court, under para 11 (a)(ii) of the order dated 19.11.2009, granted permission to the State Government to recruit vocational Computer Instructors for the existing 175 vacancies and future vacancies through the employment exchange "**as per the policy decision of the State Government as well as Government Orders applicable to appointment to the post of Computer Instructors**."

15. On the basis of the above clarification dated 19.11.2009 the appellants claim that the 652 vacancies now available are required to be filled on the basis of the seniority in the employment exchange and not by a process of open recruitment. The aforesaid claim has been negatived by the High Court by the impugned order (paragraph 46) on the ground that the government policy contained in G.O. (MS) No. 290 dated 06.12.2007 and G.O. (MS) No. 66 dated 02.03.2009 is no longer in force and that the government is at liberty to adopt a different policy. The High Court has also found that the policy as on date is to conduct a written test through the Teachers Recruitment Board by calling for applications from the open market as well as from the employment exchange. It has been further observed that the serving

(failed candidates) would be entitled to apply pursuant to such notice/advertisement as may be issued by the Teachers Recruitment Board and would also be entitled to seek relaxation of their age which claims are to be decided strictly on merit. The High Court has however made it clear that the serving Computer Instructors would not be entitled to any kind of preference.

16. The stand of the State in its counter affidavit dated 31.01.1994 (paragraph 17) may now be taken note of. It has been averred by the State that after coming into force of the Right to Children and Compulsory Education Act, 2009 (RTE Act) recruitment of Secondary Grade and Graduate Teachers (BT Assistants) (Classes I to VII) is being made by holding a teacher's eligibility test. According to the State, G.O.No.175 School Education Department dated 18.11.2011 has been issued for recruitment of post-graduate Assistant Teachers in higher secondary classes "through written examination and certificate verification instead of the earlier method of recruiting teachers by following the employment exchange seniority." It is further averred that, as computer instructors teach in higher secondary classes, in order to provide quality education, the Government has introduced competitive examination to recruit teachers in all categories. According to the State in implementation of the High Court's order dated 18.09.2013, G.O. No.296 School Education Department dated 04.12.2013 has been issued directing the Teachers Recruitment Board to fill up the 652 posts of computer instructors through a competitive examination.

17. The claims of the State, noticed above, is seriously disputed by the petitioners. Referring to the affidavit dated 12.8.2013 filed by the State before the High Court in Contempt Petition No.1270 of 2013 and the order of the same date passed in the said proceeding it is pointed out that even on 12.08.2013 it was admitted by the State before the High Court that it is committed to complete the recruitment in question on

the basis of the employment exchange seniority and further that the High Court had granted time to the State to commence and complete a substantial part of the recruitment process within a period of two months and, thereafter, file an action taken report before the Court. It is pointed out that pursuant to order dated 12.8.2013, action taken report dated 12.10.2013 has been filed stating that the whole matter is being examined by the Advocate General and his views are awaited. This is despite the directions in the impugned order dated 18.9.2013. On the basis of the above, it is contended that adoption of any other method of recruitment save and except employment exchange seniority will not be justified and the G.O. No.296 dated 04.12.2013 prescribing open/competitive examination is required to be interdicted.

18. An argument has also been advanced on behalf of the petitioners that computer instructors are not teachers and therefore even if a policy of recruitment of teachers by open competition is presently in vogue the same will not apply to the post of computer instructor. The aforesaid argument has been sought to be fortified on the basis of the averments made in this regard by the State of Tamil Nadu in its counter affidavit in C.A. No.4187 of 2009 (Arising out of SLP (C) No.25097 of 2008).

19. The above issue i.e. that Computer Instructors are not teachers need to hardly detain the Court. Not only the context in which the above statements were made must be kept in mind, the contention ex-facie deserves rejection in view of high degree of computer proficiency that is required in the contemporary world.

20. The affidavit filed on behalf of the State in contempt petition No.1270/2013 as well as the order of even date passed by the High Court in the said proceeding indicates that the State in an earlier affidavit dated 20.6.2013 had indicated that it is necessary to fill up the 652 vacancies of computer instructors through the Teachers R[illegible]y

conducting written examination. However in its order dated 2.8.2013 the High Court took the view that to such recruitments the clarificatory order dated 19.11.2009 of this Court should be adhered to and had fixed the matter on 12.8.2013 to enable the State to inform the Court the time that would be required to complete the recruitment process in terms of the direction of this Court dated 19.11.2009.

21. Accordingly, in para 10 of the affidavit dated 12.8.2013 of the State it was stated as follows:

> "It is submit that, in view of the above to fill up 652 vacancies in the post of Computer instructors based on the Seniority with employment exchange through Teacher Recruitment Board in accordance with the Government Order in G.O. (Ms) No.66, school Education Department, dated 02.03.2009 and G.O. (Ms) No.332, School Education Department dated 11.12.2009, the Teachers Recruitment Board needs considerable time to complete the process by following the procedure from the time of notification till the publication of the result.
>
> In these circumstances, it is prayed that this Hon'ble High Court may be pleased to extend the time granted by the Hon'ble High Court in W.A. No.837/2010 for further 6 months to implement the orders of this High Court and thus render justice."

22. Thereafter, the High Court proceeded on the basis that the State is committed to fill up the vacancies on the basis of the employment exchange seniority and by order dated 12.08.2013 granted two months time to enable the State to initiate the recruitment process and complete a substantial part thereof, whereafter, the compliance report was to be filed which, as has been noticed, was submitted on 12.10.2013.

23. The record of the proceedings of Contempt Case No.1270/2013, therefore, clearly indicates that the High Court,

while rendering the order dated 12.8.2013, was of the view that the recruitment should be on the basis of employment exchange seniority. This is not notwithstanding the stand of the State to the contrary. Thereafter, the order in the present group of cases was passed on 18.9.2013. It appears that before doing so, the stand of the State with regard to the change of policy of recruitment and the efficacy of the GO No.290 dated 6.12.2007 and GO No.66 dated 2.3.2009 was again considered and the impugned directions for completing the recruitment not through the employment exchange but by open competition through the Teachers Recruitment Board were issued.

24. Though Contempt Case No.1270/2013 and the present group of cases are independent of each other, the proximity of the controversy arising in both cases i.e. the mode and manner of recruitment of Computer Instructors, cannot be underscored. There is seemingly different understandings of the same issue in the two sets of proceedings. No explanation is available in the impugned order to justify the change of judicial vision. In fact, in the order dated 18.09.2013 there is no reference to the order dated 12.8.2013 in the contempt case. There is also no indication, whatsoever, as to what could have been the compelling reason(s) that had weighed with the Court to depart from its earlier order dated 12.8.2013 passed after full consideration of the claims of the State with regard to change of policy. Furthermore, if according to the State there had been a change of policy with regard to mode and manner of recruitment, the GOs No.290 dated 6.12.2007 and No.66 dated 2.3.2009 ought to have been cancelled. Neither any government order of cancellation is before the Court nor is there any statement that such a cancellation has been made. In the counter affidavit of the State dated 21.01.2014 filed before this Court though there is a mention of G.O.No.175 dated 18.12.2011 providing for recruitment of post-graduate assistant teachers in higher secondary classes through written examination instead of the earlier method of employment exchange seniority, the said G.O. has n

record. Even if the facts claimed on the basis of the said G.O. No.175 are assumed, there is no explanation as to why the Teachers Recruitment Board had issued advertisement No.1/2013 dated 8.5.2013 specifying in Clause 9 thereof that the vacancies covered by the said advertisement are to be filled up on the basis of the State level employment registration seniority. Incidentally the said Advertisement covered a sizeable number of posts (approx. 800) in different vocational streams. In view of the above, we have not been able to persuade ourselves to take the view that the recruitment to 652 posts should be made by a process other than what was directed by the clarificatory order dated 19.11.2009.

25. The order dated 19.11.2009 directing filling up of 175 existing vacancies and future vacancies of Computer Instructors on the basis of the employment exchange seniority was a conscious decision taken in departure from the virtually settled position in law that recruitment to public service, normally, ought to be by open advertisement and requisitions through the employment exchange can at best be supplemental. (See: *Excise Superintendent Malkapatnam, Krishna Distgrict, A.P. Vs.* K.B.N. Visweshwara Rao & Ors.,[1] *Arun Kumar Nayak Vs. Union of India & Ors.*[2] and *State of Orissa & Anr. Vs. Mamata Mohanty*[3]). Such departure was felt necessary due to the compulsive needs dictated by the peculiar facts of the case. At that point of time, out of the 1880 available posts 1683 posts had already been filled up by the adhoc and underqualified Computer Instructors already working leaving only 175 vacancies and an unknown number of further vacancies which was contingent on the result of the second recruitment test ordered by this Court as a one time measure. Both the recruitment tests, ordered by the High Court as well as this Court, were exclusive to the adhoc and unqualified persons

1. (1996) 6 SCC 216.
2. (2006) 8 SCC 111.
3. (2011) 3 SCC 436.

leaving a large number of qualified candidates like the petitioners out of the arena of consideration.

26. What would be the extent of the 'adverse' effect on the failed teachers if the remaining appointments are to be made on the basis of employment exchange seniority cannot be determined with any degree of accuracy at this stage inasmuch as a large number of such persons had qualified in the meantime and by virtue of clause (v) of Para 53 of the impugned order, the names of the failed computer instructors who were earlier registered in the employment exchanges have been directed to be re-entered and their earlier seniority restored. While it is also correct that by ordering recruitment on the basis of employment exchange seniority other eligible candidates who could have taken part in the competitive examination would loose out, no such person is presently before us to persuade us to take the view that for the purpose of recruitment to the 652 posts of Computer Instructors the earlier order of this Court dated 19.11.2009 should not prevail.

27. We accordingly allow these appeals and set aside directions (vi) and (vii) of Para 53 of the impugned order dated 18.09.2013 of the High Court and direct that recruitment to the 652 vacant posts shall be made on the basis of employment exchange seniority. We also make it clear that the above direction shall also govern the 175 existing vacancies covered by the order of this Court dated 19.11.2009 if the same continue to remain vacant as on date. To all other vacancies, existing or future, as may be, the State will be at liberty to follow such policy as may be in force or considered appropriate.

D.G. Appeals allowed.

SHIV CHANDER MORE & ORS.
v.
LIEUTENANT GOVERNOR & ORS.
(Civil Appeal No. 3352 of 2014)

MARCH 7, 2014

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

Andaman and Nicobar Islands (Land Tenure) Regulation, 1926:

ANDAMAN AND NICOBAR ISLANDS LAND REVENUE AND LAND REFORMS REGULATION, 1966: Regulation 144

Grant of plot under 1926 Regulation – No fresh grant or renewal – Repeal of 1926 Regulation – Whether the 1966 Regulations conferred any right upon the grantee whose grant has lapsed by passage of time to stay in possession till such time one of the grounds enumerated under Regulation 151 becomes available to the Administration for their eviction – Held: If a grantee of an expired grant had incurred the liability to surrender possession of the granted property, such liability would remain enforceable notwithstanding the repeal of the Regulations under which such liability arose – Regulation 144 of 1966 Regulations stipulates that a grantee under the old Regulations would continue to be under the same obligation/ liability or enjoy the same rights as are permissible under the 1966 Regulations – Thus, the essence of the Regulation in so far as right of a grantee to continue in possession is concerned, is the same under the 1926 Regulations and the subsequent Regulations of the year 1966 – In either of the cases, the grantee cannot stay in possession for more than 60 years – The argument that an old grantee can stay in possession in perpetuity so long as there is no violation of Regulation 151, is not tenable – The appellants, in the instant

case, no doubt had protection under the 1966 Regulations because the grant in their favour renewed upto 1994 was in existence in 1966 but such protection would cease with the expiry of the 60 years period in 1994.

Res judicata:

Constructive res judicata – Applicability to writ proceedings – Discussed.

Constructive res judicata – Grant of plot of land under 1926 Rules – Request of appellant for fresh grant declined by the Lieutenant Governor – Writ petition – High Court took the view that the occupants need not be evicted from the land only so long as the same was not needed for any public purpose – Before the High Court, appellant did not raise contention that regardless whether a fresh grant was made in their favour or not and regardless whether or not a second renewal was permissible under the 1926 Regulations, they had acquired a vested right under the 1966 Regulation to continue in occupation of the land till such time one of the contingencies enumerated under Regulation 151 of the said Regulations arose disentitling them from continuing in occupation of the land – Said contention was available to the occupants which could and indeed ought to have been raised by them at that stage – Inasmuch as the occupants did not urge such contention in the previous round of litigation they are debarred from doing so in the instant proceedings on the principles of constructive res judicata –– Andaman and Nicobar Islands (Land Tenure) Regulation, 1926.

The grandfather of the first appellant and the father of the remaining appellants was granted a plot of land for a period of 30 years in terms of Andaman and Nicobar Islands (Land Tenure) Regulation, 1926. The said period of 30 years expired in the year 1964. Revenue Administration sought to repossess the land. The grantee challenged the same and it was e

Department having received land revenue upto the year 1974 should not refuse renewal and the grantee were allowed to continue in possession till 1994. With the expiry of total period of 60 years, again the grantee was asked to vacate. Matter came up before the High Court wherein the legal heirs of grantee were permitted to make a representation for fresh grant. No such representation was filed and the Revenue Department again issued notice to vacate. The legal heirs of grantee filed petitions dated 8th and 15th May, 2000 before the Lieutenant Governor for a fresh grant in their favour which were dismissed. The writ petitions thereagainst were allowed by a single judge of the High Court. However, the Division Bench modified the order of the single judge with direction that if the land in question is required by the Administration for public purpose, it would be entitled to resort to appropriate provisions of law for acquiring the same. Lieutenant Governor appealed before Supreme Court where it was held that the representations filed by the legal heirs of the original grantee were for a fresh grant in their favour and further held that the second renewal was rightly held to be impermissible by the Lieutenant Governor. Therefore, Deputy Commissioner relying upon the decision of Supreme Court directed the appellant to handover the possession of land. The writ petition was filed to challenge the direction of Deputy Commissioner. The High Court dismissed the writ petition on the ground that the appellants were not entitled to raise any question relating to refusal of renewal or a fresh grant in their favour.

In the instant appeal, the two distinct questions which arose for consideration were: Whether the appellants were debarred from resisting eviction from the land in question on the ground that they have acquired the right to continue in possession even without renewal and a fresh grant in their favour under the Andaman and

Nicobar Islands Land Revenue and Land Reforms Regulation, 1966; and (2) Whether the 1966 Regulations indeed conferred any right upon the grantees whose grant has lapsed by passage of time to stay in possession till such time one of the grounds enumerated under Regulation 151 becomes available to the Administration for their eviction.

Dismissing the appeal, the Court

HELD: Re: Question No.1

1. By Representations dated 8th and 15th May, 2000 addressed to the Lieutenant Governor, the appellant sought a fresh grant in their favour. Their prayer was declined by the former by his order dated 28th February, 2001. The petitioner had filed these representations obviously because the High Court had taken the view that a second renewal of the grant was not permissible under the 1926 Regulations. The filing of the representations clearly amounted to acknowledging the correctness of that position. Aggrieved by the order passed by the Lieutenant Governor, the writ-petitioners approached the High Court again. It was open to them to contend that regardless whether a fresh grant was made in their favour or not and regardless whether or not a second renewal was permissible under the 1926 Regulations, they had acquired a vested right under the 1966 Regulation to continue in occupation of the land till such time one of the contingencies enumerated under Regulation 151 of the said Regulations arose disentitling the writ-petitioners/occupants from continuing in occupation of the land. Such a plea could and indeed ought to have been raised if the appellants intended to agitate that issue for adjudication. No such contention was, however, urged before the High Court in the said petition. On the contrary, the High Court took the view

that the occupants need not be evicted from the land only so long as the same was not needed for any public purpose. The High Court referred to the 1966 Regulations to suggest that a fresh grant was permissible even under the provisions of the said Regulation thereof. It is, therefore, evident that not only the writ-petitioners but even the High Court was conscious of the repeal of 1926 Regulations by the 1966 Regulations and the provisions of the latter Regulations permitting a fresh grant. That being so, it need not have prevented the occupants (appellants) from urging before the High Court as they appear to be doing now, that the 1966 Regulations entitled them to continue in occupation regardless of whether there was a renewal of the grant in their favour and regardless of whether or not, there was a fresh grant in respect of the land. The contention now sought to be urged that the occupants can continue to occupy the land in question in perpetuity without even a renewal or without a fresh grant in their favour subject only to the condition that they did not violate the provisions of Regulation 151 was available to the occupants which could and indeed ought to have been raised by them at that stage. Inasmuch as the occupants did not urge any such point or raise any such contention in the previous round of litigation ending with the order of this Court they are debarred from doing so in the present proceedings on the principles of constructive *res judicata*. That constructive *res judicata* in principle applies even to writ proceedings. The doctrine of *res judicata* being one of the most fundamental and well-settled rules of jurisprudence. The doctrine is found in all legal systems of civilized society in the world. It is founded on a two-fold logic, namely, (1) that there must be finality to adjudication by competent Court and (2) no man should be vexed twice for the same cause. These two principles attract the doctrine of *res judicata* even to inter-parties decisions that may be erroneous on a question of law. Principles of

constructive *res judicata* which are also a part of the very same doctrine have been held to be applicable to writ proceedings. [Paras 18 and 19] [433-F-H; 434-A-H; 435-A-D, H]

Lt. Governor and Ors. v. Shiv Chander More and Ors. **2008 (4) SCC 690:2008 (6) SCR 106;** *Amalgamated Coalfields Ltd. & Anr. v. Janpada Sabha Chhindwara & Ors.* **AIR 1964 SC 1013: 1963 Suppl. SCR 172 – relied on.**

1.2. It is no longer open to the appellants to contend that the principles of constructive *res judicata* would not debar them from raising the question which could and indeed ought to have been raised by them in the previous round of litigation. The High Court was, in that view of the matter, perfectly justified in holding that the plea sought to be raised by the appellants in the purported exercise of liberty given to them by the orders of this Court was not legally open and should not be allowed to be urged. [Para 22] [437-B-C]

Re: Question no.2

2.1. Regulation 141 of the 1966 Regulations classifies classes of tenants while Regulation 142 and Regulation 143 deal with occupancy tenants and non-occupancy tenants respectively. It is common ground that the appellants do not answer the description of occupancy tenants or non-occupancy tenants within the meaning of Regulation 142 and Regulation 143. Their case falls more appropriately under Regulation 144 which deals with persons belonging to anyone of the two classes in clause (a) and (b) thereunder. That is because the appellants were held to be grantees under Regulation 4(1)(a) of the 1926 Regulations which is different from licencees falling under Regulation 4(1)(b) of the said Regulations or Regulation 145 of the 1966 Regulations. The question, however, is whether e

1926 Regulations has any right to continue in occupation beyond the period of 60 years, which is the period permissible under Regulation 146 of the 1966 Regulations. It is not in dispute that no such right can be located under the 1926 Regulations. The expiry of the period of grant as in the case at hand would oblige the grantees to surrender the possession to the administration. That obligation or liability incurred under the 1926 Regulation continues to hold good, notwithstanding the repeal of the 1926 Regulations by the Regulations of the year 1966. [Para 27] [442-B-F]

2.2. If a grantee of an expired grant had incurred the liability to surrender possession of the granted property, such liability would remain enforceable notwithstanding the repeal of the Regulations under which such liability arose. The argument that the liability gets extinguished by reason of Regulation 144(1)(a) of the 1966 Regulations is legally unsound. *Firstly,* because the contention flies in the face of Regulation 211 which continues the obligation incurred under the 1926 Regulations. So long as the liability incurred is recognized and continued by the repealing Regulation, the same can be enforced in law. *Secondly,* because the interpretation of Regulation 144(1)(a) itself does not admit of a situation where the liability to surrender possession not only becomes extinct but is enlarged into a right to stay in possession in perpetuity. All that Regulation 144 stipulates is that a grantee under the old Regulations would continue to be under the same obligation/liability or enjoy the same rights as are permissible under the 1966 Regulations. The right to continue would however, depend on whether the person in occupation has a valid grant in his favour, even on the date the 1966 Regulations came into force. If the answer is in affirmative, such grant may be treated to be a grant under the 1966 Regulations, no matter, it was in fact a grant under the 1926 Regulations. [Para 28] [443-F-H; 444-A-C]

2.3. To the extent of the unexpired period of grant, as on the date, the 1966 Regulations came into force, the grantee would continue to enjoy his right and be subject to liability under the 1966 Regulations. Upon expiry of the period of grant, however, the grantee will be liable to surrender possession just as the grantee is liable to do under Regulation 146 in regard to a grant made under the 1966 Regulations. The essence of the Regulation in so far as right of a grantee to continue in possession is concerned, is the same under the 1926 Regulations and the subsequent Regulations of the year 1966. In either of the cases, the grantee cannot stay in possession for more than 60 years. The argument that an old grantee can stay in possession in perpetuity so long as there is no violation of Regulation 151, therefore, is liable to be rejected. The appellants, in the instant case, no doubt may have protection under the 1966 Regulations because the grant in their favour was deemed to have been renewed upto 1994 was in existence in 1966 but such protection would cease with the expiry of the 60 years period in 1994.[Pars 29 and 30] [444-D-H]

Ratan Kaur v. Union of India and Ors. **(1997) 10 SCC 61: 1997 (1) Suppl. SCR 48;** *Devilal Modi v. STO* **AIR 1965 SC 1150: 1965 SCR 686;** *Direct Recruit Class-II Engineering Officers Assn. v. State of Maharashtra* **(1992) 2 SCC 715;** *Direct Recruit Class-II Engineering Officers Assn. v. State of Maharashtra* **(1992) 2 SCC 715 – referred to.**

Case Law Reference:

1997 (1) Suppl. SCR 48	**Referred to**	**Para 11**
2008 (6) SCR 106	**Relied on**	**Para 18**
1963 Suppl. SCR 172	**Relied on**	**Para 18**
1965 SCR 686	**Referred to**	**Para 19**
(1992) 2 SCC 715	**Refe**	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3352 of 2014.

From the Judgment & Order dated 31.01.2011 of the High Court of Calcutta in MAT No. 4 of 2011.

Pramod Kohli, Nipu Patiri, Rajiv Talwar for the Appellants.

G. Dara, Shadman Ali, Shailender Saini, Rashmi Malhotra, D.S. Mahra, R. Balasubramanain, K.V. Jagdishvaran for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal arises out of a judgment and order dated 31st January, 2011 passed by the High Court of Calcutta, Circuit Bench at Port Blair, whereby MAT No.004 of 2011 filed by the appellants has been dismissed and order dated 20th December, 2010 passed by a Single Judge of that Court dismissing Writ Petition No.174 of 2008 affirmed.

3. The factual matrix in which the controversy arises has been set out at considerable length in the order passed by the learned Single Judge of that Court as also order dated 28th February, 2001 passed by the Lieutenant Governor, Andaman and Nicobar Islands. Shorn of details we may briefly recapitulate the same as under:

4. Vitoba, the grandfather of the first appellant and father of the remaining appellants was allotted a plot of land measuring 43 acres, 12 Kanals and 10 marlas situate within the limit of Ferragunj Tehsil in the South Andaman District in terms of Regulation 4(1)(b) of the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926. At some stage of the long drawn proceedings between the parties, one of the issues that arose for determination was whether the grant in question was made in terms of Regulation 4(1)(a) or 4(1)(b) of the

Regulation mentioned above. The Andaman and Nicobar Administration ('Administration' for short) was of the view that although the grant was made in Form B under the Regulation 4(1)(b) of the Regulations, the same was in reality a grant under Regulation 4(1)(a) thereof. That part of the controversy no longer survives for consideration before us. The submissions made before us proceeded on the common premise that the grant was indeed one, made under Regulation 4(1)(a) of the Regulation in question.

5. The grant made in favour of Vitoba was in terms of Regulation 4(1)(a) valid for a period of 30 years but could be renewed for another term of 30 years. With the expiry of the initial period of 30 years in the year 1964, the Administration appears to have taken a decision to re-possess the land in question as no renewal of the grant was ordered in favour of the holder. The Deputy Commissioner in that direction passed an order on 26th April, 1974 aggrieved whereof Ram Chander Vitoba, son and Smt. Dan Dei, widow of the deceased grantee filed an appeal before the Secretary, Andaman and Nicobar Administration challenging the order passed by the Deputy Commissioner. The Revenue Secretary disposed of the appeal holding that the Revenue Department having received land revenue from the occupants upto the year 1974, it was too late to say that the grant will not be renewed.

6. Pursuant to the direction issued by the Revenue Secretary in the appeal aforementioned, the Revenue Authorities re-fixed the revenue payable for the landed property and allowed the legal heirs of the original grantee to continue in occupation till 1994 by which time the extended period of the grant also expired, although no formal extension/renewal of grant was made in favour of the occupants. With the expiry of a total period of 60 years, Smt. Sangita Bai wife of Ram Chander Vitoba was called upon to release the land property in favour of the Administration as the same was required for developmental purposes. Aggrieved by [illegible] t.

Sangita Bai wife of Ram Chandra More and mother of the present writ-petitioner filed Writ Petition No.72 of 1994 before the High Court of Calcutta, Circuit Bench at Port Blair. A Single Judge of that Court disposed of the said writ petition on 2nd December, 1994 holding, *inter alia*, as under:

> *"Considering the facts and circumstances of this case, it appears that the petitioner has no right in the land since the lease granted in favour of her predecessors in 1934 including the extended period had lapsed in 1994 as per the Land Revenue and Land Reforms Regulation, 1966. As such the only remedy available to the petitioner, is to make a representation to the authority concerned for a fresh grant in respect of her coconut plantation which was given to the petitioners predecessor, the original licensee. Accordingly liberty is given to the petitioner to make such representation within four weeks from date and if such representation is made, the authorities concerned shall consider her such representation considering that the predecessor of the Petitioner was enjoying the possession of the land in question as licence, positively within 4 months from the date of making such representation. Till three weeks after the disposal of the representation, status quo as on today shall continue."*

7. The above order attained finality as the same was not challenged by the writ-petitioner in appeal. A second renewal of the grant was held to be impermissible under the Regulations. The High Court all the same permitted the legal heirs of the grantee to make a representation for a fresh grant in their favour in regard to the coconut plantation. No such representation having been filed, a fresh notice dated 20th July, 1998 was issued to the legal heirs, namely, Smt. Sangita Bai More and seven others by the Deputy Commissioner asking them to hand over physical possession of the land in question to the Government. On receipt of the said notice Shri Shiv

Chander More, one of the legal heirs of the original grantee, filed Writ Petition No.54 of 1998 before the High Court which was disposed of by the High Court on 16th November, 1998 once again holding that there was no provision for a second renewal of the grant but the grantees could apply for the fresh grant in their favour. The writ petition was accordingly disposed of with a direction to the petitioners to file a written representation before the Lieutenant Governor for a fresh grant in respect of the land under their possession which the Administration was directed to consider sympathetically.

8. The direction issued by the High Court notwithstanding the writ-petitioners did not submit any representation and continued in joint possession of the land. The Deputy Commissioner accordingly issued a notice to the successor-in-interest of the grantee to make over the physical possession of the land to the Tehsildar, Ferragunj. It was only after receipt of the said notice that the writ-petitioners filed two petitions one dated 8th and the other 15th of May, 2000 before the Lieutenant Governor for a fresh grant in their favour. The said representations were considered by the Lieutenant Governor and declined by his order dated 28th February, 2001. The Lieutenant Governor gave two main reasons for refusal of a fresh grant in favour of the grantees. Firstly, it was stated that although there was a provision in the Regulations of 1966 which had repealed 1926 Regulations to make a fresh grant, the Administration had not given any fresh grant to anyone after the renewal of the old grants for only one term as permissible under the Rules. All the lands under such grants were on the contrary taken over by the Administration after the expiry of the period for which they were renewed. The Lieutenant Governor held that in the case at hand, the grantees had already enjoyed possession of the land in question for over 67 years w.e.f. 1.1.1934.

9. The second reason which the Lieutenant Governor gave while declining to grant a fresh grant [illegible]t-

petitioners was that the grantee and his family members had landed properties with them at Shore point and Bambooflat and that some of the said land had been utilised for construction of houses and buildings which were rented out for commercial purposes. The refusal of a fresh grant to the writ-petitioners was not, therefore, going to render the petitioners landless. The Lieutenant Governor observed:

> *"Since the writ petitioner and his family members are having 6.35 hects of land at Shore Point/Bambooflat in their names and since they are not going to be rendered homeless on resumption of the grant, they are not entitled to get the Grant renewed in their favour. Therefore, the petition of the petitioner is rejected and the representation is hereby disposed off."*

10. Aggrieved by the order passed by the Lieutenant Governor, the legal heirs of the original grantee filed Writ Petition No.91 of 2001 before the High Court which was allowed by a Single Judge of the High Court by his order dated 18th September, 2001. The High Court held that since the petitioners and his family members had developed the land spending considerable amount, they need not be evicted from the land until and unless such land is actually needed for any public purpose. In case the land is needed for public purpose, the petitioner or anyone else shall not be entitled to retain claim to the land in question observed the High Court for public purpose must get precedence over all other purposes. But until and unless the land in question is actually needed for any public purpose, the possession of the petitioner or his family members should not be disturbed nor possession of the land handed over to any other individual. The High Court observed:

> *"Accordingly, the Lt. Governor is directed to allow the petitioner to retain the land until the same is actually needed for any public purpose and for this purpose, it necessary, the Lieutenant Governor may grant fresh licence. However, if any such fresh licence is granted by the Lieutenant Governor the same "Under no circumstances should be regard as renewal of the licence as no second renewal is admissible." The petitioner shall hand over peaceful and vacant possession of the said land in the event the same is actually needed by the respondent authorities for any specific public purpose and particularly when prior notice would be served by the respondent authorities requisitioning the land for the public purpose. The Lieutenant Governor may also ask the petitioner to furnish an undertaking before granting fresh licence to the petitioner. The impugned order passed by the Lt. Governor on 28th of February, 2001 is therefore modified in the manner as indicated hereinabove."*

11. MAT No.28 of 2001 filed against the above order of the Single Judge of the High Court was disposed of by order dated 6th February, 2002 by which the Division Bench modified the order passed by the Single Judge with a direction that if the land in question is required by the Administration for public purpose, it will be entitled to resort to appropriate provisions of law for acquiring the same. The Division Bench held that the judgment of this Court in *Ratan Kaur v. Union of India and Ors.* (1997) 10 SCC 61 had no application to the case at hand as the same had been delivered in a different fact situation.

12. Aggrieved by the order passed by the High Court the Lieutenant Governor appealed to this Court in CA No.5091 of 2004. This Court held that the representations filed by the legal heirs of the original grantee were for a fresh grant in their favour. This Court further held that the second renewal had been rightly held to be impermissible by the Lieutenant Governor in the order passed by him and as held by this Court in *Ratan Kaur's* case (supra). This Court accordingly set aside the order passed by the High Court holding that the order passed by the Lieutenant Governor was legal and proper. This Court observed:

"The order of the Lt. Governor, therefore, was legal and proper and the High Court should not have interfered with it. If the respondent has any remedy, as claimed, other than seeking fresh grant and/or renewal, that did not fall for consideration in the representation before the Lt. Governor and the High Court. We express no opinion in that regard.

The appeal is allowed to the aforesaid extent without any order as to costs."

13. A fresh round of litigation was then triggered by order dated 23rd June, 2008 passed by the Deputy Commissioner whereunder the Deputy Commissioner relying upon the decision of this Court directed the petitioners to handover the possession of the subject land within 15 days from the date of receipt of the said order failing which Tehsildar, Ferrargunj, was directed to initiate appropriate action as per law to restore the land to the Government. Writ Petition No.174 of 2008 filed to challenge the direction issued by the Deputy Commissioner not only assailed the order issued by the Deputy Commissioner but also prayed for a mandamus directing the respondents not to interfere with their possession over the disputed land. That petition was eventually dismissed by a Single Judge of the High Court holding that the petitioners were not entitled to raise any question relating to the refusal of renewal or a fresh grant in their favour in the light of the judgment of this Court and the orders passed in the earlier stages of the proceedings. The High Court took the view that once the order passed by the Lieutenant Governor declining a fresh grant to the petitioners had been affirmed by this Court as being legal and valid, there was no room for any challenge to the said order nor was it open to the petitioners to argue that they were entitled to a second renewal or a fresh grant in their favour. Letters Patent Appeal filed against the order of the Single Judge also having failed, the legal heirs of the original grantee have filed the present appeal to assail the said orders.

14. Appearing for the appellants Mr. Kohli, learned senior counsel, argued that the order passed by this Court in the previous round of litigation left sufficient room for the appellants to resist their eviction from the disputed parcel of land on any ground other than the two grounds urged earlier namely renewal of the earlier grant or a fresh grant in their favour. It was contended that the appellants were, in the fresh writ petition filed by them, neither claiming a right of second renewal of grant nor were they claiming a fresh grant in their favour as both these aspects stood concluded against them in the earlier round of litigation. What the appellants were nevertheless entitled to argue was that they had in terms of 1966 Regulations acquired a right to continue in possession till such time their case fell under one or other contingencies enumerated in Regulation 151 of the said Regulations. This was, according to the learned counsel, a ground that was available to the appellant on account of the liberty reserved to them by this Court in its order dated 9th April, 2008. Inasmuch as the High Court had taken the view that no such contention could be urged by the appellant on the doctrine of constructive *res judicata* the High Court had fallen in error. There was, according to the learned counsel, no determination of the question whether the appellants had acquired any right to stay in occupation of the land under the 1966 Regulation independent of their right to claim renewal or a fresh lease/license in their favour. That apart, the question whether a right to continue in possession even without a renewal or fresh lease was not and could not have been, according to the learned counsel, raised in the previous round of litigation so as to attract the doctrine of *res judicata* or the principles underlying the same.

15. On behalf of the respondents it was argued by Mr. Balasubramanian, that the present round of litigation was an abuse of the process of law. It was submitted that this Court having clearly held that the order passed by the Lieutenant Governor was legal and valid, there was no room for any further debate on the question whether the app o

a renewal or a fresh grant. He urged that the appellants were debarred from claiming any benefit even under the 1966 Regulation because any such benefit could and indeed ought to have been claimed by them in the previous round of litigation in which the appellants were claiming a renewal or in the alternative a fresh grant in their favour. The High Court was, therefore, justified in declining interference with the order passed by the Deputy Commissioner, argued the learned counsel.

16. Two distinct questions arise for our consideration. These are:

(1) Whether the appellants are debarred from resisting eviction from the land in question on the ground that they have acquired the right to continue in possession even without renewal and a fresh grant in their favour under the 1966 Regulation; and

(2) Whether the 1966 Regulations indeed confer any right upon the grantees whose grant has lapsed by passage of time to stay in possession till such time one of the grounds enumerated under Regulation 151 becomes available to the Administration for their eviction.

17. We propose to deal with the questions *ad seriatim*.

Re: Question No.1

18. Representations dated 8th and 15th May, 2000 addressed to the Lieutenant Governor sought a fresh grant in favour of the writ-petitioners. Their prayer was declined by the former by his order dated 28th February, 2001. The petitioner had filed these representations obviously because the High Court had taken the view that a second renewal of the grant was not permissible under the 1926 Regulations. The filing of the representations clearly amounted to acknowledging the

correctness of that position. Aggrieved by the order passed by the Lieutenant Governor, the writ-petitioners approached the High Court again in W.P. No.91 of 2001. It was open to them to contend that regardless whether a fresh grant was made in their favour or not and regardless whether or not a second renewal was permissible under the 1926 Regulations, they had acquired a vested right under the 1966 Regulation to continue in occupation of the land till such time one of the contingencies enumerated under Regulation 151 of the said Regulations arose disentitling the writ-petitioners/occupants from continuing in occupation of the land. Such a plea could and indeed ought to have been raised if the appellants intended to agitate that issue for adjudication. No such contention was, however, urged before the High Court in the said petition. On the contrary, the High Court took the view that the occupants need not be evicted from the land only so long as the same was not needed for any public purpose. The High Court referred to the 1966 Regulations to suggest that a fresh grant was permissible even under the provisions of the said Regulation thereof. It is, therefore, evident that not only the writ-petitioners but even the High Court was conscious of the repeal of 1926 Regulations by the 1966 Regulations and the provisions of the latter Regulations permitting a fresh grant. That being so, it need not have prevented the occupants (appellants herein) from urging before the High Court as they appear to be doing now, that the 1966 Regulations entitled them to continue in occupation regardless of whether there was a renewal of the grant in their favour and regardless of whether or not, there was a fresh grant in respect of the land. The contention now sought to be urged that the occupants can continue to occupy the land in question in perpetuity without even a renewal or without a fresh grant in their favour subject only to the condition that they did not violate the provisions of Regulation 151 was available to the occupants which could and indeed ought to have been raised by them at that stage. Inasmuch as the occupants did not urge any such point or raise any such contention in the previous round of

1. (1980) 2 SCC 684.

litigation ending with the order of this Court in *Civil Appeal No.5091 of 2004 the Lt. Governor and Ors. v. Shiv Chander More and Ors. reported in 2008 (4) SCC 690,* they are debarred from doing so in the present proceedings on the principles of constructive *res judicata*. That constructive *res judicata* in principle applies even to writ proceedings is fairly well-settled by several decisions of this Court. We may briefly refer to some of those decisions which elaborate the principle and extend their application to proceedings before a Writ Court. But before we do so, we need to say what is trite namely the doctrine of *res judicata* being one of the most fundamental and well-settled rules of jurisprudence. The doctrine is found in all legal systems of civilized society in the world. It is founded on a two-fold logic, namely, (1) that there must be finality to adjudication by competent Court and (2) no man should be vexed twice for the same cause. These two principles attract the doctrine of *res judicata* even to inter-parties decisions that may be erroneous on a question of law. That the doctrine is applicable even to writ jurisdiction exercised by superior Courts in this country is settled by a Constitution Bench decision of this Court in *Amalgamated Coalfields Ltd. & Anr. v. Janpada Sabha Chhindwara & Ors.* AIR 1964 SC 1013 where this Court observed:

> *"...Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Art.32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law."*

19. Principles of constructive *res judicata* which are also a part of the very same doctrine have been held to be applicable to writ proceedings, by another Constitution Bench

decision of this Court in *Devilal Modi v. STO* (AIR 1965 SC 1150) where this Court observed:

> *"It may be conceded in favour of Mr. Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly is inconsistent with considerations of public policy to which we have just referred."*

20. Reference may also be made to the Constitution Bench decision in *Direct Recruit Class-II Engineering Officers Assn. v. State of Maharashtra* (1992) 2 SCC 715 where this Court once again reiterated that the principles of constructive res judicata apply not only to what is actually adjudicated or determined in a case but every other matter which the parties might and ought to have litigated or which was incidental to or essentially connected with the subject matter of the litigation. This Court observed:

> *"..an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of co[illegible]a*

underlying Explanation IV of Section 11 of the CPC was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

21. It is in the light of the above authoritative decisions of this Court no longer open to the appellants to contend that the principles of constructive *res judicata* would not debar them from raising the question which, as observed earlier, could and indeed ought to have been raised by them in the previous round of litigation. The High Court was, in that view of the matter, perfectly justified in holding that the plea sought to be raised by the appellants in the purported exercise of liberty given to them by the orders of this Court dated 9th April, 2008 in Civil Appeal No.5091 of 2004 was not legally open and should not be allowed to be urged.

22. Question No.1 is answered accordingly.

Re: Question No.2

23. Although with Question No.1 answered against the appellants there is no need to examine this question, but since the matter was argued at some length, we may as well deal with the same.

24. Reliance was placed on behalf of the appellants on the provision of Regulations 141 to 146 and 151 of the Andaman and Nicobar Islands Land Revenue and Land Reforms Regulation, 1966. We may, for facility of reference, extract the said provisions at this stage:

"141. There shall be the following classes of tenants, namely :-

(i) Occupancy tenants;

(ii) Non-occupancy tenants;

(i) Grantees and; and

(iv) Licensees.

142. Every person belonging to any of the following classes shall be called an occupancy tenant and shall have all the rights and be subject to all the liabilities conferred or imposed upon an occupancy tenant by or under this Regulation, namely :-

(a) every person who, immediately before the commencement of this Regulation, had acquired the right of occupancy under the provisions of the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926 ;

(b) every person who has, as a non-occupancy tenant, cultivated and holding not being a holding situated within the local limits of the Port Blair Municipal Board, continuously for a period of two years from the commencement of this Regulation or of such tenancy, whichever is later, in accordance with the provisions of this Regulation and is not in arrears of land revenue.

143. Every person belonging to any of the following Classes shall be called a non-occupancy tenant and shall have all the rights and be subject to all the liabilities conferred or imposed upon a non-occupancy tenant by or under this regulation, namely :-

(a) every person who, immediately before the commencement of this Regulation, was a non-occupancy tenant under the provisions of the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926;

(b) every person who is granted a licence under clause (ii) of section 146 in respect of any agricultural land.

144 (1) Every person belonging to any of the following classes shall be called a grantee and shall have all the rights and be subject to all the l[illegible]or

imposed upon a grantee by or under this Regulation, namely :-

(a) every person who, immediately, before the commencement of this Regulation, was in occupation, of any land in pursuance of a grant made under the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926 ;

(b) every person to whom a grant is made under clause (i) of section 146.

(2) Notwithstanding anything contained in sub-section (1), every person who, not being an occupancy or non-occupancy tenant, is in possession of any account or arecanut plantation in the Nicobars immediately before the commencement of the Regulation otherwise than in pursuance of a grant or licence made or granted under the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926 shall be deemed to be a grantee thereof for the purpose of this Regulation for such period as the Chief Commissioner may by notification specify from time to time.

Explanation. – In this sub-section "Nicobars" means all the Islands comprised in the Union Territory of the Andaman and Nicobar Islands lying south of 10 Degree Channel.

145. Every person belonging to any of the following classes shall be called in licensee and shall have all the rights and be subject to all the liabilities conferred or imposed upon a licensee by or under this Regulation, namely : -

(a) every person who, immediately before the commencement of this Regulation, was in occupation of any land in pursuance of a licence granted under the

provisions of the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926 ;

(b) every person who is granted a licence in respect of any non-agricultural land under clause (ii) of section 146.

146. The Chief Commissioner may, on such terms and subject to such conditions as he thinks fit, -

(i) make to any person, for the cultivation of coconuts, coffee, rubber and other long-lived crops and for the construction of buildings and works to be used for the purpose of, or in connection with, such cultivation, a grant of land for any period not exceeding thirty years with an option for renewal for a like period :

Provided that for the cultivation of rubber crop a longer period may be specified by the Chief Commissioner with the approval for the Government

(ii) grant a licence in writing to any person to occupy any land to such extend and for such purposes as may be prescribed

151. (1) A tenant shall be liable to be ejected from his holding by an order of the Sub-Divisional Officer, made on any of the following grounds, namely:-

(a) he has done any act which is destructive or permanently injurious to the land comprising the holding; or

(b) he has used such land for any purpose other than that for which it was given; or

(c) he has transferred his interest in such land in contravention of the provisions of this Regulation or any rule made thereunder.

(2) No order under sub-section (1) shall be passed unless the Sub-Divisional Officer has, by notice, called upon the tenant to show cause against his ejectment

(3) No order for ejectment shall be executed before the 1st day of February or after the 30th day of April in any year."

25. It was contended by Mr. Kohli that since the appellants were in occupation of disputed land in terms of grant made under the Andaman and Nicobar Islands (Land Tenure) Regulation, 1926; they were grantees and had all the rights and were subject to all the liabilities conferred or imposed upon a grantee by or under the 1966 Regulations. It was contended that although the period of grant made in favour of the appellants had expired and no renewal was made in their favour, such renewal not being permissible, they were not liable to be evicted except on one or more of the grounds enumerated under Regulation 151 (supra). Mr. Kohli argued that the interpretation sought to be placed by him upon the provisions of the said Regulations may result in every grant made under the 1926 Regulation and those made under 1966 Regulation becoming a grant in perpetuity subject to the grantee avoiding the liability for eviction under Regulation 151 (supra), there is no reason why that interpretation should be avoided especially when it was meant to benefit the occupants who are legal heirs of deceased grantees who were condemned to spend their lives on the Andaman and Nicobar Islands.

26. On behalf of the respondents, it was on the other hand, argued that the interpretation sought to be placed by the appellants was in tune neither with the scheme of the Regulations nor was it sustainable on any known juristic principle. It was urged that Regulation 151 (supra) was a provision that deals with tenants. It had no application to cases of grants where the right to remain in occupation itself had expired by lapse of time as in the case at hand. Our attention was drawn in that regard to a provision of Regulation 146

(supra) according to which a grant could be made for a period of 30 years and renewed for 30 more years and not beyond. It was submitted that the interpretation sought to be given to the provisions would have the effect of negating the scheme of the Regulations apart from being erroneous and legally untenable.

27. Regulation 141 of the 1966 Regulations classifies classes of tenants while Regulation 142 and Regulation 143 deal with occupancy tenants and non-occupancy tenants respectively. It is common ground that the appellants do not answer the description of occupancy tenants or non-occupancy tenants within the meaning of Regulation 142 and Regulation 143 (supra). Their case falls more appropriately under Regulation 144 which deals with persons belonging to anyone of the two classes in clause (a) and (b) thereunder. That is because the appellants were held to be grantees under Regulation 4(1)(a) of the 1926 Regulations which is different from licencees falling under Regulation 4(1)(b) of the said Regulations or Regulation 145 of the 1966 Regulations. The question, however, is whether a grantee under the 1926 Regulations has any right to continue in occupation beyond the period of 60 years, which is the period permissible under Regulation 146 of the 1966 Regulations. It is not in dispute that no such right can be located under the 1926 Regulations. The expiry of the period of grant as in the case at hand would oblige the grantees to surrender the possession to the administration. That obligation or liability incurred under the 1926 Regulation continues to hold good, notwithstanding the repeal of the 1926 Regulations by the Regulations of the year 1966. This is evident from Regulation 211 of the 1966 Regulations which reads as under:

"211 (1) The Andaman and Nicobar Islands (Land Tenure) Regulation, 1926, is hereby repealed.

(2) The repeal of the said Regulation shall not effect, -

(a) the previous operation n

or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued, or incurred under the said Regulation; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against the said Regulation; or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the said Regulation had not been repealed.

(3) Subject to the provisions contained in sub-section (2), anything done or any action taken under the said Regulation and the rules made thereunder shall in so far as it is not inconsistent with the provisions of this Regulation, be deemed to have been done or taken under this Regulation and shall continue to be done in force until superseded by anything done any action taken under this Regulation."

(emphasis supplied)

28. If a grantee of an expired grant had incurred the liability to surrender possession of the granted property, such liability would remain enforceable notwithstanding the repeal of the Regulations under which such liability arose. The argument that the liability gets extinguished by reason of Regulation 144(1)(a) of the 1966 Regulations is, in our opinion, legally unsound. We say so, for two reasons. *Firstly,* because the contention flies in the face of Regulation 211 which continues the obligation incurred under the 1926 Regulations. So long as the liability

incurred is recognized and continued by the repealing Regulation, the same can be enforced in law. *Secondly,* because the interpretation of Regulation 144(1)(a) itself does not admit of a situation where the liability to surrender possession not only becomes extinct but is enlarged into a right to stay in possession in perpetuity. All that Regulation 144 stipulates, in our opinion, is that a grantee under the old Regulations would continue to be under the same obligation/ liability or enjoy the same rights as are permissible under the 1966 Regulations. The right to continue would however, depend on whether the person in occupation has a valid grant in his favour, even on the date the 1966 Regulations came into force. If the answer is in affirmative, such grant may be treated to be a grant under the 1966 Regulations, no matter, it was in fact a grant under the 1926 Regulations.

29. To the extent of the unexpired period of grant, as on the date, the 1966 Regulations came into force, the grantee would continue to enjoy his right and be subject to liability under the 1966 Regulations. Upon expiry of the period of grant, however, the grantee will be liable to surrender possession just as the grantee is liable to do under Regulation 146 in regard to a grant made under the 1966 Regulations. The essence of the Regulation in so far as right of a grantee to continue in possession is concerned, is the same under the 1926 Regulations and the subsequent Regulations of the year 1966.

30. In either of the cases, the grantee cannot stay in possession for more than 60 years. The argument that an old grantee can stay in possession in perpetuity so long as there is no violation of Regulation 151, therefore, needs to be noticed only to be rejected. The appellants, in the present case, no doubt may have protection under the 1966 Regulations because the grant in their favour was deemed to have been renewed upto 1994 was in existence in 1966 but such protection would cease with the expiry of the 60 years period in 1994.

31. We have in that view of the matter, no hesitation in answering Question No. 2 in negative.

32. In the result this appeal fails and is, hereby, dismissed but without any orders as to costs.

D.G. Appeal dismissed.

PRAVASI BHALAI SANGATHAN
v.
UNION OF INDIA & ORS.
(Writ Petiton (C) No. 157 of 2013)

MARCH 12, 2014.

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

CONSTITUTION OF INDIA, 1950:

Articles 14, 15, 19, 21 read with Article 38; Article 51-A (a), (b), (c), (e), (f), (i), (j) – Hate speeches delivered by elected representatives, political and religious leaders mainly based on religion, caste, region or ethnicity – Writ petition seeking stringent pre-emptory action on the part of Central and State Governments on the ground that the hate speeches militate against the Constitutional idea of fraternity and violates Articles 14, 15, 19, 21 read with Article 38 and are in derogation of the fundamental duties under Article 51-A (a), (b), (c), (e), (f), (i), (j) – Held: The statutory provisions and particularly the penal laws provide sufficient remedy to curb the menace of "hate speeches" – Thus, person aggrieved must resort to the remedy provided under a particular statute – The root of the problem is not the absence of laws but rather a lack of their effective execution – Therefore, the executive as well as civil society has to perform its role in enforcing the already existing legal regime – Effective regulation of "hate speeches" at all levels is required as the authors of such speeches can be booked under the existing penal law and all the law enforcing agencies must ensure that the existing law is not rendered a dead letter – Enforcement of the provisions is required being in consonance with the proposition "salus reipublicae suprema lex" (safety of the state is the supreme law) – Thus, petition calling for issuing certain

directions which are incapable of enforcement/execution should not be entertained – The National Human Rights Commission would be well within its power if it decides to initiate suo-motu proceedings against the alleged authors of hate speech – Penal Code, 1860 – ss.124A, 153A, 153B, 295A, 298, 505(2) – Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Representation of People Act – ss.123(3), 125 – Maxim "salus reipublicae suprema lex".

HUMAN RIGHTS:

Hate speech – Steps taken by Government – Held: The Indian legal framework has enacted several statutory provisions dealing with the subject – In addition thereto, the Central Government has always provided support to the State Governments and Union Territory administrations in several ways to maintain communal harmony in the country and in case of need the Central Government also sends advisories in this regard from time to time – The Central Government has also issued revised guidelines to promote communal harmony to the States and Union Territories in 2008 which provides inter-alia that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances –Penal Code, 1860 makes offences related to religion punishable – Similarly, intentional public humiliation of members of the 'Scheduled Castes' and 'Scheduled Tribes' is penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – R.P. Act also restrains any political party or the candidate to create feelings of enmity or hatred between different classes of citizens of India by making such an act a punishable offence – Article 20(2) of the International Covenant on Civil & Political Rights, 1966 (ICCPR) restrains advocacy of national, racial or religious hatred that may result in incitement for discrimination, hostility or violence classifying it as prohibited

by law – Similarly Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) prohibits the elements of hate speech and mandates the member states to make a law prohibiting any kind of hate speech through a suitable framework of law – Penal Code, 1860 – ss.124A, 153A, 153B, 295A, 298, 505(2) – Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Representation of People Act – ss.123(3), 125.

Hate speech – Duty of courts – Held: Courts must apply the hate speech prohibition objectively –The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred – The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

JUDICIAL INTERVENTION: Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature – If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it – The court cannot re-write, re-cast or reframe the legislation for the very good reason that it has no power to legislate –However, of lately, judicial activism of the superior courts in India has raised pubic eyebrow time and again – The directions are issued by the Court only when there has been a total vacuum in law, i.e. complete absence of active law to provide for the effective enforcement of a basic human right – In case there is inaction on the part of the executive for whatsoever reason, the court has stepped in, in exercise of its constitutional obligations to enforce the law – In case of vacuum of legal regime to deal with a particular situation the court may issue guidelines to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field – Thus, direction can be issued only in a situation where

legislature has not yet been expressed – Judicial activism – Judicial review.

Words and phrases: Hate speech – Meaning and its effect – Held: Hate speech is an effort to marginalise individuals based on their membership in a group – Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society – Hate speech, therefore, rises beyond causing distress to individual group members – It can have a societal impact – Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide – Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

The instant writ petition in the nature of public interest has been preferred by an organisation dedicated to the welfare of inter-state migrants, seeking exercise of extraordinary jurisdiction under Article 32 of the Constitution of India, 1950 to remedy the concerns that have arisen because of "hate speeches" on the ground that these "hate speeches" delivered by elected representatives, political and religious leaders mainly based on religion, caste, region or ethnicity militate against the Constitutional idea of fraternity and violates Articles 14, 15, 19, 21 read with Article 38 of the Constitution and are in derogation of the fundamental duties under Article 51-A (a), (b), (c), (e), (f), (i), (j) of the Constitution and, therefore, warrant stringent pre-emptory action on the part of Central and State Governments.

Disposing of the writ petition, the court

HELD: 1. The Supreme Court of Canada succeeded in bringing out the "human rights" obligations leading to control on publication of "hate speeches" for protection of human rights defining the expression "hate speech" observing that the definition of "hatred" set out in ****Canada (Human Rights Commission)* **with some modifications, provides a workable approach to interpreting the word "hatred" as is used in legislative provisions prohibiting hate speech. Three main prescriptions must be followed. First, courts must apply the hate speech prohibition objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred. Second, the legislative term "hatred" or "hatred or contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects. Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination. [Para 6] [465-A-G]**

Saskatchewan (Human Rights Commission) v. Whatcott **2013 SCC 11;** **Canada (Human Rights Commission) v. Taylor* **(1990) 3 SCR 892 –referred to.**

2. Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Given such disastrous consequences of hate speeches, the Indian legal framework has enacted several statutory provisions dealing with the subject. In addition thereto, the Central Government has always provided support to the State Governments and Union Territory administrations in several ways to maintain communal harmony in the country and in case of need the Central Government also sends advisories in this regard from time to time. However, in such cases, as police and public order being a State subject under the 7th Schedule of Constitution, the responsibility of registration and prosecution of crime including those involved in hate speeches, primarily rests with the respective State Governments. [Para 7, 10, 11] [465-G-H; 466-A-B, F; 467-F-G]

Ramesh v. Union of India **AIR 1988 SC 775: 1988 (2) SCR 1011 – relied on.**

Black's Law Dictionary, 9th Edn. **– referred to.**

3.1. The Central Government has also issued revised guidelines to promote communal harmony to the States and Union Territories in 2008 which provides *inter-alia*

that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances. The "Guidelines On Communal Harmony, 2008" issued by the Ministry of Home Affairs, Government of India seek to prevent and avoid communal disturbances/riots and in the event of such disturbances occurring, action to control the same and measures to provide assistance and relief to the affected persons are provided therein including rehabilitation. The detailed guidelines have been issued to take preventive/remedial measures and to impose responsibilities of the administration and to enforce the same. Various modalities have been formulated to deal with the issue which have been emphasised on participation of the stake holders. Section 124A of Penal Code, 1860 makes sedition an offence punishable, i.e., when any person attempts to bring into hatred or contempt or attempts to excite disaffection towards the Government established by law. [Paras 12 and 13] [467-H; 468-A-E]

Kedar Nath Singh v. State of Bihar **AIR 1962 SC 955: 1962 Suppl. SCR 769 – relied on.**

3.2. Sections 153A and 153B IPC makes any act which promotes enmity between the groups on grounds of religions and race etc. or which are prejudicial to national integration punishable. The purpose of enactment of such a provision was to "check fissiparous communal and separatist tendencies and secure fraternity so as to ensure the dignity of the individual and the unity of the nation". Undoubtedly, religious freedom may be accompanied by liberty of expression of religious opinions together with the liberty to reasonably criticise the religious beliefs of others, but as has been held by courts time and again, with powers come responsibility. Section 295A IPC deals with offences related to religion and provides for a punishment upto [illegible],

writings or signs which are made with deliberate and malicious intention to insult the religion or the religious beliefs of any class of citizens. Likewise Section 298 IPC provides that any act with deliberate and malicious intention of hurting the religious feelings of any person is punishable. However, Section 295A IPC deals with far more serious offences. Furthermore, Section 505(2) IPC provides that making statements that create or promote enmity, hatred or ill-will between different classes of society is a punishable offence involving imprisonment upto three years or fine or both. The Protection of Civil Rights Act 1955, which was enacted to supplement the constitutional mandate of abolishing 'untouchability' in India, contains provisions penalizing hate speech against the historically marginalised 'dalit' communities. Section 7(1)(c) of the Act prohibits the incitement or encouragement of the practice of 'untouchability' in any form (by words, either spoken or written, or by signs or by visible representations or otherwise) by any person or class of persons or the public generally. Similarly, intentional public humiliation of members of the 'Scheduled Castes' and 'Scheduled Tribes' is penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Section 123(3) of the R.P. Act, provides *inter-alia* that no party or candidate shall appeal for vote on the ground of religion, race, caste, community, language etc. Section 125 of the R.P.Act further restrains any political party or the candidate to create feelings of enmity or hatred between different classes of citizens of India by making such an act a punishable offence. [Paras 14 to 18] [468-F-H; 469-A-H]

Ramji Lal Modi v. State of U.P. **AIR 1957 SC 620: 1957 SCR 860 – relied on.**

4. Article 20(2) of the International Covenant on Civil & Political Rights, 1966 (ICCPR) restrains advocacy of

national, racial or religious hatred that may result in incitement for discrimination, hostility or violence classifying it as prohibited by law. Similarly Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) prohibits the elements of hate speech and mandates the member states to make a law prohibiting any kind of hate speech through a suitable framework of law. Thus, it is evident that the Legislature had already provided sufficient and effective remedy for prosecution of the author, who indulge in such activities. In spite of this, petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot re-write, re-cast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised pubic eyebrow time and again. Though judicial activism is regarded as the active interpretation of an existing provision with the view of enhancing the utility of legislation for social betterment in accordance with the Constitution, the courts under its garb have actively strived to achieve the constitutional aspirations of socio-economic justice. In many cases, this Court issued various guidelines/directions to prevent fraud upon the statutes, or when it was found that certain beneficiary provisions were being mis-used by the undeserving

persons, depriving the legitimate claims of eligible persons. [Para 19 and 20] [470-A-H; 471-A]

S.P. Gupta v. Union of India & Anr. **AIR 1982 SC 149: 1982 SCR 365;** *Bandhua Mukti Morcha v. Union of India & Ors.* **AIR 1984 SC 802: 1984 (2) SCR 67;** *Union of India & Anr. v. Deoki Nandan Aggarwal* **AIR 1992 SC 96;** *Supreme Court Advocates-on-Record Association & Ors. v. Union of India* **AIR 1994 SC 268: 1993 (2) Suppl. SCR 659;** *Vishaka & Ors. v. State of Rajasthan & Ors.* **AIR 1997 SC 3011 1997 (3) Suppl. SCR 404;** *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.* **(2008) 1 SCC 683 2007 (12) SCR 1084;** *Common Cause (A Regd. Society) v. Union of India & Ors.* **(2008) 5 SCC 511: 2008 (6) SCR 262;** *Nand Kishore v. State of Punjab* **(1995) 6 SCC 614: 1995 (4) Suppl. SCR 16 – relied on.**

5. This Court has consistently clarified that the directions have been issued by the Court only when there has been a total vacuum in law, i.e. complete absence of active law to provide for the effective enforcement of a basic human right. In case there is inaction on the part of the executive for whatsoever reason, the court has stepped in, in exercise of its constitutional obligations to enforce the law. In case of vacuum of legal regime to deal with a particular situation the court may issue guidelines to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. Thus, direction can be issued only in a situation where the will of the elected legislature has not yet been expressed. Further, the court should not grant a relief or pass order/ direction which is not capable of implementation. [Paras 22 and 23] [471-F-H; 472-A]

State of U.P. & Anr. v. U.P. Rajya Khanij Vikas Nigam Sangarsh Samiti & Ors. **(2008) 12 SCC 675: 2008 (7) SCR 536 – relied on.**

6. Judicial review is subject to the principles of judicial restraint and must not become unmanageable in other aspects. It is desirable to put reasonable prohibition on unwarranted actions but there may arise difficulty in confining the prohibition to some manageable standard and in doing so, it may encompass all sorts of speeches which needs to be avoided . For a long time the US courts were content in upholding legislations curtailing "hate speech" and related issues. However, of lately, the courts have shifted gears thereby paving the way for myriad of rulings which side with individual freedom of speech and expression as opposed to the order of a manageable society. [Paras 24, 25] [472-D, E-G]

King Emperor v. Khwaja Nazir Ahmed **AIR 1945 PC 18;** *State ofHaryana & Ors. v. Ch. Bhajan Lal & Ors.* **AIR 1992 SC 604: 1990 (3) Suppl. SCR 259;** *Akhilesh Yadav Etc. v. Vishwanath Chaturvedi* **(2013) 2 SCC 1: 2012 (13) SCR 949 – relied on.**

Beauharnais v. Illinois, 343 U.S. 250 (1952); *Brandenburg v. Ohio* **395 U.S. 444 (1969);** ***R.A.V. v. City of St. Paul*** **112 S. Ct. 2538 (1992) – referred to.**

7. If any action is taken by any person which is arbitrary, unreasonable or otherwise in contravention of any statutory provisions or penal law, the court can grant relief keeping in view the evidence before it and considering the statutory provisions involved. However, the court should not pass any judicially unmanageable order which is incapable of enforcement. [Para 26] [473-A-B]

8. The statutory provisions and particularly the penal law provide sufficient remedy to curb the menace of "hate speeches". Thus, person aggrieved must resort to the remedy provided under a particular statute. The root of the problem is not the absence a

lack of their effective execution. Therefore, the executive as well as civil society has to perform its role in enforcing the already existing legal regime. Effective regulation of "hate speeches" at all levels is required as the authors of such speeches can be booked under the existing penal law and all the law enforcing agencies must ensure that the existing law is not rendered a dead letter. Enforcement of the said provisions is required being in consonance with the proposition "*salus reipublicae suprema lex*" (safety of the state is the supreme law). Thus, a petition calling for issuing certain directions which are incapable of enforcement/execution should not be entertained. The National Human Rights Commission would be well within its power if it decides to initiate suo-motu proceedings against the alleged authors of hate speech. However, in view of the fact that the Law Commission has undertaken the study as to whether the Election Commission should be conferred the power to de-recognise a political party disqualifying it or its members, if a party or its members commit any of such offences, the Law Commission may also examine the issues raised thoroughly and also to consider, if it deems proper, defining the expression "hate speech" and make recommendations to the Parliament to strengthen the Election Commission to curb the menace of "hate speeches" irrespective of whenever made. [Para 27 and 28] [473-C-H; 474-A]

Case Law Reference:

2013 SCC 11	**Referred to**	**Para 6**
(1990) 3 SCR 892	**Referred to**	**Para 6**
1988 (2) SCR 1011	**Relied on**	**Para 9**
1962 Suppl. SCR 769	**Relied on**	**Para 13**
1957 SCR 860	**Relied on**	**Para 15**
1982 SCR 365	**Relied on**	**Para 20**

1984 (2) SCR 67	**Relied on**	**Para 20**
AIR 1992 SC 96	**Relied on**	**Para 20**
1993 (2) Suppl. SCR 659	**Relied on**	**Para 20**
1997 (3) Suppl. SCR 404	**Relied on**	**Para 20**
2007 (12) SCR 1084	**Relied on**	**Para 20**
2008 (6) SCR 262	**Relied on**	**Para 20**
1995 (4) Suppl. SCR 16	**Relied on**	**Para 21**
2008 (7) SCR 536	**Relied on**	**Para 23**
AIR 1945 PC 18	**Relied on**	**Para 24**
1990 (3) Suppl. SCR 259	**Relied on**	**Para 24**
2012 (13) SCR 949	**Relied on**	**Para 24**

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

Writ Petition (Civil) No. 157 of 2013.

Mohan Jain, Sidharth Luthra, ASGs, Basava Prabhu Patil, B.H. Marlapalle, Raj Singh Rana, Ajay Bansal, Manjit Singh, Gaurav Bhatia, Suryanarayana Singh, AAGs, Ravi Chandra Prakash, Purushottam Sharma, Tripathi, Filza Moonis, Mukesh Kr. Singh, B. Subramanaya Prasad L.N. Dhiram Sharma, Durgadutt, Sanjeeb Panigrahi, Luv Kumar, Narendra Kumar Goyal, Soumitra G. Chaudhri, Anip Sachthey, Avijit Bhattacharjee, Gopal Singh, Ritu Raj Biswas, K.N. Madhusoodhanan, T.G. Naryanan Nair, Aruna Mathur, Yusuf Khan (for Arputham, Aruna & Co.) Kirti Renu Mishra, Apurva Upmanyu, Asha Gopalan Nair, Abhishek Kumar Pandey, Jayesh Gaurav, Gopal Prasad, Krishna Sarma, Navnit Kumar (for Corporate Law Group), S.S. Shamshery, Bharat Sood, Varun Punia, Sandeep Singh, Ritesh Prakash Yadav, Harshvardhan Singh Rathore, Amit Sha

Singh, Apoorv Kurup, Sakshi Kakkar, Kuldip Singh, Rajiv Nanda, Anuvrat Sharma, Balaji Srinivasan, Liz Mathew, M.F. Philip, Samir Ali Khan, M. Yogesh Kanna, Dr. Sudhir Bisla, Sumitra Bisla, Ranjan Mukerjee, Subhro Sanyal, D.K. Thakur, D.S. Mahra, Richa Pandey, Meenakshi Arora, Mohit D. Ram, D.L. Chidananda, Aditya Singhla, B. Krishna Prasad, J.S. Chhabra, Pardam Singh, Gaurav Yadav, K. Enatoli Sema, Amit Kumar Singh, Sapam Biswajit Meitei, Ashok Kumar Singh, Vivekta Singh, Nupur Chaudhary, Anil Shrivastav, Rituraj Biswas, Bansuri Swaraj, Nirnimesh Dube, Mukesh Verma, Ravi Prakash Mehrotra, Pragati Neekhra, R. Rakesh Sharma, B. Balaji for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. The instant writ petition has been preferred, by an organisation dedicated to the welfare of inter-state migrants, in the nature of public interest seeking exercise of this court's extraordinary jurisdiction under Article 32 of the Constitution of India, 1950 (hereinafter referred to as the 'Constitution') to remedy the concerns that have arisen because of "hate speeches", through the following prayers:

a. Issue appropriate writ, order, decree in the nature of mandamus declaring hate/derogatory speeches made by people representatives/political/religious leaders on religion, caste, region and ethnic lines are violative of Articles 14 (Equality before Law), 15 (Prohibition of discrimination on grounds of religion, race, caste or place of birth), 16 (Equality in matters of public employment), 19 (Protection of certain rights regarding freedom of speech etc.), 21 (Protection of Life and Personal Liberty) of Fundamental Rights read with Article 38 of the Directive Principles of State Policy and Fundamental Duties under Article 51-A(a), (b), (c), (e), (f), (i) & (j) of the Constitution and merits stringent pre-emptory action on part of the Central and State governments;

b. Issue appropriate writ, order, decree in the nature of mandamus declaring hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) to be an act against the Union of India which undermines the unity and integrity of the country and militates against non-discrimination and fraternity;

c. Issue appropriate writ, order, decree in the nature of mandamus declaring that "Fraternity" forms part of "Basic Structure" of the Constitution;

d. Issue appropriate writ, order, decree in the nature of mandamus directing mandatory *suo motu* registration of FIR against authors of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) by the Union and State Governments, in the alternative, constitution of a committee by the Union of India in consultation with this Court for taking cognizance of hate/derogatory speeches delivered within the territory of India with the power to recommend initiation of criminal proceeding against the authors;

e. Issue appropriate writ, order, decree in the nature of mandamus directing mandatory imposition of "gag order" restraining the author of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) from addressing the public anywhere within the territory of India till the disposal of the criminal proceeding initiated against him as a necessary pre-condition for grant of bail by the Magistrate;

f. Issue appropriate writ, order, decree in the nature of mandamus directing spee[illegible]al

proceedings against authors of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) within a period of 6 months;

g. Issue appropriate writ, order, decree in the nature of mandamus directing suspension of membership of authors of hate/derogatory speeches made on the lines of religion, caste, race and place of birth (region) from the Union/State Legislature and other elected bodies till the final disposal of the criminal proceedings;

h. Issue appropriate writ, order, decree in the nature of mandamus directing termination of membership of authors of hate/derogatory speech made on the lines of religion, caste, race and place of birth (region) from the Union/State Legislature and other elected bodies if found guilty;

i. Issue appropriate writ, order, decree in the nature of mandamus directing de-recognition of the political party of authors of hate/derogatory speech made on the lines of religion, caste, race and place of birth (region) by the Election Commission of India where the author is heading the political party in exercise of power vested *inter-alia* under Article 324 of the Constitution read with Sections 29A(5), 123(3) of the Representation of the People Act, 1951 and Section 16A of the Election Symbols (Reservation and Allotment) Order, 1968;

j. Issue appropriate writ, order, decree in the nature of mandamus directing the Union of India to have concurrent jurisdiction to prosecute authors of hate/derogatory speeches in addition to the States in terms of the mandate of Articles 227, 355 read with Article 38 of the Constitution which merit stringent

pre-emptory action on part of the Central Government;

k. Issue appropriate writ, order, decree in the nature of mandamus directing the Union of India and respective States to enforce Fundamental Duties under Article 51-A (a), (b), (c), (e), (f), (i) & (j) of the Constitution by taking proactive steps in promoting national integration and harmony amongst the citizens of India;

l. Issue such other appropriate writ or direction that may be deemed to be just and equitable in the facts and circumstances of the case and in the interest of justice."

2. Shri Basava Prabhu S. Patil, learned senior counsel appearing on behalf of the petitioner, has submitted that the reliefs sought by the petitioner is in consonance with the scheme of our Constitution as the "hate speeches" delivered by elected representatives, political and religious leaders mainly based on religion, caste, region or ethnicity militate against the Constitutional idea of fraternity and violates Articles 14, 15, 19, 21 read with Article 38 of the Constitution and further is in derogation of the fundamental duties under Article 51-A (a), (b), (c), (e), (f), (i), (j) of the Constitution and therefore warrant stringent pre-emptory action on the part of Central and State Governments. The existing law dealing with the subject matter is not sufficient to cope with the menace of "hate speeches". Hate/derogatory speech has not been defined under any penal law. Accolade is given to the author of such speeches and they also get political patronage. In such fact-situation, this Court cannot remain merely a silent spectator, rather has to play an important role and issue guidelines/ directions in exercise of its powers under Article 142 of the Constitution which are necessary for the said purpose as the existing legal frame work is not sufficient to control the menace

of "hate speeches". Therefore, this Court should grant aforesaid reliefs.

3. Shri Sidharth Luthra, learned ASG, Shri Rajiv Nanda, Shri Gaurav Bhatia, learned AAG for the State of U.P., Ms. Asha Gopalan Nair, Shri Gopal Singh, Ms. Ruchi Kohli, Shri C.D. Singh, and all other standing counsel appearing on behalf of the respective States, have submitted that there are various statutory provisions dealing with the subject matter and the issue involved herein is a question of enforcement of the said statutory provisions and any person aggrieved can put the law into motion in such eventualities.

Shri Sidharth Luthra, learned ASG, has further submitted that the issue of decriminalisation of politics as part of electoral reforms is under consideration before this Court in Writ Petition (C) No. 536 of 2011 and in the said matter, this Court had framed certain issues and referred the matter to the Law Commission of India to study the subject with regard to the Representation of People Act, 1951 (hereinafter referred to as "R.P.Act") and may make appropriate suggestions (report) to the Government of India vide order dated 16.12.2013 and, thus, Shri Luthra has suggested that in case there is some deficiency in law, this Court should not act as super-legislature, rather make a recommendation to the Law Commission to undertake further study and submit its report to the Government of India for its consideration/acceptance.

4. Ms. Meenakshi Arora, learned senior counsel appearing on behalf of the Election Commission of India, has submitted that there are various provisions like Section 29A(5) & (7) of the R.P. Act empowering the Commission to examine the documents filed by a political party at the time of its registration and the application so filed must be accompanied by its constitution/rules which should contain a specific provision to the effect that the association/body would bear true faith and allegiance to the Constitution of India as by law established and to the principles of socialism, secularism and democracy and

that they would uphold the sovereignty, integrity and unity of India. However, it has been suggested that Election Commission does not have the power to deregister/ derecognise a political party under the R.P. Act once it has been registered. A registered political party is entitled to recognition as a State or national party only upon fulfilling the conditions laid down in paragraph 6A or 6B of the Election Symbols (Reservation and Allotment) Order, 1968 (hereinafter referred to as "Symbols Order"). The Election Commission in exercise of its powers under Paragraph 16A of Symbols Order, can take appropriate action against a political party on its failure to observe model code of conduct or in case the party fails to observe or follow the lawful directions and instructions of the Election Commission. The model code of conduct provides certain guidelines *inter-alia* that no party or candidate shall indulge in any activity which may aggravate existing differences or create mutual hatred or cause tension between two different castes and communities, religious or linguistic and no political party shall make an appeal on the basis of caste or communal feelings for securing votes. It further provides that no religious place shall be used as forum for election propaganda. However, the Election Commission only has power to control hate speeches during the subsistence of the code of conduct and not otherwise.

5. The Law Commission of India has prepared a consultation paper and studied the matter further on various issues including whether the existing provisions (Constitutional or Statutory) relating to disqualification to contest elections need to be amended?

The Law Commission had earlier in its 1998 recommendations emphasised on the need to strengthen the provision relating to disqualification and in view thereof, it has been submitted by Ms. Arora that it is only for the legislature to amend the law and empower the Election Commission to perform a balancing act in following the r[illegible]t Constitutional and statutory provisions.

6. The Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11, succeeded in bringing out the "human rights" obligations leading to control on publication of "hate speeches" for protection of human rights defining the expression "hate speech" observing that the definition of "hatred" set out in *Canada (Human Rights Commission) v. Taylor,* (1990) 3 SCR 892, with some modifications, provides a workable approach to interpreting the word "hatred" as is used in legislative provisions prohibiting hate speech. Three main prescriptions must be followed. First, courts must apply the hate speech prohibition objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred. Second, the legislative term "hatred" or "hatred or contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects. Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

7. Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group

members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

8. Black's Law Dictionary, 9th Edn. defines the expression 'hate speech' as under:

> "Speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence."

9. In *Ramesh v. Union of India,* AIR 1988 SC 775, while dealing with the subject, this Court observed:

> "..that the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view."

10. Given such disastrous consequences of hate speeches, the Indian legal framework has enacted several statutory provisions dealing with the subject which are referred to as under:

Sl.No.	Statute	Provisions
1.	Indian Penal Code, 1860	Sections 124A, 153A, 153B, 295-A, 298, 505(1), 505(2)
2.	The Representation of People Act, 1951	Sections 8, 123 (3A), 125

3.	Information Technology Act, 2000 & Information Technology (Intermediaries guidelines) Rules, 2011	Sections 66A, 69, 69A Rule 3(2)(b), Rule 3(2)(i)
4.	Code of Criminal Procedure, 1973	Sections 95, 107, 144, 151, 160
5.	Unlawful Activities (Prevention) Act, 1967	Sections 2(f), 10, 11, 12
6.	Protection of Civil Rights Act, 1955	Section 7
7.	Religious Institutions (Prevention of Misuse) Act, 1980	Sections 3 and 6
8.	The Cable Television Networks (Regulation) Act, 1995 and The Cable Television Network (Rules), 1994	Sections 5,6,11,12,16, 17, 19, 20 & Rules 6 & 7
9.	The Cinematographers Act, 1952	Sections 4, 5B, 7

11. In addition thereto, the Central Government has always provided support to the State Governments and Union Territory administrations in several ways to maintain communal harmony in the country and in case of need the Central Government also sends advisories in this regard from time to time. However, in such cases, as police and public order being a State subject under the 7th Schedule of Constitution, the responsibility of registration and prosecution of crime including those involved in hate speeches, primarily rests with the respective State Governments.

12. The Central Government has also issued revised

guidelines to promote communal harmony to the States and Union Territories in 2008 which provides *inter-alia* that strict action should be taken against anyone inflaming passions and stroking communal tension by intemperate and inflammatory speeches and utterances.

The "Guidelines On Communal Harmony, 2008" issued by the Ministry of Home Affairs, Government of India seek to prevent and avoid communal disturbances/riots and in the event of such disturbances occurring, action to control the same and measures to provide assistance and relief to the affected persons are provided therein including rehabilitation. The detailed guidelines have been issued to take preventive/ remedial measures and to impose responsibilities of the administration and to enforce the same. Various modalities have been formulated to deal with the issue which have been emphasised on participation of the stake holders.

13. So far as the statutory provisions, as referred to hereinabove, are concerned, Section 124A of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') makes sedition an offence punishable, i.e., when any person attempts to bring into hatred or contempt or attempts to excite disaffection towards the Government established by law. (Vide: *Kedar Nath Singh v. State of Bihar,* AIR 1962 SC 955)

14. Sections 153A and 153B IPC makes any act which promotes enmity between the groups on grounds of religions and race etc. or which are prejudicial to national integration punishable. The purpose of enactment of such a provision was to "check fissiparous communal and separatist tendencies and secure fraternity so as to ensure the dignity of the individual and the unity of the nation". Undoubtedly, religious freedom may be accompanied by liberty of expression of religious opinions together with the liberty to reasonably criticise the religious beliefs of others, but as has been held by courts time and again, with powers come responsibility.

15. Section 295A IPC deals with offences related to religion and provides for a punishment upto 3 years for speech, writings or signs which are made with deliberate and malicious intention to insult the religion or the religious beliefs of any class of citizens. This Court in *Ramji Lal Modi v. State of U.P.,* AIR 1957 SC 620, has upheld the Constitutional validity of the section.

16. Likewise Section 298 IPC provides that any act with deliberate and malicious intention of hurting the religious feelings of any person is punishable. However, Section 295A IPC deals with far more serious offences.

Furthermore, Section 505(2) IPC provides that making statements that create or promote enmity, hatred or ill-will between different classes of society is a punishable offence involving imprisonment upto three years or fine or both.

17. The Protection of Civil Rights Act 1955, which was enacted to supplement the constitutional mandate of abolishing 'untouchability' in India, contains provisions penalizing hate speech against the historically marginalised 'dalit' communities. Section 7(1)(c) of the Act prohibits the incitement or encouragement of the practice of 'untouchability' in any form (by words, either spoken or written, or by signs or by visible representations or otherwise) by any person or class of persons or the public generally. Similarly, intentional public humiliation of members of the 'Scheduled Castes' and 'Scheduled Tribes' is penalized under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

18. Section 123(3) of the R.P. Act, provides *inter-alia* that no party or candidate shall appeal for vote on the ground of religion, race, caste, community, language etc.

Section 125 of the R.P.Act further restrains any political party or the candidate to create feelings of enmity or hatred between different classes of citizens of India by making such an act a punishable offence.

19. Article 20(2) of the International Covenant on Civil & Political Rights, 1966 (ICCPR) restrains advocacy of national, racial or religious hatred that may result in incitement for discrimination, hostility or violence classifying it as prohibited by law.

Similarly Articles 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) prohibits the elements of hate speech and mandates the member states to make a law prohibiting any kind of hate speech through a suitable framework of law.

20. Thus, it is evident that the Legislature had already provided sufficient and effective remedy for prosecution of the author, who indulge in such activities. In spite of the above, petitioner sought reliefs which tantamount to legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the judge is simply not authorised to legislate law. "If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it." The court cannot re-write, re-cast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised pubic eyebrow time and again. Though judicial activism is regarded as the active interpretation of an existing provision with the view of enhancing the utility of legislation for social betterment in accordance with the Constitution, the courts under its garb have actively strived to achieve the constitutional aspirations of socio-economic justice. In many cases, this Court issued various guidelines/directions to prevent fraud upon the statutes, or when it was found that certain beneficiary provisions were b[illegible]e

undeserving persons, depriving the legitimate claims of eligible persons. (See: *S.P. Gupta v. Union of India & Anr.,* AIR 1982 SC 149; *Bandhua Mukti Morcha v. Union of India & Ors.,* AIR 1984 SC 802; *Union of India & Anr. v. Deoki Nandan Aggarwal,* AIR 1992 SC 96; *Supreme Court Advocates-on-Record Association & Ors. v. Union of India,* AIR 1994 SC 268; *Vishaka & Ors. v. State of Rajasthan & Ors.,* AIR 1997 SC 3011; *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.,* (2008) 1 SCC 683; and *Common Cause (A Regd. Society) v. Union of India & Ors.,* (2008) 5 SCC 511).

21. While explaining the scope of Article 141 of the Constitution, in *Nand Kishore v. State of Punjab,* (1995) 6 SCC 614, this Court held as under:

> *"Their Lordships decisions declare the existing law but do not enact any fresh law, is not in keeping with the plenary function of the Supreme Court under Article 141 of the Constitution, for the Court is not merely the interpreter of the law as existing, but much beyond that. The Court as a wing of the State is by itself a source of law. The law is what the Court says it is."*

22. Be that as it may, this Court has consistently clarified that the directions have been issued by the Court only when there has been a total vacuum in law, i.e. complete absence of active law to provide for the effective enforcement of a basic human right. In case there is inaction on the part of the executive for whatsoever reason, the court has stepped in, in exercise of its constitutional obligations to enforce the law. In case of vacuum of legal regime to deal with a particular situation the court may issue guidelines to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. Thus, direction can be issued only in a situation where the will of the elected legislature has not yet been expressed.

23. Further, the court should not grant a relief or pass order/direction which is not capable of implementation. This Court in *State of U.P. & Anr. v. U.P. Rajya Khanij Vikas Nigam Sangarsh Samiti & Ors.,* (2008) 12 SCC 675, has held as under:

> *"48. To us, one of the considerations in such matters is whether an* ***order passed or direction issued is susceptible of implementation and enforcement****, and if it is not implemented whether appropriate proceedings including proceedings for wilful disobedience of the order of the Court can be initiated against the opposite party. The direction issued by the High Court falls short of this test and on that ground also, the order is vulnerable."* (Emphasis added)

24. Judicial review is subject to the principles of judicial restraint and must not become unmanageable in other aspects. (Vide: *King Emperor v. Khwaja Nazir Ahmed,* AIR 1945 PC 18; *State of Haryana & Ors. v. Ch. Bhajan Lal & Ors. v.,* AIR 1992 SC 604; and *Akhilesh Yadav Etc. v. Vishwanath Chaturvedi,* (2013) 2 SCC 1).

25. It is desirable to put reasonable prohibition on unwarranted actions but there may arise difficulty in confining the prohibition to some manageable standard and in doing so, it may encompass all sorts of speeches which needs to be avoided . For a long time the US courts were content in upholding legislations curtailing "hate speech" and related issues. However, of lately, the courts have shifted gears thereby paving the way for myriad of rulings which side with individual freedom of speech and expression as opposed to the order of a manageable society. [See: *Beauharnais v. Illinois, 343 U.S. 250 (1952); Brandenburg v. Ohio,* 395 U.S. 444 (1969); and *R.A.V. v. City of St. Paul,* 112 S. Ct. 2538 (1992)].

26. In view of the above, the law can be summarised to

the effect that if any action is taken by any person which is arbitrary, unreasonable or otherwise in contravention of any statutory provisions or penal law, the court can grant relief keeping in view the evidence before it and considering the statutory provisions involved. However, the court should not pass any judicially unmanageable order which is incapable of enforcement.

27. As referred to herein above, the statutory provisions and particularly the penal law provide sufficient remedy to curb the menace of "hate speeches". Thus, person aggrieved must resort to the remedy provided under a particular statute. The root of the problem is not the absence of laws but rather a lack of their effective execution. Therefore, the executive as well as civil society has to perform its role in enforcing the already existing legal regime. Effective regulation of "hate speeches" at all levels is required as the authors of such speeches can be booked under the existing penal law and all the law enforcing agencies must ensure that the existing law is not rendered a dead letter. Enforcement of the aforesaid provisions is required being in consonance with the proposition "*salus reipublicae suprema lex*" (safety of the state is the supreme law).

28. Thus, we should not entertain a petition calling for issuing certain directions which are incapable of enforcement/ execution. The National Human Rights Commission would be well within its power if it decides to initiate suo-motu proceedings against the alleged authors of hate speech.

However, in view of the fact that the Law Commission has undertaken the study as to whether the Election Commission should be conferred the power to de-recognise a political party disqualifying it or its members, if a party or its members commit the offences referred to hereinabove, we request the Law Commission to also examine the issues raised herein thoroughly and also to consider, if it deems proper, defining the expression "hate speech" and make recommendations to the

Parliament to strengthen the Election Commission to curb the menace of "hate speeches" irrespective of whenever made.

With these observations, the writ petition stands disposed of.

A copy of the judgment be sent to the Hon'ble Chairman of Law Commission of India.

D.G. Writ Petition disposed of.

HOMI RAJVANSH

v.

STATE OF MAHARASHTRA & ORS.

(Criminal Appeal No. 687 of 2014)

MARCH 27, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

Code of Criminal Procedure, 1973 – s.482 – Exercise of power under – Scope – Allegations of misappropriation of funds by officials of NAFED – Charge-sheet against appellant and respondent no.3 alongwith other accused – Respondent no.3 filed writ petition u/s.482 CrPC r/w Art. 226/227 of the Constitution – Appellant not shown or impleaded in the petition as a party – High Court allowed the writ petition and quashed criminal proceedings pending against respondent no.3 before the Magistrate – Held: High Court erred in quashing the complaint against respondent no.3 without hearing the appellant who was co-accused in the case as their alleged roles were interconnected – High Court further erred in coming to a finding against the appellant without the appellant being a party in the writ petition filed by respondent no.3 – High Court simply agreed with the submissions of respondent no.3 against the appellant without giving him opportunity of being heard – The High Court over exercised its jurisdiction which was in complete violation of the principles of natural justice – Though the High Court possesses inherent powers u/s.482 CrPC, these powers are meant to do real and substantial justice, for the administration of which alone it exists or to prevent abuse of the process of the court – Inasmuch as the appellant was not impleaded/shown as one of the parties before the High Court, the specific finding against his alleged role, based on the submissions of respondent no.3 without giving an opportunity of being heard,

cannot be sustained – Matter remitted back – Appellant be impleaded as respondent no.4 in the writ Petition – High Court to hear the matter afresh – Penal Code, 1860 – s.120B r/w ss.409, 411,420, 467, 468 and 471.

The appellant was an Executive Director in National Agricultural Co-operative Marketing Federation of India Ltd. (NAFED). Respondent No.3, the Managing Director of NAFED, approved the 1st Non-agricultural tie-up of NAFED in order to diversify NAFED's business activities and participated in all the meetings and approved all transactions for the said purpose. When Respondent No.3 was scheduled to go for an international tour, the appellant was made the officiating Managing Director in order to attend all urgent matters.

Subsequently, a public interest litigation was filed against NAFED before the High Court on the allegations of misappropriation of funds by its officials in non-agricultural business. The Government of India, in its reply, stated that CBI enquiry will be conducted. The CBI filed charge-sheet against the appellant and Respondent No.3 along with other accused for committing offence under Section 120B read with Sections 409, 411,420, 467, 468 and 471 of IPC. At this stage, Respondent No.3 preferred Writ Petition for discharge before the High Court under Section 482 of CrPC read with Article 226/227 of the Constitution. By impugned order, the High Court allowed the writ petition and quashed the criminal proceedings pending against respondent No.3 before the Metropolitan Magistrate.

The appellant contended before this Court that: (i) the High Court erred in quashing the complaint against Respondent No.3 without hearing the appellant, who was a co-accused in the case and over exercised its jurisdiction by holding a summary trial on facts; (ii) the High Court committed error in comin[illegible]st

the appellant without the appellant being a party in the writ petition filed by respondent No.3 and in agreeing with the submissions of Respondent No.3 without affording an opportunity of being heard to the appellant; and (iii) that the adverse findings against the appellant in the impugned judgment would affect the trial, and hence prayed for quashing of the same.

Allowing the appeal, the Court

HELD:1. In the writ petition filed by Respondent No.3 before the High Court for quashing the criminal proceedings, the appellant was not shown or impleaded as one of the parties. On the other hand, the role of the appellant was specifically contended before the High Court at several places and, in categorical terms, in paragraph 10 of the impugned order. The perusal of the contentions of Respondent No.3 and the categorical findings followed by conclusion not only exonerated Respondent No.3 from the criminal prosecution but also reinforce the allegations levelled against the appellant, who was admittedly not a party before the High Court. [Paras 8, 13] [482-C-D; 484-D]

2. The High Court committed an error in quashing the complaint against Respondent No.3 without hearing the appellant who is a co-accused in the case as their alleged roles are interconnected. The High Court committed an error in coming to a finding against the appellant without the appellant being a party in the writ petition filed by Respondent No.3. In fact, the perusal of the impugned order clearly shows that the High Court simply agreed with the submissions of Respondent No.3 against the appellant without giving him an opportunity of being heard. The High Court, in the impugned order, over exercised its jurisdiction which is complete violation of principles of natural justice since the appellant, who is a co-accused, was not heard on the allegations levelled against him by Respondent No.3. [Paras 15, 16] [484-F-H; 485-A-B]

3. Though the High Court possesses inherent powers under Section 482 of the Code, these powers are meant to do real and substantial justice, for the administration of which alone it exists or to prevent abuse of the process of the court. This Court, time and again, has observed that extraordinary power should be exercised sparingly and with great care and caution. The High Court would be justified in exercising the said power when it is imperative to exercise the same in order to prevent injustice. [Para 17] [485-B-D]

4. Inasmuch as admittedly the appellant was not impleaded/shown as one of the parties before the High Court, the specific finding against his alleged role, based on the submissions of Respondent No.3 without giving an opportunity of being heard, cannot be sustained. The matter is remitted to the High Court for fresh disposal. The appellant be impleaded as Respondent No. 4 in the Writ Petition concerned and the High Court to hear the matter afresh after affording opportunity to all the parties including the newly impleaded party, and dispose of the same as expeditiously as possible. [Paras 18, 19, 20] [485-D-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 687 of 2014.

From the Judgment & Order dated 29.06.2012 of the High Court of Bombay in CRLWP No. 220 of 2010.

P.P. Malhotra, ASG, Shekhar Naphade, Kailash Vasdev, Subramonium Prasad, Rajiv Dalal, Varun Tandon, Dinesh Kothari, Padmalakshmi Nigam, B.V. Balaram Das, Yasir Rauf, Aniruddha P. Mayee Pawanshree Agarwal, Charudatta Mahinderkar, Asha Gopalan Nair, Vish a

Maheshwari, Pankaj Singh, Umrao Singh Rawat, Sambharya Shankar for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. Leave granted.

2. The above appeal is filed against the final impugned judgment and order dated 29.06.2012 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 220 of 2010 wherein the High Court quashed the criminal proceedings against Alok Ranjan-Respondent No.3 herein (writ petitioner in the High Court) in C.C. No. 1036/CPW/2008 pending before the Metropolitan Magistrate, 19th Court, Esplanade, Mumbai.

3. **Brief facts:**

(a) The appellant, an Indian Revenue Service Officer, joined National Agricultural Co-operative Marketing Federation of India Ltd. (NAFED), on deputation on 15.07.2003 as an Executive Director.

(b) On 01.10.2003, Respondent No.3 herein–Alok Ranjan took over the charge as the new Managing Director of NAFED and he approved the 1st Non-agricultural tie-up of NAFED on 13.10.2003 in order to diversify NAFED's business activities to cope up from severe financial crunch so that income from other businesses can compensate the losses being made on trading of agricultural items. Respondent No. 3 participated in all the meetings and approved all the transactions entered into with M/s Swarup Group of Industries (SGI) for the above said purpose.

(c) On 20.04.2004, when the Respondent No. 3 was scheduled to go for an international tour to Beijing, the appellant was made the officiating Managing Director for 21.04.2004 to 27.04.2004 in order to attend all urgent matters.

(d) In January 2006, a public interest litigation was filed against NAFED before the Delhi High Court on the allegations of misappropriation of funds by its officials in non-agricultural business. The Government of India, in its reply, stated that CBI enquiry will be conducted. In the affidavit filed by NAFED, it was again reiterated that all the transactions were *bona fide*.

(e) Anticipating pressure of CBI, Respondent No. 3 directed Mr. M.V. Haridas, Manager (Vigilance and Personnel) to lodge a complaint against SGI and, accordingly, a complaint was lodged before the CBI Economic Offences Wing (EOW), Mumbai.

(f) The CBI filed a charge-sheet dated 15.12.2008 against the appellant herein and Respondent No.3 along with other accused for committing offence under Section 120B read with Sections 409, 411,420, 467, 468 and 471 of the Indian Penal Code, 1860 (in short 'the IPC').

(g) At this stage, Respondent No.3 preferred a petition being Criminal Writ Petition No. 220 of 2010 for discharge before the High Court under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code") read with Article 226/227 of the Constitution of India.

(h) By impugned order dated 29.06.2012, the High Court accepted the case of Respondent No.3 herein and allowed his petition.

(i) Being aggrieved by the impugned judgment of the High Court, the appellant moved before this Court. Since the appellant herein was not a party before the High Court, this Court, by order dated 19.03.2013, granted him permission to file special leave petition.

4. Heard Mr. Shekhar Naphade, learned senior counsel for the appellant, Mr. P.P. Malhotra, learned Additional Solicitor General for Respondent No.2-CBI, Mr. Kailash Vasudev, learned senior counsel for the contesting [illegible]d

Ms. Asha Gopalan Nair, learned counsel for the State of Maharashtra.

Contentions:

5. Mr. Shekhar Naphade, learned senior counsel for the appellant, after taking us through the charge sheet dated 15.12.2008 filed before the Special Judge, CBI, bye-laws of NAFED and impugned order of the High Court, submitted as under:

(i) the High Court erred in quashing the complaint against Respondent No.3 without hearing the appellant herein, who is a co-accused in the case;

(ii) the High Court had over exercised its jurisdiction by holding a summary trial on facts, which is contrary to the law laid down by this Court in catena of judgments;

(iii) the High Court committed an error in coming to a finding against the appellant without the appellant being a party in the writ petition filed by respondent No.3 herein before it;

(iv) the High Court committed an error in agreeing with the submissions of Respondent No.3 herein without affording an opportunity of being heard to the appellant; and

(v) the adverse findings against the appellant in the impugned judgment would affect the trial, and hence prayed for quashing of the same.

6. On the other hand, Mr. Kailash Vasdev, learned senior counsel for Respondent No.3 submitted that in the absence of specific material in the charge-sheet about the role of respondent No.3, the High Court is fully justified in quashing the criminal case and discharging him. He further submitted that there is no categorical finding against the appellant and the High Court has merely reproduced what is stated in the charge sheet and nothing more.

7. We have carefully considered the rival submissions and perused the relevant materials.

Discussion:

8. In view of our proposed decision and the ultimate direction which we are going to issue at the end, there is no need to traverse all the factual details. We have already noted the role of the appellant, Respondent No.3 and Respondent No.4. A careful consideration of the bye-laws of the NAFED also makes clear the separate role of the accused. It is not in dispute that in the writ petition filed by Respondent No.3 before the High Court for quashing the criminal proceedings, the appellant herein was not shown or impleaded as one of the parties. On the other hand, the role of the appellant herein was specifically contended before the High Court at several places and, in categorical terms, in paragraph 10 of the impugned order, which is as under:

> "……..According to the learned counsel, the loss that has been caused, is attributable to the subsequent MOU dated 24.4.2004, entered into between NAFED and M/s Swarup Group of Industries, which was signed by the accused No.2 – Homi Rajvansh, who was the then Divisional Head of Finance and Accounts and tie up business in NAFED. It is submitted that it is the case of the investigating agency itself, that the said MOU was signed by the accused No.2 – Homi Rajvansh, without the approval of the petitioner or without his knowledge. The said MOU neither has any quantitative nor any value restrictions. It is submitted that the collateral security which had been provided in the earlier MOU, was totally missing in this MOU. Not only that, but various relevant clauses appearing in earlier MOU protecting and securing the interest of NAFED were either deleted or modified without information to the petitioner. It is submitted that though the allegation in the charge sheet is that the accused No.2 – Homi Rajvansh made such huge disbursement of funds worth ut

taking approval of the Managing Director, i.e., the petitioner, strangely, the Managing Director, i.e., the petitioner has been held responsible for such disbursement and has been made an accused in the case."

9. Apart from the above contentions, the charges levelled by the investigating agency against the accused persons in the police report were also highlighted.

10. The High Court, after adverting to the above contentions, arrived at the following conclusion:

"There is great substance in the contention advanced by the learned counsel for the petitioner. The allegation that the accused No.2 – Homi Rajvansh, committed the acts in question without the approval of the Managing Director, i.e., the petitioner and without informing him and the allegation that the Managing Director, i.e., the petitioner is responsible for the said acts, cannot go hand in hand together. Surely, if the case is that Homi Rajvansh committed these illegalities without informing the Managing Director, as was required and without his permission, as was necessary, then the responsibility of such acts (which were done without the permission of and the information to the petitioner), cannot be fastened on the petitioner. This is so obvious, that it does not need any further elaboration."

11. Again in paragraph 17, in categorical terms, the High Court has concluded as under:

".....Significantly, so far as the accused No.2—Homi Rajvansh is concerned, the investigation could establish that he had acquired huge properties from the ill-gotten wealth....."

12. In paragraph 22, the High Court arrived at a specific conclusion against the appellant herein which reads as under:

"Further, the allegations leveled against the petitioner about

he being in collusion with the accused No.2-Homi Rajvansh, are in conflict with the allegations that have been levelled against the accused No.2. It has already been seen that the allegations that the said accused No.2, Homi Rajvansh, did certain wrongs without the permission of the petitioner and behind his back, and that the said Homi Rajvansh and the petitioner had conspired to commit the said wrongs, cannot go hand in hand together. Indeed, the allegations against the co-accused Homi Rajvansh are supported by material in the charge sheet, but the very absence of such material, so far as the petitioner is concerned, renders the theory of the petitioner being a party to the alleged conspiracy, unacceptable."

13. The perusal of the contentions of Respondent No.3 herein-the writ petitioner in the High Court and the categorical findings followed by conclusion not only exonerated Respondent No.3 herein from the criminal prosecution but also reinforce the allegations levelled against the appellant herein, who was admittedly not a party before the High Court.

14. It is settled law that for considering the petition under Section 482 of the Code, it is necessary to consider as to whether the allegations in the complaint *prima facie* make out a case or not and the Court is not to scrutinize the allegations for the purpose of deciding whether such allegations are likely to be upheld in trial.

15. The High Court committed an error in quashing the complaint against Respondent No.3 without hearing the appellant herein who is a co-accused in the case as their alleged roles are interconnected. The High Court committed an error in coming to a finding against the appellant without the appellant being a party in the writ petition filed by Respondent No.3. In fact, the perusal of the impugned order clearly shows that the High Court simply agreed with the submissions of Respondent No.3 against the appellant herein without giving him an opportunity of being heard.

16. We are satisfied that the High Court, in the impugned order, over exercised its jurisdiction which is complete violation of principles of natural justice since the appellant, who is a co-accused, was not heard on the allegations levelled against him by Respondent No.3 herein.

17. Though the High Court possesses inherent powers under Section 482 of the Code, these powers are meant to do real and substantial justice, for the administration of which alone it exists or to prevent abuse of the process of the court. This Court, time and again, has observed that extraordinary power should be exercised sparingly and with great care and caution. The High Court would be justified in exercising the said power when it is imperative to exercise the same in order to prevent injustice.

18. Inasmuch as admittedly the appellant was not impleaded/shown as one of the parties before the High Court, the specific finding against his alleged role, based on the submissions of Respondent No.3 herein without giving an opportunity of being heard, cannot be sustained.

19. In the light of what is stated above, the impugned judgment dated 29.06.2012 in Criminal Writ Petition No. 220 of 2010 is set aside and the matter is remitted to the High Court for fresh disposal.

20. In view of our conclusion, the appellant herein – Homi Rajvansh be impleaded as Respondent No. 4 in Criminal Writ Petition No. 220 of 2010 and we request the High Court to hear the matter afresh after affording opportunity to all the parties including the newly impleaded party, and dispose of the same as expeditiously as possible preferably within a period of six months from the date of receipt of copy of this judgment.

21. The appeal is allowed on the above terms.

B.B.B. Appeal allowed.

SUNDEEP KUMAR BAFNA
v.
STATE OF MAHARASHTRA & ANR.
(Criminal Appeal No. 689 of 2014)

MARCH 27, 2014.

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

CODE OF CRIMINAL PROCEDURE, 1973:

s. 439 – Bail – Case triable by Court of Session — Power of Court of Session and High Court to grant bail till committal of case to Court of Session – Held: There is no provision in Cr. P. C. or elsewhere, curtailing the power of either of superior courts to entertain and decide pleas for bail – A substantial period may inevitably intervene between a Magistrate taking cognizance of an offence triable by Court of Session and its committal to such court — During this interregnum, s. 439 can be invoked for purpose of pleading for bail — Since severe restrictions have been placed on power of Magistrate to grant bail to a person accused of an offence punishable by death or imprisonment for life, a superior court such as Court of Session, should not be incapacitated from considering a bail application especially keeping in perspective that its powers are comparatively unfettered u/s 439 – In the instant case, offence had already been committed to Court of Session – Applicant prayed for surrender to High Court and for grant of bail — Single Judge erred in law in holding that he was devoid of jurisdiction so far as application presented to him by appellant was concerned — Once prayer for surrender is accepted, appellant would come into custody of court within contemplation of s. 439 — Impugned order is, accordingly, set aside — Single Judge shall consider appellant's plea for surrendering to court and grant of bail – Constitution of India, 1950 – Art. 21.

CRIMINAL LAW:

Expressions, 'arrest', 'custody' and 'detention' – Explained – Held: The terms 'custody', 'detention' or 'arrest' have not been defined in CrPC — However, an analysis of case law indicates that these are sequentially cognate concepts— 'Custody' and 'arrest' are not synonyms even though in every arrest there is custody but not vice versa.

ADMINISTRATION OF JUSTICE:

Role of Public Prosecutor and hearing to complainant/ informant/ aggrieved party – Held: The role of Public Prosecutor is to uphold the law and put forth a sound prosecution — Presence of a private lawyer would inexorably undermine fairness and impartiality which must be hallmark, attribute and distinction of every proper prosecution — No vested right is granted to a complainant or informant or aggrieved party to directly conduct a prosecution — Constant or even frequent interference in prosecution should not be encouraged as it will have a deleterious impact on its impartiality – However, where Magistrate or Sessions Judge is of the opinion that prosecution is likely to fail, prudence would prompt that complainant or informant or aggrieved party be given an informal hearing.

PRECEDENT:

Expression, 'per incuriam' – Explained — Held: It is necessary to give a salutary clarion caution to all courts, including High Courts, to be extremely careful and circumspect in concluding a judgment of Supreme Court to be per incuriam — An earlier judgment cannot be seen as per incuriam a later judgment as the latter if numerically stronger only then it would overrule the former — In the instant case, in the impugned order, single Judge of High Court followed incorrect and misleading editorial note in the cited law journal without apprising himself of the context in which

***Rashmi Rekha** was wrongly reported to hold **Niranjan Singh** per incuriam — **Rashmi Rekha** dealt with anticipatory bail u/s 438, Cr. P. C. and only tangentially with ss. 437 and 439, Cr. P. C. — In the factual matrix of the instant case, **Niranjan Singh** is the precedent of relevance and not Gurbaksh Singh **Sibbia** nor any other decision where the scope and sweep of anticipatory bail was at the fulcrum of the conundrum – Law reporting.*

WORDS AND PHRASES:

Expressions, 'custodey', 'detention' and' arrest' – Connotation of.

The Supreme Court, while dismissing the appellant's petition for special leave to appeal against the order of the High Court rejecting his application for anticipatory bail in a case triable by Court of Session, granted him protection from arrest for four weeks so as to enable him to apply for regular bail. Accordingly, he filed an application u/s 439 Cr. P.C. before the High Court. The single Judge of the High Court declining the prayer observed that it was the Magistrate whose jurisdiction had necessarily to be invoked and not of the High Court or even of the Sessions Judge. He further observed that the appellant was required to be arrested or otherwise he was to surrender before the court which could send him to remand either to the police custody or to the Magisterial custody and this could only be done u/s 167, Cr. P. C. by the Magistrate, as such an order could not be passed at the High Court level.

Allowing the appeal, the Court

HELD:

<u>Provisions in Cr.P.C. to grant regular bail:</u>

1.1. Chapter XXXIII of the

Procedure, 1973(Cr.PC), which comprises ss.436 to 450, deals with bail. For the purpose of the instant case, ss.437 and 438 are relevant. Section 437, *inter alia*, provides that if any person accused of, or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or if such person appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail in certain circumstances. There is no provision in the Code or elsewhere, curtailing the power of the Court of Session or the High Court to entertain and decide pleas for bail. Further, no provision categorically prohibits the production of an accused before either of these courts. The universal right of personal liberty emblazened by Art. 21 of the Constitution of India, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. In view of the amendments carried out by Parliament, ss. 437 to 439, Cr. P. C. predicate on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Whilst s. 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, s. 439 empowers the Court of Session or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. [para 5 and 8] [499-G-H; 500-A-B; 504-C-E; 505-F-H; 506-A-C]

1.2. Furthermore, while s. 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with

death or imprisonment for life, the two higher courts have only the procedural requirement of giving notice of the bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate, on the one hand, and the two superior courts, on the other, are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC. [para 8] [506-C-E]

P.S.R. Sadhanantham vs Arunachalam **1980 (2) SCR 873 = (1980) 3 SCC 141,** *Gurcharan Singh vs State* **1978 (2) SCR 358 = (1978) 1 SCC 118,** *State of Haryana vs Bhajan Lal* **1990 (3) Suppl. SCR 259 = 1992 (Supp) 1 SCC 335 – referred to.**

Meaning of 'custody':

1.3. The terms 'custody', 'detention' or 'arrest' have not been defined in the CrPC. However, an analysis of the case law indicates that these are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. It has been held by this Court that the terms 'custody' and 'arrest' are not synonyms even though in every arrest there is a deprivation of liberty and custody but not vice versa. A person is in custody no s[illegible]s

before the police or before the appropriate Court. [para 9 and 12] [506-F; 509-F-H; 510-A, 511-C]

Directorate of Enforcement vs Deepak Mahajan **1994 (1) SCR 445 = (1994) 3 SCC 440;** *Niranjan Singh vs Prabhakar Rajaram Kharote* **1980 (3) SCR 15 = (1980) 2 SCC 559;** *Nirmal Jeet Kaur vs State of M.P.* **2004 (3) Suppl. SCR 1006 = (2004) 7 SCC 558;** *Sunita Devi vs State of Bihar* **2004 (6) Suppl. SCR 707 = (2005) 1 SCC 608; and** *Adri Dharan Das vs State of West Bengal* **2005 (2) SCR 188 = (2005) 4 SCC 303;** *State of Haryana vs Dinesh Kumar* **2008 (1) SCR 281 = (2008) 3 SCC 222 – relied on.**

Roshan Beevi vs Joint Secretary **1984(15) ELT 289 (Mad) – stood approved.**

Miranda vs Arizona **384 US 436 (1966),** *Minnesota vs Murphy* **465 US 420 (1984),** *R. vs Whitfield* 1969 *CareswellOnt* ***138,*** *R. vs Suberu* **[2009] S.C.J.No.33** *Berkemer vs McCarty* **468 U.S. 420 (1984), referred to.**

The Oxford Dictionary (online); The Cambridge Dictionary (online); Longman Dictionary (online); Chambers Dictionary (online); Chambers' Thesaurus; The Collins Cobuild English Dictionary for Advance Learners; The Shorter Oxford English Dictionary; The Corpus Juris Secundum; Black's Law Dictionary, (9th ed. 2009); Halsbury's Laws of England (4th Edition), Vol. II, paragraph 99 – referred to.

Cognizance, committal and bail:

1.4. Chapter XVI of the Code makes it amply clear that a substantial period may inevitably intervene between a Magistrate taking cognizance of an offence triable by Court of Session and its committal to such court. In this interregnum, the accused would be entitled to seek

before a court his enlargement on bail. Since severe restrictions have been placed on the powers of a Magistrate to grant bail, in the case of an offence punishable by death or for imprisonment for life, an accused should be in a position to move the courts meaningfully empowered to grant him succour. There is no provision in the CrPC which prohibits an accused from moving the Court of Session for such a relief except, theoretically, s.193 which only prohibits it from taking cognizance of an offence as a court of original jurisdiction, but this does not prohibit the Court of Session from adjudicating upon a plea of bail. Therefore, till the committal of case to the Court of Session, s. 439 can be invoked for the purpose of pleading for bail. [para 21] [520-G-H; 521-C, D-E, F-H]

1.5. In the instant case, the offence has already been committed to the Court of Session, albeit, the accused/ appellant could not have been brought before the Magistrate. It is beyond cavil that a court takes cognizance of an offence and not an offender. The appellant has filed an application praying, firstly, that he be permitted to surrender to the High Court and secondly, for his plea to be considered for grant of bail by the High Court. There are no restrictions on the High Court to entertain an application for bail provided always the accused is in custody, and this position obtains as soon as the accused actually surrenders himself to the court. Therefore, the High Court was not justified in directing the appellant to appear before the Magistrate. [para 22] [522-D-E; 523-A-B, C]

Dilawar Singh vs Parvinder Singh, **2005 (5) Suppl. SCR 83 = (2005) 12 SCC 709;** *Raghubans Dubey vs State of Bihar,* **1967 SCR 423 =AIR 1967 SC 1167 – referred to.**

R vs Evans, **(2012) 1 WLR 1192– referred to.**

Rule of precedent and per incuriam:

2.1. The discipline demanded by a precedent is of great importance for certainty of law, consistency of rulings and comity of courts. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be *per incuriam* if it is not possible to reconcile its *ratio* with that of a previously pronounced judgment of a co-equal or larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. [para 15] [513-C-E]

Union of India vs Raghubir Singh **1989 (3) SCR 316 =1989 (2) SCC 754;** *Chandra Prakash v. State of U.P.* **2002 (2) SCR 913 =AIR 2002 SC 1652 – relied on.**

2.2. It is necessary to give a salutary clarion caution to all courts, including High Courts, to be extremely careful and circumspect in concluding a judgment of the Supreme Court to be *per incuriam*. In the instant case, in the impugned order the single Judge of the High Court appears to have blindly followed the incorrect and certainly misleading editorial note in the cited law journal, i.e., Supreme Court Cases, without apprising himself of the context in which *Rashmi Rekha* has been reported to hold *Niranjan Singh per incuriam*, and equally importantly, to which previous judgment. An earlier judgment cannot possibly be seen as *per incuriam* a later judgment as the latter if numerically stronger only then it would overrule the former. *Rashmi Rekha* dealt with anticipatory bail u/s 438 and only tangentially with ss. 437 and 439 of the CrPC. In the factual matrix of the instant case, *Niranjan Singh* is the precedent of relevance and not *Gurbaksh Singh Sibbia* or any other decision where the scope and sweep of anticipatory bail was at the fulcrum of the conundrum. [para 16] [514-A-E]

Niranjan Singh vs Prabhakar Rajaram Kharote **(1980) 2 SCC 559 – relied on.**

Rashmi Rekha Thatoi vs State of Orissa, **2012 (5) SCR 674 = (2012) 5 SCC 690;** *Gurbaksh Singh Sibbia vs State of Punjab* **1980 (3) SCR 383 = (1980) 2 SCC 565; and** *Balchand Jain vs State of M.P.* **1977 (2) SCR 52 = (1976) 4 SCC 572 – referred to.**

Balkrishna Dhondu Rani vs Manik Motiram Jagtap **2005 (Supp.) Bom C.R.(Cri) 270 – approved.**

2.3. This Court is, therefore, of the opinion that the single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the appellant was concerned. Once the prayer for surrender is accepted, the appellant would come into the custody of the court within the contemplation of s. 439 Cr. P. C. The Court of Session as well as the High Court, both of which exercise concurrent powers u/s. 439, would then have to venture to the merits of the matter so as to decide whether the applicant/appellant had shown sufficient reason or grounds for being enlarged on bail. [para 26] [527-H; 528-A, B-C]

2.4. The impugned order is set aside. The single Judge shall consider the appellant's plea for surrendering to the court and, accordingly, shall consider his plea for bail. The appellant shall not be arrested for a period of two weeks or till the final disposal of the said application, whichever is later. [para 27] [528-D-E]

Role of Public Prosecutor and private counsel in prosecution:

3.1. The role of the Public Prosecutor is to uphold the law and put forth a sound prosecution, and the presence of a private lawyer would inexora

fairness and impartiality which must be the hallmark attribute and distinction of every proper prosecution. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. [para 24] [525-F-G; 526-C]

Thakur Ram vs State of Bihar **1966 SCR 740 = AIR 1966 SC 911,** *Bhagwant Singh vs Commissioner of Police*, **1985 (3) SCR 942 = (1985) 2 SCC 537,** *Shiv Kumar vs Hukam Chand* **1999 (2) Suppl. SCR 81 = (1999) 7 SCC 467,** *J.K. International vs State* **2001 (2) SCR 90 = (2001) 3 SCC 462, referred to.**

3.2. No vested right is granted to a complainant or informant or aggrieved party to directly conduct a prosecution. So far as the Magistrate is concerned, comparative latitude is given to him but he must always bear in mind that while the prosecution must remain being robust and comprehensive and effective it should not abandon the need to be free, fair and diligent. So far as the Court of Session is concerned, it is the Public Prosecutor who must at all times remain in control of the prosecution and a counsel of a private party can only assist the Public Prosecutor in discharging its responsibility. The complainant or informant or aggrieved party may, however, be heard at a crucial and critical juncture of the trial so that his interests in the prosecution are not prejudiced or jeopardized. Constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality. If the Magistrate or Sessions Judge is of the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing. [para 25] [527-B-E]

3.3. In the case in hand, the complainant or informant

or aggrieved party was not possessed of any vested right of being heard as it is manifestly evident that the court has not formed any opinion adverse to the prosecution. Whether the accused is to be granted bail is a matter which can adequately be argued by the State Counsel. However, before this Court, the Senior Counsel for the complainant has been granted a full hearing and the Court has perused detailed written submissions made by him. [para 25] [527-E-G]

Case Law Reference:

1980 (2) SCR 873	referred to	Para 8
1978 (2) SCR 358	referred to	Para 8
1990 (3) Suppl. SCR 259	referred to	Para 8
1984(15) ELT 289 (Mad)	stood approved	Para 10
1994 (1) SCR 445	relied on	para 10
384 US 436 (1966)	referred to	Para 11
465 US 420 (1984)	referred to	Para 11
[2009] S.C.J.No.33	referred to	Para 11
468 U.S. 420 (1984)	referred to	Para 11
1980 (3) SCR 15	relied on	para 12
2004 (3) Suppl. SCR 1006	relied on	para 12
2004 (6) Suppl. SCR 707	relied on	para 12
2005 (2) SCR 188	relied on	para 12
2008 (1) SCR 281	relied on	para 12
1989 (3) SCR 316	relied on	para 13
2002 (2) SCR 913	relied on	para 14
2012 (5) SCR 674	referred	

1977 (2) SCR 52	**referred to**	**Para 16**
2005 (Supp.) Bom C.R.(Cri) 270	**approved**	**Para 17**
1980 (3) SCR 383	**referred to**	**Para 19**
(2012) 1 WLR 1192	**referred to**	**para 22**
2005 (5) Suppl. SCR 83	**referred to**	**Para 22**
1967 SCR 423	**referred to**	**para 22**
1966 SCR 740	**referred to**	**Para 24**
1985 (3) SCR 942	**referred to**	**Para 24**
1999 (2) Suppl. SCR 81	**referred to**	**Para 24**
2001 (2) SCR 90	**referred to**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 689 of 2014.

From the Judgment & Order dated 06.02.2014 of the High Court of Bombay in CRMBA No. 206 of 2014.

Mukul Rohatgi, V.K. Bali, Saurabh Kirpal, Manali Singhal, Aditya Soni, Christine Aey Kumar, Abhikalp Pratap Singh, Santosh Sachin (for Nikhil Jain) for the Appellant.

T.A. Rahman, Satbir Pillania, Somvir Deswal, R.C. Gubrele, Aniruddha P. Mayee, Charudatta Mahindrakar for the Respondents, Merchant (complainant-in-person).

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted.

2. A neat legal nodus of ubiquitous manifestation and gravity has arisen before us. It partakes the character of a general principle of law with significance sans systems and

States. The futility of the Appellant's endeavours to secure anticipatory bail having attained finality, he had once again knocked at the portals of the High Court of Judicature at Bombay, this time around for regular bail under Section 439 of the Code of Criminal Procedure (CrPC), which was declined with the observations that it is the Magistrate whose jurisdiction has necessarily to be invoked and not of the High Court or even the Sessions Judge. The legality of this conclusion is the gravemen of the appeal before us. While declining to grant anticipatory bail to the Appellant, this Court had extended to him transient insulation from arrest for a period of four weeks to enable him to apply for regular bail, even in the face of the rejection of his Special Leave Petition on 28.1.2014. This course was courted by him, in the event again in vain, as the bail application preferred by him under Section 439 CrPC has been dismissed by the High Court in terms of the impugned Order dated 6.2.2014. His supplications to the Bombay High Court were twofold; that the High Court may permit the petitioner to surrender to its jurisdiction and secondly, to enlarge him on regular bail under Section 439 of the Code, on such terms and conditions as may be deemed fit and proper.

3. In the impugned Judgment, the learned Single Judge has opined that when the Appellant's plea to surrender before the Court is accepted and he is assumed to be in its custody, the police would be deprived of getting his custody, which is not contemplated by law, and thus, the Appellant "is required to be arrested or otherwise he has to surrender before the Court which can send him to remand either to the police custody or to the Magisterial custody and this can only be done under Section 167 of CrPC by the Magistrate and that order cannot be passed at the High Court level." Learned Senior Counsel for the Appellant have fervidly assailed the legal correctness of this opinion. It is contended that the Magistrate is not empowered to grant bail to the Appellant, since he can be punished with imprisonment for life, as statutorily stipulated in Section 437(1) CrPC; CR No.290 of 2

with P.S. Mahim for offences punishable under Sections 288, 304, 308, 336, 388 read with 34 and Section 120-B of IPC. Learned Senior Counsel further contends that since the matter stands committed to Sessions, the Magistrate is denuded of all powers in respect of the said matter, for the reason that law envisages the commitment of a case and not of an individual accused.

4. While accepting the Preliminary Objection, the dialectic articulated in the impugned order is that law postulates that a person seeking regular bail must perforce languish in the custody of the concerned Magistrate under Section 167 CrPC. The Petitioner had not responded to the notices/summons issued by the concerned Magistrate leading to the issuance of non-bailable warrants against him, and when even these steps proved ineffectual in bringing him before the Court, measures were set in motion for declaring him as a proclaimed offender under Section 82 CrPC. Since this was not the position obtaining in the case, i.e. it was assumed by the High Court that the Petitioner was not in custody, the application for bail under Section 439 of CrPC was held to be not maintainable. This conclusion was reached even though the petitioner was present in Court and had pleaded in writing that he be permitted to surrender to the jurisdiction of the High Court. We shall abjure from narrating in minute detail the factual matrix of the case as it is not essential to do so for deciding the issues that have arisen in the present Appeal.

Relevant Provisions in the CrPC Pertaining to Regular Bail:

5. The pandect providing for bail is Chapter XXXIII comprises Sections 436 to 450 of the CrPC, of which Sections 437 and 439 are currently critical. Suffice it to state that Section 438 which deals with directions for grant of bail to persons apprehending arrest does not mandate either the presence of the applicant in Court or for his being in custody. Section 437, *inter alia*, provides that if any person accused of, or suspected

of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or if such person appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail in certain circumstances.

6. For facility of reference, Sections 437 and 439, both covering the grant of regular bail in non-bailable offences are reproduced hereunder. Section 438 has been ignored because it is the composite provision dealing only with the grant of anticipatory bail.

> "**437**. **When bail may be taken in case of non-bailable offence**.- (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but –
>
> (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
>
> (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:
>
> Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1) – the Court shall impose the conditions –

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person 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 him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub- section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub- section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accu[illegible]y such offence, it shall release the[illegible]n

custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

439. Special powers of High Court or Court of Session regarding bail –

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of the opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

7. Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law. We are immediately reminded of three sentences from the Constitution Bench decision in *P.S.R. Sadhanantham vs Arunachalam* (1980) 3 SCC 141, which we appreciate as poetry in prose - "Article 21**,** in its sublime brevity, guards human liberty by insisting on the prescription of procedure established by law, not fiat as *sine qua non* for deprivation of personal freedom. And those

procedures so established must be fair, not fanciful, nor formal nor flimsy, as laid down in Maneka Gandhi case. So, it is axiomatic that our Constitutional jurisprudence mandates the State not to deprive a person of his personal liberty without adherence to fair procedure laid down by law". Therefore, it seems to us that constriction or curtailment of personal liberty cannot be justified by a conjectural dialectic. The only restriction allowed as a general principle of law common to all legal systems is the period of 24 hours post-arrest on the expiry of which an accused must mandatorily be produced in a Court so that his remand or bail can be judicially considered.

8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in *Gurcharan Singh vs State* (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with *Gurcharan Singh*, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in *State of Haryana vs Bhajan Lal,* 1992 (Supp)1 SCC 335, that is, the all e

accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. The CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of

these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC.

Meaning of Custody:

9. Unfortunately, the terms 'custody', 'detention' or 'arrest' have not been defined in the CrPC, and we must resort to few dictionaries to appreciate their contours in ordinary and legal parlance. The Oxford Dictionary (online) defines custody as imprisonment, detention, confinement, incarceration, internment, captivity; remand, duress, and durance. The Cambridge Dictionary (online) explains 'custody' as the state of being kept in prison, especially while waiting to go to court for trial. Longman Dictionary (online) defines 'custody' as 'when someone is kept in prison until they go to court, because the police think they have committed a crime'. Chambers Dictionary (online) clarifies that custody is 'the condition of being held by the police; a t;

to take someone into custody to arrest them'. Chambers' Thesaurus supplies several synonyms, such as detention, confinement, imprisonment, captivity, arrest, formal incarceration. The Collins Cobuild English Dictionary for Advance Learners states in terms of that someone who is in custody or has been taken into custody or has been arrested and is being kept in prison until they get tried in a court or if someone is being held in a particular type of custody, they are being kept in a place that is similar to a prison. The Shorter Oxford English Dictionary postulates the presence of confinement, imprisonment, durance and this feature is totally absent in the factual matrix before us. The Corpus Juris Secundum under the topic of 'Escape & Related Offenses; Rescue' adumbrates that 'Custody, within the meaning of statutes defining the crime, consists of the detention or restraint of a person against his or her will, or of the exercise of control over another to confine the other person within certain physical limits or a restriction of ability or freedom of movement.' This is how 'Custody' is dealt with in Black's Law Dictionary, (9th ed. 2009):-

> "**Custody**- The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the detainer of a man's person by virtue of lawful process or authority.
>
> The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. Term "custody" within statute requiring that petitioner be "in custody" to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. U. S. ex rel. Wirtz v. Sheehan, D.C.Wis, 319 F.Supp. 146, 147. Accordingly, persons on probation or released on own recognizance have been held to be "in custody" for purposes of habeas corpus proceedings."

10. A perusal of the dictionaries thus discloses that the concept that is created is the controlling of a person's liberty in the course of a criminal investigation, or curtailing in a substantial or significant manner a person's freedom of action. Our attention has been drawn, in the course of Rejoinder arguments to the judgment of the Full Bench of the High Court of Madras in *Roshan Beevi vs Joint Secretary* 1984(15) ELT 289 (Mad), as also to the decision of the Court in *Directorate of Enforcement vs Deepak Mahajan* (1994) 3 SCC 440; in view of the composition of both the Benches, reference to the former is otiose. Had we been called upon to peruse **Deepak Mahajan** earlier, we may not have considered it necessary to undertake a study of several Dictionaries, since it is a convenient and comprehensive compendium on the meaning of arrest, detention and custody.

11. Courts in Australia, Canada, U.K. and U.S. have predicated in great measure, their decisions on paragraph 99 from Vol. II Halsbury's Laws of England (4th Edition) which states that – "Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer". The US Supreme Court has been called upon to explicate the concept of custody on a number of occasions, where, coincidentally, the plea that was proffered was the failure of the police to administer the **Miranda** caution, i.e. of apprising the detainee of his Constitutional rights. In *Miranda vs Arizona* 384 US 436 (1966), custodial interrogation has been said to mean "question

enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way*". In *Minnesota vs Murphy* 465 US 420 (1984), it was opined by the U.S. Supreme Court that since "no formal arrest or restraint on freedom of movement of the degree associated with formal arrest" had transpired, the Miranda doctrine had not become operative. In *R. vs Whitfield* 1969 CareswellOnt 138, the Supreme Court of Canada was called upon to decide whether the police officer, who directed the accused therein to stop the car and while seizing him by the shirt said "you are under arrest:", could be said to have been "custodially arrested" when the accused managed to sped away. The plurality of the Supreme Court declined to draw any distinction between an arrest amounting to custody and a mere or bare arrest and held that the accused was not arrested and thus could not have been guilty of "escaping from lawful custody". More recently, the Supreme Court of Canada has clarified in *R. vs Suberu* [2009] S.C.J.No.33 that detention transpired only upon the interaction having the consequence of a significant deprivation of liberty. Further, in *Berkemer vs McCarty* 468 U.S. 420 (1984), a roadside questioning of a motorist detained pursuant to a routine traffic stop was not seen as analogous to custodial interrogation requiring adherence to **Miranda** rules.

12. It appears to us from the above analysis that custody, detention and arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. In *Roshan Beevi,* the Full Bench

of the High Court of Madras, speaking through S. Ratnavel Pandian J, held that the terms 'custody' and 'arrest' are not synonymous even though in every arrest there is a deprivation of liberty is custody but not vice versa. This thesis is reiterated by Pandian J in **Deepak Mahajan** by deriving support from *Niranjan Singh vs Prabhakar Rajaram Kharote* (1980) 2 SCC 559. The following passages from **Deepak Mahajan** are worthy of extraction:-

"**48.** Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. **To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender**. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi.

49. While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in *Niranjan Singh v. Prabhakar Rajaram Kharote* observed that: (SCC p. 563, para 9)

"He can be in custody not merely when the police arrests him, produces him before

a remand to judicial or other custody. **He can be stated to be in judicial custody when he surrenders before the court and submits to its directions**." (**emphasis added**)

If the third sentence of para 48 is discordant to **Niranjan Singh**, the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains us also to adhere to **Niranjan Singh**; ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate Court. This enunciation of the law is also available in three decisions in which Arijit Pasayat J spoke for the 2-Judge Benches, namely (a) *Nirmal Jeet Kaur vs State of M.P.* (2004) 7 SCC 558 and (b) *Sunita Devi vs State of Bihar* (2005) 1 SCC 608, and (c) *Adri Dharan Das vs State of West Bengal,* (2005) 4 SCC 303, where the Co-equal Bench has opined that since an accused has to be present in Court on the moving of a bail petition under Section 437, his physical appearance before the Magistrate tantamounts to surrender. The view of **Niranjan Singh** (see extracted para 49 infra) has been followed in *State of Haryana vs Dinesh Kumar* (2008) 3 SCC 222. We can only fervently hope that member of Bar will desist from citing several cases when all that is required for their purposes is to draw attention to the precedent that holds the field, which in the case in hand, we reiterate is **Niranjan Singh**.

Rule of Precedent & Per Incuriam:

13. The Constitution Bench in *Union of India vs Raghubir Singh,* 1989 (2) SCC 754, has come to the conclusion extracted below:

> **"27**. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges? There is no constitutional or statutory prescription in the

> matter, and the point is governed entirely by the practice in India of the courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. …"

14. This ratio of **Raghubir Singh** was applied once again by the Constitution Bench in *Chandra Prakash v. State of U.P.:* AIR 2002 SC 1652. We think it instructive to extract the paragraph 22 from **Chandra Prakash** in order to underscore that there is a consistent and constant judicial opinion, spanning across decades, on this aspect of jurisprudence:

> "Almost similar is the view expressed by a recent judgment of a five-Judge Bench of this Court in Parija's case (supra). In that case, a Bench of two learned Judges doubted the correctness of the dec[illegible]e

learned Judges, hence, directly referred the matter to a Bench of five learned Judges for reconsideration. In such a situation, the five-Judge Bench held that judicial discipline and propriety demanded that a Bench of two learned Judges should follow the decision of a Bench of three learned Judges. On this basis, the five-Judge Bench found fault with the reference made by the two-Judge Bench based on the doctrine of binding precedent."

15. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the *per incuriam* rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be *per incuriam* any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be *per incuriam* if it is not possible to reconcile its *ratio* with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the *per incuriam* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta.* It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of *per incuriam*.

Validation of *Ratio* in Niranjan Singh:

16. We must now discuss in detail the decision of a Two-Judge Bench in ***Rashmi Rekha*** *Thatoi vs State of Orissa,* (2012) 5 SCC 690, for the reason that in the impugned Order the Single Judge of the High Court has proclaimed, which word we used intentionally, that **Niranjan Singh** is *per incuriam.* The 'chronology of cases' mentioned in **Rashmi Rekha** elucidates that there is only one judgment anterior to **Niranjan Singh,** namely, *Balchand Jain vs State of M.P.* (1976) 4 SCC 572,

which along with the Constitution Bench decision in Gurbaksh Singh **Sibbia**, intrinsically concerned itself only with anticipatory bail. It is necessary to give a salutary clarion caution to all Courts, including High Courts, to be extremely careful and circumspect in concluding a judgment of the Supreme Court to be *per incuriam*. In the present case, in the impugned Order the learned Single Judge appears to have blindly followed the incorrect and certainly misleading editorial note in the Supreme Court Cases without taking the trouble of conscientiously apprising himself of the context in which **Rashmi Rekha** appears to hold **Niranjan Singh** *per incuriam*, and equally importantly, to which previous judgment. An earlier judgment cannot possibly be seen as *per incuriam* a later judgment as the latter if numerically stronger only then it would overrule the former. **Rashmi Rekha** dealt with anticipatory bail under Section 438 and only tangentially with Sections 437 and 439 of the CrPC, and while deliberations and observations found in this clutch of cases may not be circumscribed by the term *obiter dicta*, it must concede to any judgment directly on point. In the factual matrix before us, **Niranjan Singh** is the precedent of relevance and not Gurbaksh Singh **Sibbia** or any other decision where the scope and sweep of anticipatory bail was at the fulcrum of the conundrum.

17. Recently, in **Dinesh Kumar**, this conundrum came to be considered again. This Court adhered to the **Niranjan Singh** dicta (as it was bound to do), viz. that a person can be stated to be in judicial custody when he surrendered before the Court and submits to its directions. We further regretfully observe that the impugned Judgment is repugnant to the analysis carried out by two coordinate Benches of the High Court of Bombay itself, which were duly cited on behalf of the Appellant. The first one is reported as *Balkrishna Dhondu Rani vs Manik Motiram Jagtap* 2005 (Supp.) Bom C.R.(Cri) 270 which applied **Niranjan Singh**; the second is by a different Single Bench, which correctly applied the first. In the common law system, the purpose of precedents is

to law, regrettably the judicial indiscipline displayed in the impugned Judgment, defeats it. If the learned Single Judge who had authored the impugned Judgment irrepressibly held divergent opinion and found it unpalatable, all that he could have done was to draft a reference to the Hon'ble Chief Justice for the purpose of constituting a larger Bench; whether or not to accede to this request remains within the discretion of the Chief Justice. However, in the case in hand, this avenue could also not have been traversed since **Niranjan Singh** binds not only Co-equal Benches of the Supreme Court but certainly every Bench of any High Court of India. Far from being *per incuriam*, **Niranjan Singh** has metamorphosed into the structure of *stare decisis*, owing to it having endured over two score years of consideration, leading to the position that even Larger Benches of this Court should hesitate to remodel its ratio.

18. It will also be germane to briefly cogitate on the fasciculous captioned "Section 438 of the Code of Civil Procedure, as amended by the Code of Criminal Procedure (Amendment) Act, 2005 of the 203rd Report of the Law Commission. Although, the Law Commission was principally focused on the parameters of anticipatory bail, it had reflected on **Niranjan Singh,** and, thereafter, observed in paragraph 6.3.23 that "where a person appears before the Court in compliance with any Court's order and surrenders himself to the Court's directions or control, he may be granted regular bail, since he is already under restraint. The provisions relating to the anticipatory bail may not be attracted in such a case". An amendment was proposed to the provisions vide CrPC (Amendment) Act, 2005 making the presence of the applicant seeking anticipatory bail obligatory at the time of final hearing of the application for enlargement on bail. The said amendment has not been notified yet and kept in abeyance because of two reasons. Firstly, the amendment led to widespread agitation by the lawyers fraternity since it would virtually enable the police to immediately arrest an accused in the event the Court declined to enlarge the accused on bail. Secondly, in the

perception of the Law Commission, it would defeat the very purpose of the anticipatory bail. The conclusion of the Law Commission, in almost identical words to those extracted above are that: "when the applicant appears in the Court in compliance of the Court's order and is subjected to the Court's directions, he may be viewed as in Court's custody and this may render the relief of anticipatory bail infructuous". Accordingly, the Law Commission has recommended omission of sub-section (1-B) of Section 438 CrPC.

19. The Appellant had relied on *Niranjan Singh vs Prabhakar Rajaram Kharote* (1980) 2 SCC 559, before the High Court as well as before us. A perusal of the impugned Order discloses that the learned Single Judge was of the mistaken opinion that **Niranjan Singh** was *per incuriam*, possibly because of an editorial error in the reporting of the later judgment in *Rashmi Rekha Thatoi vs State of Orissa* (2012) 5 SCC 690. In the latter decision the curial assault was to the refusal to grant of anticipatory bail under Section 438(1) CrPC, yet nevertheless enabling him to surrender before the Sub Divisional Magistrate and thereupon to be released on bail. In the appeal in hand this issue is not in focus; the kernel of the conundrum before us is the meaning to be ascribed to the concept of custody in Section 439 CrPC, and a careful scrutiny of **Rashmi Rekha** will disclose that it does not even purport to or tangentially intend to declare **Niranjan Singh** as *per incuriam*. Any remaining doubt would be dispelled on a perusal of Ranjit Singh vs State of M.P, where our esteemed Brother Dipak Misra has clarified that **Rashmi Rekha** concerned itself only with anticipatory bail. The impugned Order had therefore to remain in complete consonance with **Niranjan Singh.** It needs to be clarified that paragraph 14 of *Sunita Devi vs State of Bihar* (2005) 1 SCC 608, extracts verbatim paragraph 7 of **Niranjan Singh**, without mentioning so. The annals of the litigation in **Niranjan Singh** are that pursuant to a private complaint under Section 202 CrPC, the concerned Magistrate issued non-bailable warrants in respec d

subsequently while refusing bail to them had neglected to contemporaneously cause them to be taken into custody. In that interregnum or hiatus, the accused moved the Sessions Court which granted them bail albeit on certain terms which the High Court did not interfere therewith. This Court, speaking through Krishna Iyer J elucidated the law in these paragraphs:

> **"6.** Here the respondents were accused of offences but were not in *custody*, argues the petitioner so no bail, since this basic condition of being in jail is not fulfilled. This submission has been rightly rejected by the courts below. We agree that, in one view, an outlaw cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were not absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged. We agree that no person accused of an offence can move the court for bail under Section 439 CrPC unless he is in custody.
>
> **7.** When is a person in *custody*, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in *custody* for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not

> taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.
>
> **8.** Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.
>
> **9.** He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. **He can be stated to be in judicial custody when he surrenders before the court and submits to its directions**. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and maybe, enabled the accused persons to circumvent the principle of Section 439 CrPC. We might have taken a serious view of such a course, indifferent to mandatory provisions, by the subordinate magistracy **but for the fact that in the present case the accused made up for it by surrender before the Sessions Court**. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset th[illegible]d.

Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Article 136, do not feel that we should interfere with a discretion exercised by the two courts below."

(**Emphasis added by us**)

It should not need belabouring that High Courts must be most careful and circumspect in concluding that a decision of a superior Court is *per incuriam*. And here, palpably without taking the trouble of referring to and reading the precedents alluded to, casually accepting to be correct a careless and incorrect editorial note, the Single Judge has done exactly so. All the cases considered in **Rashmi Rekha** including the decision of the Constitution Bench in *Gurbaksh Singh Sibbia vs State of Punjab* (1980) 2 SCC 565, concentrated on the contours and circumference of anticipatory bail, i.e. Section 438. We may reiterate that the Appellant's prayer for anticipatory bail had already been declined by this Court, which is why he had no alternative but to apply for regular bail. Before we move on we shall reproduce the following part of paragraph 19 of **Sibbia** as it has topicality:-

"19 … Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principles stated by this Court in State of U.P. v. Deoman Upadhyaya to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal

Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency."

20. In this analysis, the opinion in the impugned Judgment incorrectly concludes that the High Court is bereft or devoid of power to jurisdiction upon a petition which firstly pleads surrender and, thereafter, prays for bail. The High Court could have perfunctorily taken the Appellant into its custody and then proceeded with the perusal of the prayer for bail; in the event of its coming to the conclusion that sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody could have been ordained. A Judge is expected to perform his onerous calling impervious of any public pressure that may be brought to bear on him.

The Conundrum of Cognizance, Committal & Bail

21. We have already noted in para 8 the creation by the CrPC of a hiatus between the cognizance of an offence by the Magistrate and the committal by him of that offence to the Court of Session. Section 190 contemplates the cognizance of an offence by a Magistrate in any of the following four circumstances: (i) upon receiving a complaint of facts; or (ii) upon a police report of such facts; or (iii) upon information received from any person other than a police officer, or (iv) upon the Magistrate's own knowledge. Thereafter, Section 193 proscribes the Court of Session from taking cognizance of any offence, as a Court of original jurisdiction, unless the case has been committed to it by a Magistrate; its Appellate jurisdiction is left untouched. Chapter XVI makes it amply clear that a substantial period may inevitably intervene between a Magistrate taking cognizance of an offence triable by Sessions and its committal to the Court of Sess… s

the duty on a Magistrate to issue process; Section 205 empowers him to dispense with personal attendance of accused; Section 206 permits Special summons in cases of petty offence; Sections 207 and 208 obligate the Magistrate to furnish to the accused, free of cost, copies of sundry documents mentioned therein; and, thereafter, under Section 209 to commit the case to Sessions. What is to happen to the accused in this interregnum; can his liberty be jeopardized! The only permissible restriction to personal freedom, as a universal legal norm, is the arrest or detention of an accused for a reasonable period of 24 hours. Thereafter, the accused would be entitled to seek before a Court his enlargement on bail. In connection with serious offences, Section 167 CrPC contemplates that an accused may be incarcerated, either in police or judicial custody, for a maximum of 90 days if the Charge Sheet has not been filed. An accused can and very often does remain bereft of his personal liberty for as long as three months and law must enable him to seek enlargement on bail in this period. Since severe restrictions have been placed on the powers of a Magistrate to grant bail, in the case of an offence punishable by death or for imprisonment for life, an accused should be in a position to move the Courts meaningfully empowered to grant him succour. It is inevitable that the personal freedom of an individual would be curtailed even before he can invoke the appellate jurisdiction of Sessions Judge. The Constitution therefore requires that a pragmatic, positive and facilitative interpretation be given to the CrPC especially with regard to the exercise of its original jurisdiction by the Sessions Court. We are unable to locate any provision in the CrPC which prohibits an accused from moving the Court of Session for such a relief except, theoretically, Section 193 which also only prohibits it from taking cognizance of an offence as a Court of original jurisdiction. This embargo does not prohibit the Court of Session from adjudicating upon a plea for bail. It appears to us that till the committal of case to the Court of Session, Section 439 can be invoked for the purpose of pleading for bail. If administrative difficulties are encountered,

such as, where there are several Additional Session Judges, they can be overcome by enabling the accused to move the Sessions Judge, or by further empowering the Additional Sessions Judge hearing other Bail Applications whether post committal or as the Appellate Court, to also entertain Bail Applications at the pre-committal stage. Since the Magistrate is completely barred from granting bail to a person accused even of an offence punishable by death or imprisonment for life, a superior Court such as Court of Session, should not be incapacitated from considering a bail application especially keeping in perspective that its powers are comparatively unfettered under Section 439 of the CrPC.

22. In the case in hand, we need not dwell further on this question since the Appellant has filed an application praying, firstly, that he be permitted to surrender to the High Court and secondly, for his plea to be considered for grant of bail by the High Court. We say this because there are no provisions in the CrPC contemplating the committal of a case to the High Court, thereby logically leaving its powers untrammelled. There are no restrictions on the High Court to entertain an application for bail provided always the accused is in custody, and this position obtains as soon as the accused actually surrenders himself to the Court. Reliance on *R vs Evans,* (2012) 1 WLR 1192, by learned Senior Counsel for the respondents before us is misplaced, since on its careful reading, the facts are totally distinguishable inasmuch as the accused in that case had so engineered events as not to be available *in persona* in the Court at the time of the consideration of his application for surrender. The Court of Appeal observed that they "do not agree that reporting to the usher amounts to surrender". The Court in fact supported the view that surrender may also be accomplished by the commencement of any hearing before the Judge, however brief, where the accused person is formally identified and plainly would overtly have subjected himself to the control of the Court. Incontrovertibly, at the material time the Appellant was corporeally present in th rt

making **Evans** applicable to the case of the Appellant rather than the case of the respondent. A further singularity of the present case is that the offence has already been committed to Sessions, albeit, the accused/Appellant could not have been brought before the Magistrate. It is beyond cavil "that a Court takes cognizance of an offence and not an offender" as observed in *Dilawar Singh vs Parvinder Singh,* (2005) 12 SCC 709, in which Raghubans Dubey vs State of Bihar, AIR 1967 SC 1167, was applied. Therefore, the High Court was not justified in directing the Appellant to appear before the Magistrate.

23. On behalf of the State, the submission is that the prosecution should be afforded a free and fair opportunity of subjecting the accused to custody for interrogation as provided under Section 167 CrPC. This power rests with the Magistrate and not with the High Court, which is the Court of Revision and Appeal; therefore, the High Court under Section 482 CrPC can only correct or rectify an order passed without jurisdiction by a subordinate Court. Learned State counsel submits that the High Court in exercise of powers under Section 482 can convert the nature of custody from police custody to judicial custody and vice versa, but cannot pass an Order of first remanding to custody. Therefore, the only avenue open to the accused is to appear before the Magistrate who is empowered under Section 167 CrPC. Thereupon, the Magistrate can order for police custody or judicial custody or enlarge him on bail. On behalf of the State, it is contended that if accused persons are permitted to surrender to the High Court, it is capable of having, if not a disastrous, certainly a deleterious effect on investigations and shall open up the flood gates for accused persons to make strategies by keeping themselves away from the investigating agencies for months on end. The argument continues that in this manner absconding accused in several sensitive cases, affecting the security of the nation or the economy of the country, would take advantage of such an interpretation of law and get away from the clutches of the investigating officer. We are not

impressed by the arguments articulated by learned Senior Counsel for the Complainant or informant because it is axiomatic that any infraction or inroad to the freedom of an individual is possible only by some clear unequivocal and unambiguous procedure known to law.

Role of Public Prosecutor and Private Counsel in Prosecution

24. The concern of the Three Judge Bench in *Thakur Ram vs State of Bihar* AIR 1966 SC 911, principally was whether the case before them should have been committed to Sessions, as also whether this plea could be countenanced at the stage when only the Judgment was awaited and any such interference would effectuate subjecting the accused to face trial virtually *de novo*. The observations that where "a case has proceeded on a police report a private party has really no *locus standi*, since the aggrieved party is the State", are strictly senso *obiter dicta* but it did presage the view that was to be taken by this Court later. In *Bhagwant Singh vs Commissioner of Police,* (1985) 2 SCC 537, another Three Judge Bench formulated the question which required its answer that "whether in a case where First Information Report is lodged and after completion of investigation initiated on the basis of the First Information Report, the police submits a report that no offence appears to have been committed, the Magistrate can accept the report and drop the proceeding without issuing notice to the first informant or to the injured or in case the incident has resulted in death, to the relatives of the deceased". Sections 154, 156, 157, 173 and 190 of the CrPC were duly considered threadbare, before opining thus:-

> "4. ….when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade

cognizance of the offence and issue process…..

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"5. The position may however, be a little different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration by the Magistrate. We cannot spell out either from the provisions of the Code of Criminal Procedure, 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report. But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report……"

Thereafter, in *Shiv Kumar vs Hukam Chand* (1999) 7 SCC 467, the question that was posed before another Three Judge Bench was whether an aggrieved has a right to engage its own counsel to conduct the prosecution despite the presence of the Public Prosecutor. This Court duly noted that the role of the Public Prosecutor was upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be the hallmark, attribute and distinction of every proper prosecution. In that case the advocate appointed by the aggrieved party ventured to conduct the cross-examination of the witness which was allowed by the Trial Court but was reversed in Revision by the High Court, and the High Court permitted only the submission of Written Argument after the closure of evidence. Upholding the view of the High Court, this

Court went on to observe that before the Magistrate any person (except a police officer below the rank of Inspector) could conduct the prosecution, but that this laxity is impermissible in Sessions by virtue of Section 225 of the CrPC, which pointedly states that the prosecution shall be conducted by a Public Prosecutor. We, respectfully, agree with the observations that – "A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. …….. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor." In *J.K. International vs State* (2001) 3 SCC 462, the Appellant had filed a complaint alleging offences under Sections 420, 406 and 120-B IPC in respect of which a Charge Sheet was duly filed. The Appellant preferred a petition in the High Court for quashing the FIR in which proceeding the complainant's request for being heard was rejected by the High Court. **Thakur Ram** and **Bhagwant Singh** were cited and analysed. It was reiterated by this Court that it is the Public Prosecutor who is in the management of the prosecution the Court should look askance at frequent interjection and interference by a private person. However, if the proceedings are likely to be quashed, then the complainant should be heard at that stage, rather than compelling him to assail the quashment by taking recourse to an appeal. Sections 225, 301 and 302 were also adverted to and, thereafter, it was opined that a private person is not altogether eclipsed from the scenario, as he remains a person who will be prejudiced by an order culminating in the dismissal of the prosecution. The Three Judge Bench observed that upon the Magistrate becoming prescient that a prosecution is likely to end in its dismissal, it would be salutary to al…e

Complainant at the earliest; and, in the case of a Sessions trial, by permitting the filing of Written Arguments.

25. The upshot of this analysis is that no vested right is granted to a complainant or informant or aggrieved party to directly conduct a prosecution. So far as the Magistrate is concerned, comparative latitude is given to him but he must always bear in mind that while the prosecution must remain being robust and comprehensive and effective it should not abandon the need to be free, fair and diligent. So far as the Sessions Court is concerned, it is the Public Prosecutor who must at all times remain in control of the prosecution and a counsel of a private party can only assist the Public Prosecutor in discharging its responsibility. The complainant or informant or aggrieved party may, however, be heard at a crucial and critical juncture of the Trial so that his interests in the prosecution are not prejudiced or jeopardized. It seems to us that constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality. If the Magistrate or Sessions Judge harbours the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing. Reverting to the case in hand, we are of the opinion that the complainant or informant or aggrieved party who is himself an accomplished criminal lawyer and who has been represented before us by the erudite Senior Counsel, was not possessed of any vested right of being heard as it is manifestly evident that the Court has not formed any opinion adverse to the prosecution. Whether the Accused is to be granted bail is a matter which can adequately be argued by the State Counsel. We have, however, granted a full hearing to Mr. Gopal Subramanium, Senior Advocate and have perused detailed Written Submissions since we are alive to impact that our opinion would have on a multitude of criminal trials.

26. In conclusion, therefore, we are of the opinion that the learned Single Judge erred in law in holding that he was devoid

of jurisdiction so far as the application presented to him by the Appellant before us was concerned. Conceptually, he could have declined to accept the prayer to surrender to the Courts' custody, although, we are presently not aware of any reason for this option to be exercised. Once the prayer for surrender is accepted, the Appellant before us would come into the custody of the Court within the contemplation of Section 439 CrPC. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant/Appellant had shown sufficient reason or grounds for being enlarged on bail.

27. The impugned Order is, accordingly, set aside. The Learned Single Judge shall consider the Appellant's plea for surrendering to the Court and dependent on that decision, the Learned Single Judge shall, thereafter, consider the Appellant's plea for his being granted bail. The Appellant shall not be arrested for a period of two weeks or till the final disposal of the said application, whichever is later. We expect that the learned Single Judge shall remain impervious to any pressure that may be brought to bear upon him either from the public or from the media as this is the fundamental and onerous duty cast on every Judge.

28. The appeal is allowed in the above terms.

R.P. Appeal allowed.

MAHIPAL SINGH

v.

C.B.I. & ANR.

(Criminal Appeal No. 682 of 2014)

MARCH 27, 2014

[CHANDRAMAULI KR. PRASAD AND PINAKI CHANDRA GHOSE, JJ.]

Maharashtra Control of Organised Crime Act (MCOCA) – ss.2(1)(e), 2(1)(d) and 3 – "Organised crime" – "Continuing unlawful activity" – Entrance examinations to Postgraduate and undergraduate courses in Medical Science and undergraduate courses in Veterinary Science – Rigging of results – Invocation of s.3 of MCOCA – Permissibility – Held: For punishment for offence of organised crime u/s.3 of MCOCA, the accused is required to be involved in continuing unlawful activity which inter alia provides that more than one charge-sheet have been filed before a competent court within the preceding period of ten years and the court had taken cognizance of such offence – Submission of charge-sheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known – An act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on – Procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date the crime is committed or detected – In the case at hand, the examinations alleged to have been rigged had taken place in January, 2010, June, 2010, November, 2010 and January, 2011 and the date on which the FIRs were registered, more than one charge-sheets were not filed against the accused for the

offence of specified nature within the preceding period of ten years and further, the court had not taken cognizance in such number of cases – On the date of commission of the offence, all the ingredients to bring the act within s.3 of MCOCA were not satisfied – Therefore, the accused could not be prosecuted for the offence u/s.3 of MCOCA – Constitution of India, 1950 – Art. 20(1) – Penal Code, 1860 – s.120B r/w ss.420, 467, 471 and 511.

'M' was accused in a number of cases related to rigging of results of entrance examinations. The prosecution case was that 'M' was the kingpin, who facilitated the interpolation and manipulation of the OMR Answer Sheets of certain candidates enabling them to qualify in the postgraduate and undergraduate courses in Medical Science and undergraduate courses in Veterinary Science. 'M' was alleged to have committed the offence under Section 120B read with Section 420, 467, 471 and 511 IPC.

'M' was charge-sheeted in four cases. The DIG, CBI granted approval for invoking Section 3 of Maharashtra Control of Organised Crime Act (MCOCA) against him. 'M' challenged the orders in four separate writ petitions filed before the High Court. Meanwhile, the investigating agency secured M's remand under MCOCA from the Designated Court in two cases. 'M' also challenged those orders of remand in two separate writ petitions.

All the writ petitions were heard together and by a common judgment, the High Court set aside the orders of the DIG, CBI granting approval in three cases on its finding that CBI "could not have invoked MCOCA in four different cases on same set of facts and four different charge-sheets". However, in the fourth case, the order of DIG, CBI invoking Section 3 of MCOCA was upheld by the High Court. The High Court dismissed both the writ petitions filed against the orders of

under the provisions of MCOCA as infructuous. Hence the cross-appeals by the accused 'M' and the CBI.

Allowing the appeal preferred by the accused and dismissing the appeals preferred by the CBI, the Court

HELD:1. Section 3 of Maharashtra Control of Organised Crime Act (MCOCA) is the penal provision which provides for punishment for organized crime. "Organised crime" has been defined under Section 2(1)(e) of MCOCA. The definition, inter alia, makes it clear that to come within the mischief of organised crime, continuing unlawful activity with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or promoting insurgency are essential. "Continuing unlawful activity" has been defined under Section 2(1)(d) of MCOCA. From a plain reading of the aforesaid provision, it is evident that to come within the mischief of continuing unlawful activity, it is required to be established that the accused is involved in activities prohibited by law which are cognizable offence punishable with imprisonment of three years or more and in respect thereof, more than one charge-sheets have been filed against such person before a competent court within the preceding period of ten years and that court has taken cognizance of such offence. [Paras 7, 8 and 9] [537-C, G-H; 538-C-F]

2. It is trite that to bring an accused within the mischief of the penal provision, ingredients of the offence have to be satisfied on the date the offence was committed. Article 20(1) of the Constitution of India permits conviction of a person for an offence for violation of law in force at the time of commission of the act charged as an offence. In the case in hand, examinations alleged to have been rigged had taken place in January, 2010, June, 2010, November, 2010 and January, 2011 and the date on which the first

information reports were registered, more than one charge-sheets were not filed against the accused for the offence of specified nature within the preceding period of ten years and further, the court had not taken cognizance in such number of cases. For punishment for offence of organised crime under Section 3 of MCOCA, the accused is required to be involved in continuing unlawful activity which inter alia provides that more than one charge-sheets have been filed before a competent court within the preceding period of ten years and the court had taken cognizance of such offence. Therefore, in the case in hand, on the date of commission of the offence, all the ingredients to bring the act within Section 3 of MCOCA have not been satisfied. There may be a case in which on the date of registration of the case, one may not be aware of the fact of charge-sheet and cognizance being taken in more than one case in respect of the offence of specified nature within the preceding period of ten years, but during the course of investigation, if it transpires that such charge-sheets and cognizance have been taken, Section 3 of the MCOCA can be invoked. There may be a case in which the investigating agency does not know exactly the date on which the crime was committed; in such a case the date on which the offence comes to the notice of the investigating agency, the ingredients constituting the offence have to be satisfied. An act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on. There may not be any impediment in complying with the procedural requirement later on in case the ingredients of the offence are satisfied, but satisfying the requirement later on to bring the act within the mischief of penal provision is not permissible. In other words, procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date

the crime is committed or detected. Submission of charge-sheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known. [Para 10] [538-G-H; 539-A-H; 540-A-B]

3. In the case at hand, on the date the offence was committed or came to be known, one of the ingredients of the offence, i.e. submission of charge-sheet and cognizance of offence of specified nature in more than one case within the preceding period of ten years, has not been satisfied. Therefore, the accused cannot be prosecuted for the offence under Section 3 of MCOCA. [Para 11] [540-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 682 of 2014.

From the Judgment and Order dated 21.05.2012 of the High Court of Delhi at New Delhi in WP (Crl) No. 1555 of 2011.

WITH

Criminal Appeal Nos. 683-685 of 2014.

Indira Jaising ASG, Gopal Subramaniam, R. Basant, S.K. Katriar, Sushil Karanjkar, Abdul Majid, Gaurav Khanna, Karthik Ashok, K.N. Rai, Rajiv Nanda, M. Khairati, Anindita Pujari, Sonakshi Malhan, B.V. Balaram Das for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. In these special leave petitions, Mahipal Singh figures as an accused. He was initially named as an accused in Hasan Ganj, Lucknow P.S. Case No. 151 of 2005. This case was registered on 26th of May, 2005 and after investigation the accused Mahipal Singh was charge-sheeted on 26th of April, 2006. On the basis of a report given by Inspector Manoj Kumar, another case E0005

was registered against him by the Central Bureau of Investigation (for short "CBI"), on 2nd of June, 2011. Further, on the basis of the report given by the same Inspector, four other cases i.e. E0007, E0008, E0009 and E0010 were registered on 28th of July, 2011 by the CBI. All these cases excepting E0009 related to rigging of results of various entrance examinations for admission to postgraduate courses in medical colleges conducted by the All India Institute of Medical Sciences (for short "AIIMS"). Case No. E0009 also related to the rigging of the result of entrance examination but it is in connection with admission to undergraduate course in medical colleges. Another case i.e. E0006 was registered by the CBI on 3rd of June, 2011 concerning the rigging of the result of entrance examination of Pre-Veterinary test conducted by the AIIMS. In all these cases, Mahipal Singh figured as an accused and alleged to be the kingpin, who facilitated the interpolation and manipulation of the OMR Answer Sheets of certain candidates enabling them to qualify in the postgraduate and undergraduate courses in Medical Science and undergraduate courses in Veterinary Science. In all these first information reports, accused Mahipal Singh was alleged to have committed the offence under Section 120B read with Section 420, 467, 471 and 511 of the Indian Penal Code. In E0005 and E0006, charge-sheets were submitted on 1st of September, 2011 and the learned Judge in sesin of the case took cognizance of the offence on 13th of September, 2011 and 1st of September, 2011 respectively. Accused Mahipal Singh was charge-sheeted in E0007 and E0008 and the Deputy Inspector General (for short "DIG") of CBI granted approval for invoking Section 3 of Maharashtra Control of Organised Crime Act (hereinafter referred to as "MCOCA"), against him by order dated 18th of October, 2011. Accused Mahipal Singh was further charge-sheeted in E0009 and E0010 and by order dated 14th of January, 2012, the DIG, CBI granted approval for invoking Section 3 of MCOCA against him. Accused Mahipal challenged the orders dated 18th of October, 2011 and 14th of January, 2012 passed by the DIG, C 3

of MCOCA in the four cases detailed above in four separate writ petitions filed before the Delhi High Court. The investigating agency secured Mahipal Singh's remand under MCOCA from the Designated Court in E0006 and E0007 by separate orders passed on 30th of November, 2011. Accused Mahipal Singh challenged those orders of remand in two separate writ petitions. Thus, altogether accused Mahipal Singh filed six writ petitions. All those writ petitions were heard together and by a common judgment dated 21st of May, 2012, the High Court set aside the orders of the DIG, CBI granting approval in E0008, E0009 and E0010 on its finding that CBI "could not have invoked MCOCA in four different cases on same set of facts and four different charge-sheets". However, it upheld the order of the DIG, CBI invoking Section 3 of MCOCA in E0007. The High Court further dismissed both the writ petitions filed against the orders of remand for offence under the provisions of MCOCA as infructuous.

2. Accused Mahipal Singh, aggrieved by the order upholding the order of the DIG, CBI invoking Section 3 of MCOCA, has preferred Special Leave Petition (Criminal) No. 6401 of 2012, whereas the CBI and its functionary, aggrieved by setting aside of the orders of DIG invoking Section 3 of MCOCA in three cases, have filed Special Leave Petition (Criminal) Nos. 2377-2379 of 2013 and both of them pray for grant of special leave to appeal to assail the judgment.

3. Leave granted.

4. We have heard Mr. Gopal Subramaniam, learned Senior Counsel for the accused Mahipal Singh and Ms. Indira Jaising, Additional Solicitor General for the CBI. At the outset, Mr. Subramaniam attempted to argue that the provisions of MCOCA cannot be applied in cases where the offence has been committed outside the State of Maharashtra. He points out that in the present case, the offence has admittedly been committed in Delhi and, therefore, the case shall not be governed by the provisions of MCOCA. However, when

confronted that no such question was raised before the High Court or for that matter, in the special leave petition, he gave up this submission.

5. While assailing the order, Mr. Subramaniam has made a large number of submissions, but as the accused is to succeed on a very short point, we deem it inexpedient either to incorporate or answer those submissions. Mr. Subramamiam submits, even if it is assumed for the sake of these appeals that the allegations made against the accused satisfy all other ingredients of continuing unlawful activity, the requirements of submission of more than one charge-sheets before a competent court within the preceding period of ten years for offence punishable with imprisonment of three years or more and further, the competent court taking cognizance of the offence, have not been satisfied. He submits that in case Nos. E0007 and E0008, DIG gave approval for invoking Section 3 of MCOCA on 18th of October, 2011 and in E0009 and E0010 on 14th of January, 2012 whereas the charge-sheets in E0005 and E0006 were submitted on 1st of September, 2011 and the competent court took cognizance of the offence on 13th of September, 2011 and 1st of September, 2011 respectively. He points out that in all those four cases i.e. E0007, E0008, E0009 and E0010, in which Section 3 of the MCOCA has been invoked, first information reports were registered on 28th of July, 2011 and the examinations were held in January, 2010, November, 2010, June, 2010 and January, 2011 respectively. Therefore, according to Mr. Subramaniam, on the dates the crimes were committed or the cases registered or the crimes came to be known, more than one charge-sheets in respect of offence of specified nature were not submitted within ten years nor the competent court had taken cognizance of the offence in more than one case of specified nature, against the accused.

6. Ms. Jaising, however, contends that the ingredients constituting the offence under Section 3 [illegible]e

satisfied on the date MCOCA was invoked. She points out that there is no dispute that the date on which MCOCA was invoked, more than two charge-sheets for the commission of the offence of specified nature were filed and the competent court had taken cognizance of the same. According to her, the ingredients of the offence have to be satisfied with reference to the date the DIG gave approval for invoking Section 3 of MCOCA and not on the date the offence was committed or came to be known.

7. Section 3 of MCOCA is the penal provision which provides for punishment for organised crime. "Organised crime" has been defined under Section 2(1)(e) of MCOCA and the same reads as follows:

"2. Definitions-

(1) In this Act, unless the context otherwise requires,-

xxx xxx xxx

(e) "organised crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any person or promoting insurgency;

xxx xxx xxx"

8. The definition aforesaid, inter alia, makes it clear that to come within the mischief of organised crime, continuing unlawful activity with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or any other person or promoting insurgency are essential. "Continuing unlawful activity" has been defined under Section 2(1)(d) of MCOCA. It reads as follows:

"2. Definitions-

(1) In this Act, unless the context otherwise requires,-

xxx xxx xxx

(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been field before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;

xxx xxx xxx"

9. From a plain reading of the aforesaid provision, it is evident that to come within the mischief of continuing unlawful activity, it is required to be established that the accused is involved in activities prohibited by law which are cognizable offence punishable with imprisonment of three years or more and in respect thereof, more than one charge-sheets have been filed against such person before a competent court within the preceding period of ten years and that court has taken cognizance of such offence.

10. We have given our most anxious consideration to the rival submissions and in the light of what we have observed above, the submissions advanced by Mr. Subramaniam commend us. It is trite that to bring an accused within the mischief of the penal provision, ingredients of the offence have to be satisfied on the date the offence was committed. Article 20(1) of the Constitution of India permits conviction of a person for an offence for violation of law in force at the time of commission of the act charged as an offence. In the case in hand, examinations alleged to have been rigged had taken place in January, 2010, June, 2010, and

January, 2011 and the date on which the first information reports were registered, more than one charge-sheets were not filed against the accused for the offence of specified nature within the preceding period of ten years and further, the court had not taken cognizance in such number of cases. As observed earlier, for punishment for offence of organised crime under Section 3 of MCOCA, the accused is required to be involved in continuing unlawful activity which inter alia provides that more than one charge-sheets have been filed before a competent court within the preceding period of ten years and the court had taken cognizance of such offence. Therefore, in the case in hand, on the date of commission of the offence, all the ingredients to bring the act within Section 3 of MCOCA have not been satisfied. We are conscious of the fact that there may be a case in which on the date of registration of the case, one may not be aware of the fact of charge-sheet and cognizance being taken in more than one case in respect of the offence of specified nature within the preceding period of ten years, but during the course of investigation, if it transpires that such charge-sheets and cognizance have been taken, Section 3 of the MCOCA can be invoked. There may be a case in which the investigating agency does not know exactly the date on which the crime was committed; in our opinion, in such a case the date on which the offence comes to the notice of the investigating agency, the ingredients constituting the offence have to be satisfied. In our opinion, an act which is not an offence on the date of its commission or the date on which it came to be known, cannot be treated as an offence because of certain events taking place later on. We may hasten to add here that there may not be any impediment in complying with the procedural requirement later on in case the ingredients of the offence are satisfied, but satisfying the requirement later on to bring the act within the mischief of penal provision is not permissible. In other words, procedural requirement for prosecution of a person for an offence can later on be satisfied but ingredients constituting the offence must exist on the date the crime is committed or detected. Submission of charge-

sheets in more than one case and taking cognizance in such number of cases are ingredients of the offence and have to be satisfied on the date the crime was committed or came to be known.

11. Now we proceed to apply the principle aforesaid to the facts of the present case. We find that on the date the offence was committed or came to be known, one of the ingredients of the offence, i.e. submission of charge-sheet and cognizance of offence of specified nature in more than one case within the preceding period of ten years, has not been satisfied. Therefore, we have no other option than to hold that the accused cannot be prosecuted for the offence under Section 3 of MCOCA.

12. To put the record straight, Mr. Subramaniam as also Ms. Jaising, in order to assail the impugned order, have raised various other submissions, but the view taken by us goes to the root of the matter and, therefore, we do not consider it expedient either to incorporate or answer those submissions.

13. In the result, we allow the appeal preferred by the accused and dismiss the appeals preferred by the CBI.

B.B.B. Appeals disposed of.

HIGH COURT OF JUDICATURE AT PATNA, THROUGH R.G.

v.

SHYAM DEO SINGH & ORS.

(Civil Appeal No. 2529 of 2002)

MARCH 28, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

Service Law – Judicial Service – Entitlement to continuation/ extension of service beyond the age of 58 years – Manner of determination – Bihar Superior Judicial Service – Denial of extension to respondent-Judicial Officer beyond the age of 58 years – If justified – Held: The entitlement to continuation/ extension of service of a judicial officer beyond the age of 58 has to be determined on the basis of the service record of the particular officer under consideration and not on a comparative assessment with the record of other officers – Even if the ACRs of another officer were decidedly inferior to those of the respondent, the same, at best, may have relevance to the grant of extension to such officer without conferring any right or entitlement to the respondent for a similar extension – In the present case, though there were adverse remarks/comments dated 15.12.1995 against the respondent, but the same were not acted upon and moreover, the subsequent ACRs of respondent were sufficiently positive and depicted him as an efficient Judicial Officer with good reputation for honesty and impartiality – Also, promotion to the highest level in the District judiciary as well as selection grade in the said cadre was granted to the respondent – The said promotions had the effect of wiping out the adverse remark dated 15.12.1995 – The High Court, on the administrative side, therefore, was not justified in refusing to continue with the service of the respondent beyond the age

of 58 years – However, a period of nearly 14 years has elapsed in the meantime and it will be highly inequitable to request the High Court to redo the exercise at this belated stage – Besides such a course of action will also be unnecessary – Respondent to be treated to have retired from service on completion of 60 years of age and all consequential benefits, including pay and pension on that basis, directed to be made available to him forthwith and without any delay.

Service Law – Judicial Service – Potential for continued useful service of Judicial Officer beyond the age of 58 years – Evaluation and assessment – Judicial Review – Scope – Held: Evaluation of service record of a judicial officer for the purpose of formation of an opinion as to his/her potential for continued useful service is required to be made by the High Court which means the Full Court on the administrative side – The ultimate decision is always preceded by an elaborate consideration of the matter by Hon'ble Judges of the High Court who are familiar with the qualities and attributes of the judicial officer under consideration – The very process by which the decision is eventually arrived at, should permit a limited judicial review – It is only in a rare case where the decision taken is unsupported by any material or the same reflects a conclusion which, on the face of it, cannot be sustained that judicial review would be permissible.

By a communication issued by the Registrar General of the Patna High Court, the respondent was informed that he would retire from the service on completion of 58 years of age. The said communication of the Registrar General was, *inter alia,* based on a decision of the High Court on the administrative side taken in a meeting of the Full Court wherein the decision of its Evaluation Committee not to extend the service of the respondent beyond the age of 58 years was approved. All the aforesaid decisions being challenge[illegible]y

the High Court by the impugned order dated 20-2-2001 and the matter was directed to be reconsidered.

Two reasons, in the main, had prevailed upon the High Court to arrive at the impugned conclusion. The first is that the negative remarks/adverse comments recorded in the Annual Confidential Report (ACR) of the respondent on 15.12.1995 were not communicated to the respondent and that the standing committee of the High Court on 03.01.1997 had decided not to pursue the matter. The High Court also took the view that notwithstanding the said remarks the respondent was subsequently promoted to the post of District & Sessions Judge and also granted the selection grade, which, according to the High Court, had the effect of wiping out the adverse remarks dated 15.12.1995. The High Court, in the impugned order, also took note of the fact that the ACRs of the respondent for the subsequent years indicated that the respondent, over all, is a good officer with nothing adverse as to his integrity and reputation. The other reason for which the High Court had come to the impugned conclusion was that while extension of service was refused to the respondent, one 'U' whose ACRs were decidedly inferior to that of the respondent was granted continuation after 58 years.

Dismissing the appeal, the Court

HELD: 1.1. The entitlement to continuation/extension of service of a judicial officer beyond the age of 58 has to be determined on the basis of the service record of the particular officer under consideration and not on a comparative assessment with the record of other officers. Therefore, even if the ACRs of 'U' were decidedly inferior to those of the respondent, the same, at best, may have relevance to the grant of extension to the aforesaid officer without conferring any right or entitlement to the respondent for a similar extension. [Para 4] [547-F-H]

1.2. The evaluation of the service record of a judicial officer for the purpose of formation of an opinion as to his/her potential for continued useful service is required to be made by the High Court which obviously means the Full Court on the administrative side. In all High Courts such evaluation, in the first instance, is made by a committee of senior Judges. The decision of the Committee is placed before the Full Court to decide whether the recommendation of the Committee should be accepted or not. The ultimate decision is always preceded by an elaborate consideration of the matter by Hon'ble Judges of the High Court who are familiar with the qualities and attributes of the judicial officer under consideration. The very process by which the decision is eventually arrived at, should permit a limited judicial review and it is only in a rare case where the decision taken is unsupported by any material or the same reflects a conclusion which, on the face of it, cannot be sustained that judicial review would be permissible. [Para 8] [550-D-H]

1.3. In the present case, the adverse remarks/ comments dated 15.12.1995 had not been communicated to the respondent. It is also clear from the materials on record that the standing committee of the High Court in its meeting held on 3.1.1997 had decided to close the matter instead of proceeding any further. The subsequent ACRs of the respondent for the years 1997-1998 and 2000-2001 are sufficiently positive and depicts the respondent as an efficient judicial officer with a good reputation for honesty and impartiality. The respondent was promoted to the post of District and Sessions Judge on 5.9.1998. By Notification dated 17.2.2000 he was promoted to the selection grade of the Bihar Superior Judicial Service with effect from 1.1.1997. Therefore, not only the adverse remark dated 15.12.1995 was not acted upon but subsequent thereto prom[illegible]t

level in the district judiciary as well as selection grade in the said cadre was granted to the respondent. The said promotion(s), therefore, would have the effect of wiping out the adverse remark dated 15.12.1995. In the light of the facts, the High Court, on the administrative side, was not justified in refusing to continue with the service of the respondent beyond the age of 58 years. The order dated 20.2.2001 passed by the High Court setting aside the said decision, therefore, will have to be affirmed. [Para 9] [551-G-H; 552-H-F]

Bishwanath Prasad Singh vs. State of Bihar & Ors. **(2001) 2 SCC 305: 2000 (5) Suppl. SCR 718;** *Syed T.A. Naqshbandi vs. State of J&K* **(2003) 9 SCC 592: 2003 (1) Suppl. SCR 114 and** *Brij Mohan Singh Chopra vs. State of Punjab* **AIR 1987 SC 948 : 1987 (2) SCR 583 – relied on.**

All India Judges' Association & Ors. vs. Union of India & Ors. **(1993) 4 SCC 288: 1993 (1) Suppl. SCR 749 – referred to.**

2. However, a period of nearly 14 years has elapsed in the meantime. It will be highly inequitable to request the High Court to redo the exercise at this belated stage. Besides such a course of action will also be unnecessary. It is deemed fit to order that the respondent be treated to have retired from service on completion of 60 years of age and all consequential benefits, including pay and pension on that basis, be made available to him forthwith and without any delay. [Para 10] [552-G-H; 553-A-B]

Case Law Reference:

2000 (5) Suppl. SCR 718	**relied on**	**Para 6**
1993 (1) Suppl. SCR 749	**referred to**	**Para 6**
2003 (1) Suppl. SCR 114	**relied on**	**Para 8**
1987 (2) SCR 583	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2529 of 2002.

From the Judgment & Order dated 20.02.2001 of the High Court of Judicature at Patna in C.W.J.C. No. 6459 of 2000.

P.H. Parekh, Rajeev Kumar Bansal, Kamakshi S. Mehlwal, Ritika Sethi, Vishal Prasad, Himanjali Gautam, Ambhoj Kumar Sinha, Gopal Singh, Manish Kumar Chandan Kumar for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. By a communication dated 17.5.2000 issued by the Registrar General of the Patna High Court the respondent herein was informed that he would retire from the service on completion of 58 years of age. The said communication of the Registrar General was, *inter alia,* based on a decision of the High Court on the administrative side taken in a meeting of the Full Court held on 6.5.2000 wherein the decision of its Evaluation Committee dated 2.5.2000 not to extend the service of the respondent beyond the age of 58 years was approved. All the aforesaid decisions being challenged, were set aside by the High Court by its order dated 20.2.2001 and the matter was directed to be reconsidered. Aggrieved, the High Court is in appeal before us.

2. A perusal of the order under challenge goes to show that two reasons, in the main, had prevailed upon the High Court to arrive at the impugned conclusion.

The first is that the negative remarks/adverse comments recorded in the Annual Confidential Report (ACR) of the respondent on 15.12.1995 were not communicated to the respondent and the foundational facts for the said remarks are wholly unsubstantiated. It was also found by the High Court that the standing committee of the High Court on 03.01.1997 had decided not to pursue the matter but to treat the same as closed. The High Court also took the view

the said remarks the respondent was subsequently promoted to the post of District & Sessions Judge and also granted the selection grade. The aforesaid facts, according to the High Court, had the effect of wiping out the adverse remarks dated 15.12.1995. The High Court, in the impugned order, also took note of the fact that the ACRs of the respondent for the subsequent years indicated that the respondent, over all, is a good officer with nothing adverse as to his integrity and reputation.

The other reason for which the High Court had come to the impugned conclusion is that while extension of service was refused to the respondent, one Mr. Udai Kant Thakur whose ACRs were decidedly inferior to that of the respondent was granted continuation after 58 years. It is on the aforesaid twin basis that the High Court had concluded that the denial of extension to the respondent necessitated interference in exercise of power of judicial review under Article 226 of the Constitution.

3. We have heard Shri P.H. Parekh, learned senior counsel for the appellant and Mr. Ambhoj Kumar Sinha, learned counsel appearing for the respondent No.1.

4. It is convenient to deal, at the first instance, with the second ground that had prevailed upon the High Court to set aside the orders passed by it on the administrative side. Having considered the matter, we do not think it is necessary for us to go into the said question inasmuch as the entitlement to continuation/extension of service of a judicial officer beyond the age of 58 has to be determined on the basis of the service record of the particular officer under consideration and not on a comparative assessment with the record of other officers. Therefore, even if we hold that the ACRs of Shri Udai Kant Thakur were decidedly inferior to those of the respondent, the same, at best, may have relevance to the grant of extension to the aforesaid officer without conferring any right or entitlement to the respondent for a similar extension. It is, therefore, the first

ground that had weighed with the High Court to grant relief to respondent which really needs to be examined by us.

5. The adverse remarks dated 15.12.1995 being the center of focus may be conveniently set out hereunder:

> "Of late I have heard quite disturbing reports about the integrity of Sri S.D. Singh, A.D.J., Dhanbad. I had a talk with the District Judge there and he also expressed his dissatisfaction about the working of Sri Singh in the discharge of his duties as a Judicial Officer. Recently, I heard about a criminal case lodged by C.B.I. (in which one Sri Modi and Sri Gandhi figure as accused) where the conduct of Sri Singh is not beyond reproach."

6. In *Bishwanath Prasad Singh Vs. State of Bihar & Ors.*[1] which coincidently arises out of the same resolution of the Full Court as in the present case, this Court had the occasion to consider whether continuance in service beyond 58 years is a right or a benefit conferred and also the norms that should govern the decision to grant or refuse such continuance. The aforesaid consideration by this Court was necessitated by the different interpretations that seem to have emerged from the directions in *All India Judges' Association & Ors. Vs. Union of India & Ors.*[2]**.** In paragraph 18 of the report in *Bishwanath Prasad Singh (supra)* the conclusions of this Court were summed up as follows:

> *"1. Direction with regard to the enhancement of superannuation age of judicial officers given in All India Judges Assn. v. Union of India does not result in automatic enhancement of the age of superannuation. By force of the judgment a judicial officer does not acquire a right to continue in service up to the extended age of 60 years. It is only a benefit conferred on the judicial*

1. (2001) 2 SCC 305.
2. (1993) 4 SCC 288.

officers subject to an evaluation as to their continued utility to the judicial system to be carried out by the respective High Courts before attaining the age of 58 years and formation of an opinion as to their potential for their continued useful service. Else the judicial officers retire at the superannuation age appointed in the service rules governing conditions of services of the judicial officers.

2. The direction given in 1993 case is by way of ad hoc arrangement so as to operate in the interregnum, commencing the date of judgment and until an appropriate amendment is made in the service rules by the State Government. Once the service rules governing superannuation age have been amended, the direction ceases to operate.

3. The High Court may, before or after the normal age of superannuation, compulsorily retire a judicial officer subject to formation of an opinion that compulsory retirement in public interest was needed. The decision to compulsorily retire must be in accordance with relevant service rules independent of the exercise for evaluation of judicial officer made pursuant to 1993 case[2]. Recommendation for compulsory retirement shall have to be sent to State Government which would pass and deliver the necessary orders.

4. If the High Court finds a judicial officer not entitled to the benefit of extension in superannuation age he would retire at the age of superannuation appointed by the service rules. No specific order or communication in that regard is called for either by the High Court or by the Governor of the State. Such retirement is not "compulsory retirement" in the sense of its being by way of penalty in disciplinary proceedings or even by way of "compulsory retirement in public interest". No right of the judicial officer is taken away. Where the High Court may choose to make any communication in this regard, it would be better advised not to use therein the expression "compulsory retirement". It creates confusion. It would suffice to communicate, if at all, that the officer concerned, having been found not fit for being given the benefit or extended age of superannuation, would stand retired at the normal age or date of superannuation."

7. It is in the light of the above propositions laid down in *Bishwanath Prasad Singh (supra)* that the entitlement of the respondent as claimed and the decision of the High Court on the administrative side to the contrary will have to be examined, particularly, in the context of the extent of the power of judicial review that would be available to examine the impugned refusal made by the High Court.

8. The importance of the issue can hardly be gainsaid. The evaluation of the service record of a judicial officer for the purpose of formation of an opinion as to his/her potential for continued useful service is required to be made by the High Court which obviously means the Full Court on the administrative side. In all High Courts such evaluation, in the first instance, is made by a committee of senior Judges. The decision of the Committee is placed before the Full Court to decide whether the recommendation of the Committee should be accepted or not. The ultimate decision is always preceded by an elaborate consideration of the matter by Hon'ble Judges of the High Court who are familiar with the qualities and attributes of the judicial officer under consideration. This is also what had happened in the present case. The very process by which the decision is eventually arrived at, in our view, should permit a limited judicial review and it is only in a rare case where the decision taken is unsupported by any material or the same reflects a conclusion which, on the face of it, cannot be sustained that judicial review would be permissible. An enumeration of the extent of permissi[illegible]s

been made by this Court in *Syed T.A. Naqshbandi Vs. State of J&K.*[3] Paragraph 10 of the report which highlights the above position may be specifically noticed:-

> "Neither the High Court nor this Court, in exercise of its powers of judicial review, could or would at any rate substitute themselves in the place of the Committee/Full Court of the High Court concerned, to make an independent reassessment of the same, as if sitting on an appeal. On a careful consideration of the entire materials brought to our notice by learned counsel on either side, we are satisfied that the evaluation made by the Committee/Full Court forming their unanimous opinion is neither so arbitrary or capricious nor can be said to be so irrational as to shock the conscience of the Court to warrant or justify any interference. In cases of such assessment, evaluation and formulation of opinions, a vast range of multiple factors play a vital and important role and no one factor should be allowed to be overblown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. In the very nature of things it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some monstrous thing which ought not to have taken place has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court."
>
> (Emphasis is ours)

9. In the light of the above, we may now advert to the facts of the present case.

It is not in dispute that the adverse remarks/comments

3. (2003) 9 SCC 592.

dated 15.12.1995 had not been communicated to the respondent. It is also clear from the materials on record that the standing committee of the High Court in its meeting held on 3.1.1997 had decided to close the matter instead of proceeding any further. The subsequent ACRs of the respondent for the years 1997-1998 and 2000-2001 are sufficiently positive and depicts the respondent as an efficient judicial officer with a good reputation for honesty and impartiality. The respondent was promoted to the post of District and Sessions Judge on 5.9.1998. By Notification dated 17.2.2000 he was promoted to the selection grade of the Bihar Superior Judicial Service with effect from 1.1.1997. Therefore, not only the adverse remark dated 15.12.1995 was not acted upon but subsequent thereto promotion to the highest level in the district judiciary as well as selection grade in the said cadre was granted to the respondent. Promotion to the higher post of District Judge and placement in the selection grade is on an assessment of positive merit and ability. The said promotion(s), therefore, would have the effect of wiping out the adverse remark dated 15.12.1995. Such a view has in fact been expressed in *Brij Mohan Singh Chopra Vs. State of Punjab*[4] (Para 10). In the light of the above facts, we do not see how the High Court, on the administrative side, can be found to be justified in refusing to continue with the service of the respondent beyond the age of 58 years. The order dated 20.2.2001 passed by the High Court setting aside the said decision, therefore, will have to be affirmed and the present appeal dismissed. We order accordingly.

10. What should be the consequential relief that ought to be granted? A period of nearly 14 years has elapsed in the meantime. It will be highly inequitable to request the High Court to redo the exercise at this belated stage. Besides such a course of action will also be unnecessary, particularly, when the entire service record of the respondent had been placed before us, details whereof is also available in the impugned judgment

4. AIR 1987 SC 948.

of the High Court. Having considered the same, we deem it fit to order that the respondent be treated to have retired from service on completion of 60 years of age and all consequential benefits, including pay and pension on that basis, be made available to him forthwith and without any delay.

B.B.B. Appeal dismissed.

A

B. JAYARAJ

v.

STATE OF A.P.

(Criminal Appeal No. 696 of 2014)

MARCH 28, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

Prevention of Corruption Act, 1988 – ss.7 and 13(1)(d)(i)(ii) r/w s.13(2) and 20 –Complainant had a fair price shop – He alleged that appellant, Mandal Revenue officer, demanded bribe from him for release of PDS items – Conviction of appellant u/ss. 7 and 13(1)(d)(i)(ii) r/w s.13(2) by the Courts below – Justification – Held: Not justified – PW-2, the complainant, did not support the prosecution case insofar as demand of illegal gratification by appellant is concerned – Prosecution did not examine any other witness, present at the time when the money was allegedly handed over to appellant by the complainant, to prove that the same was pursuant to any demand made by the appellant – When the complainant himself had disowned what he had stated in the initial complaint, and there is no other evidence to prove that appellant had made any demand, the evidence of PW-1 (panch witness) and the contents of the initial complaint cannot be relied upon – Only other material available is recovery of tainted currency notes from possession of appellant – However, mere possession and recovery of currency notes from appellant without proof of demand will not bring home the offence u/s.7 – Proof of acceptance of illegal gratification can follow only if there is proof of demand – As the same is lacking, primary facts on the basis of which legal presumption u/s.20 can be drawn against the appellant are wholly absent.

The appellant was working as a Mandal Revenue officer (MRO). PW-2 had a fair price shop. The prosecution case was that PW-2 allegedly approached the appellant for release of essential commodities against his shop whereafter he demanded bribe to issue the release order. The Special Judge for SPE & ACB cases, City Civil Court, convicted the appellant under Sections 7 and 13 (1)(d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988. The conviction was affirmed by the High Court, and therefore the present appeal.

Allowing the appeal, the Court

HELD:1. The conviction of the appellant cannot be sustained either under Section 7 or under 13(1)(d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988. [Para 10] [561-F-G]

2. PW-2, the complainant, did not support the prosecution case. He disowned making the complaint (Exbt.P-11) and had stated in his deposition that the amount of Rs.250/- was paid by him to the appellant with a request that the same may be deposited with the bank as fee for the renewal of his licence. He was, therefore, declared hostile. However, PW-1 (panch witness) had testified that after being summoned by LW-9, on 13.11.1995, the contents of Exhibit P-11 (complaint) filed by PW-2 were explained to him in the presence of the complainant who acknowledged the fact that the appellant had demanded a sum of Rs.250/- as illegal gratification for release of the PDS items. It is on the aforesaid basis that the liability of the accused-appellant for commission of the offences alleged was held to be proved. In doing so, the trial court as well as the High Court also relied on the provisions of Section 20 of the Act to draw a legal presumption as regards the motive or reward for doing or forbearing to do any official act after

finding acceptance of illegal gratification by the accused-appellant. [Para 6] [559-F-H; 560-A-C]

3. Insofar as the offence under Section 7 of the Prevention of Corruption Act, 1988 is concerned, it is a settled position in law that demand of illegal gratification is *sine qua non* to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. [Para 7] [560-C-E]

C.M. Sharma vs. State of A.P. **(2010) 15 SCC 1: 2010 (13) SCR 1105 and** *C.M. Girish Babu vs. C.B.I* **(2009) 3 SCC 779: 2009 (2) SCR 1021 – relied on.**

4. PW2 did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt.P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. The only other material available is the recovery of the tainted currency notes from the possession of the accused. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position a[illegible]o

obtain any valuable thing or pecuniary advantage cannot be held to be established. [Para 8] [560-E-G; 561-A-C]

5. Insofar as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent. [Para 9] [561-D-F]

Case Law Reference:

2010 (13) SCR 1105	**relied on**	**Para 7**
2009 (2) SCR 1021	**relied on**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 696 of 2014.

From the Judgment & Order dated 25.04.2011 of the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 99 of 2005.

Guntur Prabhakar for the Appellant.

Mayur R. Shah, D. Mahesh Babu, Suchitra Hrangkhawl, Amjit Maqbool, Amit K. Nain, B. Ramakrishna Rao, Aditya Jain for the Respodent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 25.04.2011 passed by the High Court of Andhra Pradesh affirming the order of conviction passed by the Additional Special Judge for SPE & ACB cases, City Civil Court Hyderabad, whereby the accused appellant has been found guilty of commission of the offences under Sections 7 and 13 (1)(d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short "the Act"). The accused appellant has been sentenced to undergo rigorous imprisonment for one year for each of the offences and also to pay a fine of Rs.1000/- in default to suffer simple imprisonment for three months more.

3. According to the prosecution, the accused appellant was, at the relevant point of time, working as a Mandal Revenue officer (MRO) in the Ranga Reddy District of the State of Andhra Pradesh. The complainant K.Venkataiah (PW-2) had a fair price shop in Dadupally village. On 8.11.1995, the complainant, it is alleged, had approached the accused appellant for release of essential commodities against his shop for the month of November, 1995. The accused appellant, it is claimed, demanded a bribe of Rs.250/- to issue the release order. As the complainant was not willing to pay the said amount, he had approached listed witness No.9 K.Narsinga Rao, (since deceased) Deputy Superintendent of Police, ACB, Hyderabad on 9.11.1995 and submitted a written complaint (Exbt.P-11) before him. According to the prosecution, LW-9 after verifying the contents of the complaint registered a case and issued Exhibit P-12 (FIR). LW-9 directed the complainant to come with the bribe amount on 13.11.995. It is also alleged that LW-9 summoned PW-1, S. Hanuma Reddy, Deputy Director of Insurance to act as a panch witness and explained the details of the complaint (Exbt.P-11) to him. Furthermore, according to the prosecution, LW-9 got the currency notes treated with phenolphthalein powder and also explained to PW-1 the significance of the sodium carbonate solution test. The details of the trap that was planned ll

concerned including the complainant. Accordingly, the plan was put into execution and on receipt of the pre-arranged signal to the trap laying officer, the police party headed by LW-9, which also included PW-5, rushed into the office of the accused appellant. Thereafter, according to the prosecution, the sodium carbonate solution test was conducted on the right hand fingers of the accused as well as the right shirt pocket. Both tests proved to be positive. The tainted currency notes were recovered from the possession of the accused.

4. Chargesheet was filed against the accused-appellant on completion of investigation. Upon grant of sanction for prosecution, cognizance of the offences alleged was taken and charges were framed to which the accused pleaded not guilty. In the course of the trial 5 witnesses were examined on behalf of the prosecution and 12 documents (Exbt. P-1 to P-12) besides 10 material objects (MOs 1 to 10) were exhibited. The plea of the accused was that on the date of the trap, PW-2, the complainant had put the currency notes in his shirt pocket with a request to have the same deposited in the bank as fee for renewal of the licence of the complainant. It was at this point of time that the police party had come and seized the currency notes after taking the same from his pocket.

5. We have heard Mr. Guntur Prabhakar, learned counsel for the appellant and Mr. Mayur R. Shah, learned counsel appearing on behalf of the respondent-State.

6. PW-2, the complainant, did not support the prosecution case. He disowned making the complaint (Exbt.P-11) and had stated in his deposition that the amount of Rs.250/- was paid by him to the accused with a request that the same may be deposited with the bank as fee for the renewal of his licence. He was, therefore, declared hostile. However, PW-1 (panch witness) had testified that after being summoned by LW-9, K. Narsinga Rao, on 13.11.1995, the contents of Exhibit P-11 (complaint) filed by the complainant PW-2 were explained to him in the presence of the complainant who acknowledged the

fact that the accused appellant had demanded a sum of Rs.250/- as illegal gratification for release of the PDS items. It is on the aforesaid basis that the liability of the accused-appellant for commission of the offences alleged was held to be proved, notwithstanding the fact that in his evidence the complainant PW-2 had not supported the prosecution case. In doing so, the learned trial court as well as the High Court also relied on the provisions of Section 20 of the Act to draw a legal presumption as regards the motive or reward for doing or forbearing to do any official act after finding acceptance of illegal gratification by the accused-appellant.

7. In so far as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is *sine qua non* to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in *C.M. Sharma Vs. State of A.P.*[1] and *C.M. Girish Babu Vs. C.B.I.*[2]

8. In the present case, the complainant did not support the prosecution case in so far as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt.P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made

1. (2010) 15 SCC 1.
2. (2009) 3 SCC 779.

by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive in so far as the offence under Section 13(1)(d)(i)(ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established.

9. In so far as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent.

10. For the aforesaid reasons, we cannot sustain the conviction of the appellant either under Section 7 or under 13(1)(d)(i)(ii) read with Section 13(2) of the Act. Accordingly, the conviction and the sentences imposed on the accused-appellant by the trial court as well as the High Court by order dated 25.4.2011 are set aside and the appeal is allowed.

B.B.B. Appeal allowed.

P. RAMAKRISHNAM RAJU
v.
UNION OF INDIA & ORS.
(Writ Petition (Civil) No. 521 of 2002)

MARCH 31, 2014.

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

JUDICIARY:

Judicial service – High Court Judges (Salaries & Conditions of Service) Act, 1954 – s.14; First schedule Part I, Clause 2 – Pension for the retired judges of High Court who are directly appointed from the Bar – Clause 2 of Part I says that no pension is payable to the judges having less than 7 years of service as a judge – Constitutional validity of – Held: The Judges, who are appointed under Article 217(2)(a) being members of the Judicial Service, even if they serve as a Judge of the High Court for only one or two years, get full pension benefits because of the applicability of Rule 26B or because of their earlier entry into judicial service – However, the Judges of the High Court, who are appointed from the Bar do not get similar benefit of full pension – This is arbitrary and discriminatory – s.14 of the HCJ Act and Clause 2 of Part I of the First Schedule which governs the pension payable to Judges gives rise to unequal consequences – The existing scheme treats unequally the equals, which is violative of Articles 14 and 21 of the Constitution – Irrespective of the source from where the Judges are drawn, they must be paid the same pension just as they have been paid same salaries and allowances and perks as serving Judges – If the service of a judicial officer is counted for fixation of pension, there is no valid reason as to why the experience at Bar cannot be treated as equivalent for the same purpose – Thus, fixation

of higher pension to the Judges drawn from the Subordinate Judiciary who have served for shorter period in contradistinction to Judges drawn from the Bar who have served for longer period with less pension is highly discriminatory and breach of Article 14 of the Constitution – The classification itself is unreasonable without any legally acceptable nexus with the object sought to be achieved – Constitution of India, 1950 – Articles 14 and 21.

Scheme for post-retiral benefits to the retired Chief Justices and retired Judges of the respective High Courts – Held: Government of Andhra Pradesh sanctioned an amount of Rs.14,000/- per month to the retired Chief Justices of the High Court of Andhra Pradesh and an amount of Rs.12,000/- per month to the retired Judges of the High Court of Andhra Pradesh for defraying the services of an orderly, driver, security guard etc. and for meeting expenses incurred towards secretarial assistance on contract basis and a residential telephone free of cost with number of free calls to the extent of 1500 per month over and above the number of free calls per month allowed by the telephone authorities to both the retired Chief Justices and Judges of the High Court of Andhra Pradesh w.e.f. 01.04.2012 – Steps taken by the Government of Andhra Pradesh and other States who have already formulated such scheme appreciated – Other States who have so far not framed such scheme to also formulate the same, depending on the local conditions, for the benefit of the retired Chief Justices and retired Judges of the respective High Courts as early as possible.

The instant writ petitions were filed by the former Judges of the various High Courts as well as the Association of the Retired Judges of the Supreme Court and the High Courts elevated from the Bar. The prayer in the writ petitions was that for the purpose of determining the maximum pension permissible under Part-I of the First Schedule to the High Court Judges

(salaries and conditions of Service) Act, 1954, the number of years practiced as an Advocate should be taken into account and should be added to the service as a Judge of the High Court. It was further stated that in respect of Part-III of the First Schedule, which dealt with the Judges elevated from the State Judicial Service, almost all the Judges get full pension even if they have worked as a Judge of the High Court for 2 or 3 years and their entire service is added to their service as a Judge of the High Court for computing pension under this Part. For this reason, the members of the subordinate judiciary get more pension than the Judges elevated from the Bar on retirement. The petitioners prayed that though Part-I and Part-III Judges hold equivalent posts, they are not similarly situated in regard to pension and retirement benefits which is breach of Articles 14 and 21 of the Constitution of India and one rank one pension must be the norm in respect of a constitutional office. In appeal 4248-49/14, it was further prayed that the retired Judges of the High Courts should also be given enhanced allowance for domestic help/peon/driver, telephone expenses and other secretarial assistance.

Disposing of the writ petitions and the appeal 4248-49/14, the Court

HELD: 1. The Constitution of India provides for three-tier judicial system. The Union Judiciary-Establishment and Constitution of Supreme Court of India (Articles 124 to 147); The High Courts in the States (Articles 214 to 231) and Subordinate Courts (Article 233 to 237). The Constitution of India also provides for appointment of Judges from amongst the members of the Bar at all the three levels. The appointment of the Judges of the Supreme Court is governed by Article 124(3), (a), (b) and (c) of the Constitution. It envisages appointment from three sources: (i) from amongst the

Court having service of at least five years; (ii) the members of the Bar having a standing of not less than 10 years; and (iii) any person, who is, in the opinion of the President, is a distinguished jurist. The appointment of a Judge of the High Court is governed by Article 217(2)(a) and (b) of the Constitution which envisages appointments from two different sources: (a) from amongst the Judicial officers who have held the office for at least 10 years; and (b) the members of the Bar, who have been Advocates of a High Court for at least 10 years. The appointment of District Judges is governed by Article 233(2) of the Constitution which provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment. [Paras 6 to 9] [572-D-H; 573-A-B]

2. The Supreme Court Judges (Salaries & Conditions of Service) Act, 1958, (SCJ Act), the HCJ Act and the Rules made thereunder, regulate their salary and conditions of service. The provisions under both the Acts were similar prior to the Amendment Act, 2005. The service conditions of the Judges of the subordinate courts are governed by the Service Rules made under Article 309 of the Constitution of India. Section 13 of the SCJ Act read with Clause 2 of Part-I of the Schedule deals with the pension payable to the retired Judges of the Supreme Court. Similarly, Section 14 of the HCJ Act read with Clause 2 of Part-I of the First Schedule deals with the pension payable to the retired Judges of the High Courts. The provisions under both the Acts were similar prior to the Amendment Act, 2005. Clause 2 of Part-I to the First Schedule of the said Act deals with the pension for the retired Judges of the High Court, who are directly appointed from the Bar. Clause (2) of Part I of the First Schedule implies that no pension is payable to the

Judges having less than 7 years of service as a Judge. The above Section further shows that for a Judge of the High Court to receive full pension benefits, he should have completed 12 years of service as a Judge of the High Court. Section 13 and Clause 2 of the Schedule to the SCJ Act earlier contained similar prohibition with regard to the eligibility of pension to the Judges appointed from the Bar as contained in the HCJ Act. Both the Acts provide that no pension shall be payable to a Judge who has less than 7 years of service. [para 10 to 14] [573-B-E; 574-A-B, E-F, G-H; 575-A]

3. The Government, vide Amendment Act, 2005 (46/2005), added Section 13A to the SCJ Act. The condition of minimum 7 years of service as a Judge to become eligible for pension was omitted from the Section as well as from Clause 2 of its Schedule. [para 16] [576-E, G]

4. In the three-tier judicial system provided by the Constitution, members of the Bar, who join the Higher Judicial Service at the District Judges level, on retirement, get the benefit of 10 years addition to their service for the purposes of pension (Rule 26B of the DHJS Rules). Judges of the Supreme Court, who are appointed from the Bar given a period of 10 years to their service for the purposes of pension (Section 13A of the Amendment Act, 2005). However, the benefit of 10 years addition to their service for the purposes of pension is being denied to the Judges of the High court appointed from the Bar, which is arbitrary and violative of Article 14 of the Constitution of India. The Explanation (aa) appended to Article 217(2) of the Constitution of India envisages that, "in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the

requiring special knowledge of law after he became an advocate." The explanation thus treats the experience of an Advocate at the Bar and the period of judicial office held by him at par. [Paras 18, 19] [577-D-G]

5. The judges, who are appointed under Article 217(2)(a) being members of the Judicial Service, even if they serve as a Judge of the High Court for only one or two years, get full pension benefits because of the applicability of Rule 26B or because of their earlier entry into judicial service. However, the Judges of the High Court, who are appointed from the Bar do not get similar benefit of full pension, which is arbitrary and discriminatory. Section 14 of the HCJ Act and Clause 2 of Part I of the First Schedule which governs the pension payable to Judges gives rise to unequal consequences. The existing scheme treats unequally the equals, which is violative of Articles 14 and 21 of the Constitution of India. To remove the above discrimination, in the Chief Justices Conference held on April 5 and 6, 2013, it was, *inter alia*, resolved that, "for pensionary benefits, ten years' practice as an advocate be added as a qualifying service, for Judges elevated from the Bar." (Resolution No.18 (viii). It fully supports the petitioner's submission. [Paras 20 to 22] [577-H; 578-A-E]

Union of India vs. *Devki Nandan Agarwal* **AIR 1992 SC 196 – held inapplicable.**

6. When persons who occupied the Constitutional Office of Judge, High Court retire, there should not be any discrimination with regard to the fixation of their pension. Irrespective of the source from where the Judges are drawn, they must be paid the same pension just as they have been paid same salaries and allowances and perks as serving Judges. Only practicing Advocates who have attained eminence are invited to accept Judgeship of the High Court. Because of the

status of the office of High Court Judge, the responsibilities and duties attached to the office, hardly any advocate of distinction declines the offer. Though it may be a great financial sacrifice to a successful lawyer to accept Judgeship, it is the desire to serve the society and the high prestige attached to the office and the respect the office commands that propel a successful lawyer to accept Judgeship. The experience and knowledge gained by a successful lawyer at the Bar can never be considered to be less important from any point of view *vis-à-vis* the experience gained by a judicial officer. If the service of a judicial officer is counted for fixation of pension, there is no valid reason as to why the experience at Bar cannot be treated as equivalent for the same purpose. [para 24] [578-G-H; 579-A-D]

Kuldip Singh vs. *Union of India* **(2002) 9 SCC 218: 2002 (3) SCR 620;** *Govt. of NCT of Delhi & Ors.* vs. *All India Young Lawyers' Association (Registered) And Anr* **(2009) 14 SCC 49: 2009 (3) SCR 555;** *All India Judges Association* vs. *Union of India* **AIR 1992 SC 165;** *All India Judges Association* vs. *Union of India* **AIR 1993 SC 2493: 1993(1) Suppl. SCR 749 – referred to.**

7. The fixation of higher pension to the Judges drawn from the Subordinate Judiciary who have served for shorter period in contradistinction to Judges drawn from the Bar who have served for longer period with less pension is highly discriminatory and breach of Article 14 of the Constitution. The classification itself is unreasonable without any legally acceptable nexus with the object sought to be achieved. The meager pension for Judges drawn from the Bar and served for less than 12 years on the Bench adversely affects the image of the Judiciary. When pensions are meager because of the shorter service, lawyers who attain distinction in the profession may not, because of this [illegible] e

office of Judgeship. When capable lawyers do not show inclination towards Judgeship, the quality of justice declines. In most of the States, the Judgeship of the High Court is offered to advocates who are in the age group of 50-55 years, since pre-eminence at the Bar is achieved normally at that age. After remaining at the top for a few years, a successful lawyer may show inclination to accept Judgeship, since that is the culmination of the desire and objective of most of the lawyers. When persons holding constitutional office retire from service, making discrimination in the fixation of their pensions depending upon the source from which they were appointed is in breach of Articles 14 and 16(1) of the Constitution. One rank one pension must be the norm in respect of a Constitutional Office. When a Civil Servant retires from service, the family pension is fixed at a higher rate whereas in the case of Judges of the High Court, it is fixed at a lower rate. No discrimination can be made in the matter of payment of family pension. The expenditure for pension to the High Court Judges is charged on the Consolidated Fund of India under Article 112(3)(d)(iii) of the Constitution. Thus, for pensionary benefits, ten years' practice as an advocate should be added as a qualifying service for Judges elevated from the Bar. Further, in order to remove arbitrariness in the matter of pension of the Judges of the High Courts elevated from the Bar, the reliefs, as mentioned above are to be reckoned from 01.04.2004, the date on which Section 13A was inserted by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 2005 (46 of 2005). Requisite amendment must be carried out in the High Court Judges Rules, 1956 with regard to post-retiral benefits as has been done in relation to the retired Judges of the Supreme Court in terms of amendment carried out by Rule 3B of the Supreme Court Judges Rules, 1959. [Paras 25 to 29] [579-D-H; 580-A-G]

Civil appeal 4248-49/14

8. With reference to the claim for the retired judges, in the Conference of Chief Ministers and Chief Justices of the High Courts held on 18.09.2004, a Resolution was passed. Pursuance thereto, most of the States in the country extended various post-retiral benefits to the retired Chief Justices and retired Judges of the respective High Courts. By G.O.Ms.No. 28 dated 16.03.2012 issued by Law Department, Government of A.P., sanctioned an amount of Rs.14,000/- p.m. to the retired Chief Justices of the High Court of Andhra Pradesh and an amount of Rs.12,000/- p.m. to the retired Judges of the High Court of A.P. for defraying the services of an orderly, driver, security guard etc. and for meeting expenses incurred towards secretarial assistance on contract basis and a residential telephone free of cost with number of free calls to the extent of 1500 p.m. over and above the number of free calls per month allowed by the telephone authorities to both the retired Chief Justices and Judges of the High Court of A.P. w.e.f. 01.04.2012. The steps taken by the Government of A.P. and other States who have already formulated such scheme are appreciated. The States who have not so far framed such scheme should formulate the same, depending on the local conditions, for the benefit of the retired Chief Justices and retired Judges of the respective High Courts as early as possible. [paras 32 to 34] [581-C-D, F-H; 581-A-C]

Case Law Reference:

2002 (3) SCR 620	referred to	Para 15
2009 (3) SCR 555	referred to	Para 16
AIR 1992 SC 196	held inapplicable	Para 23
AIR 1992 SC 165	referred to	Para 23
1993 (1) Suppl. SCR 749	referre	

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

Writ Petition (Civil) No. 521 of 2002.

WITH

W.P.(C) No. 523 of 2002, 38 of 2003, 524 of 2002, 37 of 2003, 465 of 2005, and C.A. Nos. 4248-4249 of 2014.

A. Mariarputham AG, Rakesh K. Khanna, ASG, M.N. Rao, P.P. Rao, Pravin H. Parekh, S.K. Dubey, M.R. Calla, Fakhruddin, C.M. Nayar, S.K. Agarwal, A.K. Shrivastava, J.S. Attri, Dr. K.P. Kylasanatha Pillay, K. Padmanabam Nair, S.S. Shamshery, Krishna Sarma, Suryanarayana S, Manjit Singh, AAGs, Promila, S. Thananjayan, Sameer Parekh, Sumit Goel, Rukhmini Bobde, Abhishek Vinod Deshmukh, Akshat Kulshrestha, Swarnendu Chatterjee (for Parekh & Co.), Anupam Lal Das, Harshvardhan Singh Rathore, Ruchi Kohli, Priyanka Bharihoke, D.K. Thakur, B.V. Balaram Das, Irshad Ahmad, Abhisth Kumar, Raman Yadav, Rachana Srivastava, Utkarsh Sharma, Pratiksha Chaturvedi, B. Balaji, R. Rakesh Sharma, S. Anand, A. Selvin Raja, Gopal Singh, Manish Kumar, Chandan Kumar, Anil Shrivastav, Rituraj Biswas, Sapam Biswajit Meitei, Khwairakpam Nobin Singh, Ashok Mathur, Sunil Fernandes, Aruna Mathur, Yusuf Khan, Arputham, Aruna & Co., Hemantika Wahi, Preeti Bhardwaj, Harshvardhan Singh Rathore, Riku Sarma, Navnit Kumar (for Corporate Law Group), Anip Sachthey, Mohit Paul, Apoorv Kurup, Aniruddha P. Mayee, Charudatta Mahindarkar, K. Enatoli Sema, Amit Kumar, Pragati Neekhra, K.N. Madhusoodhanan, R. Sathish, Vivekta Singh, Nupur Choudhary, Kamal Mohan Gupta, Balasubramanian, K.V. Jagdishvaran, G. Indira, Jayesh Gaurav, Ratan Kumar Choudhuri, V.G. Pragasam, Praburamasubramanian, S.J. Aristotle, Ranjan Mukherjee, C.D. Singh, Sunil K. Jain, Sachin Sharma, Ashok K. Mahajan, P. Parmeswaran, Sibo Sankar Mishra, Rajiv Nanda, R. Nedumaran, Sanjay R. Hegde, P.V. Yogeshwaran, Avijit Bhattacharjee, R. Sathish, G.N. Reddy, Abhijit Sengupta, D.S.

Mahra, Naresh K. Sharma, Kamini Jaiswal, T.C. Sharma, T. Harish Kumar, Aruneshwar Gupta, Dharmendra Kumar Sinha, G. Prakash, G.N. Reddy, A. Venayagam Balan, Asha Joseph, V.S. Lakshmi, Varinder Kumar Sharma for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. The main question which arises for consideration is whether High Court Judges, who are appointed from the Bar under Article 217(2)(b) of the Constitution of India, on retirement, are entitled for an addition of 10 years to their service for the purposes of their pension?

2. The above petitions have been filed by former Judges of the various High Courts of the country as well as by the Association of the Retired Judges of the Supreme Court and the High Courts elevated from the Bar.

3. The petitioners have prayed that the number of years practiced as an advocate shall be taken into account and shall be added to the service as a Judge of the High Court for the purpose of determining the maximum pension permissible under Part-I of the First Schedule to the High Court Judges (Salaries and Conditions of Service) Act, 1954 (in short 'the HCJ Act'). It was further stated that in respect of Part-III of the First Schedule, which deals with the Judges elevated from the State Judicial Service, almost all the Judges get full pension even if they have worked as a Judge of the High Court for 2 or 3 years and their entire service is added to their service as a Judge of the High Court for computing pension under this Part. For this reason, the members of the subordinate judiciary get more pension than the Judges elevated from the Bar on retirement.

4. In view of the above, the petitioners prayed that though Part-I and Part-III Judges hold equivalent posts, they are not similarly situated in regard to pension and retirement benefits which is breach of Articles 14 and 21 of the Constitution of India and one rank one pension must be the

constitutional office. It is further prayed that the retired Judges of the High Courts should also be given enhanced allowance for domestic help/peon/driver, telephone expenses and other secretarial assistance.

5. We have heard the arguments advanced by learned counsel for the parties and perused the records.

6. The Constitution of India provides for three-tier judicial system. The Union Judiciary-Establishment and Constitution of Supreme Court of India (Articles 124 to 147); The High Courts in the States (Articles 214 to 231) and Subordinate Courts (Article 233 to 237). The Constitution of India also provides for appointment of Judges from amongst the members of the Bar at all the three levels.

7. The appointment of the Judges of the Supreme Court is governed by Article 124(3),(a), (b) and (c) of the Constitution. It envisages appointment from three sources: (i) from amongst the Judges of the High Court having service of at least five years; (ii) the members of the Bar having a standing of not less than 10 years; and (iii) any person, who is, in the opinion of the President, is a distinguished jurist.

8. The appointment of a Judge of the High Court is governed by Article 217(2)(a) and (b) of the Constitution which envisages appointments from two different sources: (a) from amongst the Judicial officers who have held the office for at least 10 years; and (b) the members of the Bar, who have been Advocates of a High Court for at least 10 years.

9. The appointment of District Judges is governed by Article 233(2) of the Constitution which provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

10. The Supreme Court Judges (Salaries & Conditions of Service) Act, 1958, (in short 'the SCJ Act'), the HCJ Act and

the Rules made thereunder, regulate their salary and conditions of service. The provisions under both the Acts were similar prior to the Amendment Act, 2005. The service conditions of the Judges of the subordinate courts are governed by the Service Rules made under Article 309 of the Constitution of India.

11. Section 13 of the SCJ Act read with Clause 2 of Part-I of the Schedule deals with the pension payable to the retired Judges of the Supreme Court. Similarly, Section 14 of the HCJ Act read with Clause 2 of Part-I of the First Schedule deals with the pension payable to the retired Judges of the High Courts. The provisions under both the Acts were similar prior to the Amendment Act, 2005. Relevant portion of Section 14 of the HCJ Act reads as follows:

> "**14. Pension payable to Judges.-** Subject to the provisions of this Act, every Judge shall, on his retirement, be paid a pension in accordance with the scale and provisions in Part 1 of the First Schedule:
>
> Provided that no such pension shall be payable to a Judge unless-
>
> (a) he has completed not less than twelve years of service for pension; or
>
> (b) he has attained the age of sixty-two years; or
>
> (c) his retirement is medically certified to be necessitated by ill-health;"

12. Clause 2 of Part-I to the First Schedule of the said Act deals with the pension for the retired Judges of the High Court, who are directly appointed from the Bar, which reads as under:-

> "2. Subject to the other provisions of this part, the pension payable to a Judge, to whom this part apply and who has completed not less than 7 years of service for pension shall be

(a) for service as Chief Justice in any High Court, Rs.43,890/- per annum for each completed year of service; (b) for service as any other Judge in any High Court Rs.34,350/- per annum for each completed year of service.

Provided that the pension under this paragraph shall in no case exceed Rs.5,40,000/- per annum in the case of Chief Justice and Rs.4,80,000/- per annum in case of any other Judges."

13. The above-noted Clause (2) of Part I of the First Schedule implies that no pension is payable to the Judges having less than 7 years of service as a Judge. The above Section further shows that for a Judge of the High Court to receive full pension benefits, he should have completed 12 years of service as a Judge of the High Court. It is submitted that when members of the Bar are offered the post of High Court Judges, they are generally at the age of about 50 years or above and at the prime of their practice, which they have to give up to serve the system. Therefore, many of them are reluctant to accept the offer as the post-retirement benefits are not attractive enough.

14. Section 13 and Clause 2 of the Schedule to the SCJ Act earlier contained similar prohibition with regard to the eligibility of pension to the Judges appointed from the Bar as contained in the HCJ Act. Both the Acts provide that no pension shall be payable to a Judge who has less than 7 years of service.

15. In *Kuldip Singh vs. Union of India,* (2002) 9 SCC 218, the petitioner therein, who was appointed as a Judge of the Supreme Court from the Bar, on his retirement was denied the benefit of pension as he did not fulfill the requisite conditions. Consequently, he filed a Writ Petition before this Court praying, *inter alia,* (a) to take into account 10 years of practice at the Bar in addition to his service for the purposes of pension. (b) In the alternative, prayed for a direction to treat the appointees under Article 124(3)(b) for the purposes of pension at *par* with

the appointees under Article 124(3)(a). On 24.09.2002, while issuing notice, this Court passed the following order:-

"1. In this writ petition, the question which arises for consideration relates to pension which is payable to a Judge who retires from this Court after having been appointed directly from the Bar. Similar question also arises with regard to Bar appointees to the High Courts.

2. Experience has shown that the Bar appointees especially, if they are appointed at the age of 50 years and above, get lesser pension than the Service Judge appointees. It is to be seen that as far as the Constitution of India is concerned, it stipulates the manner of appointment of the Judges and provides what may be termed as the qualification required for their appointment. The Constitution contemplates appointment to the High Courts from amongst members of the Bar as well as from amongst the judicial officers. The Constitution does not provide for any specific quota. Till a few years ago in practice 66 2/3% of vacancies were filled from amongst members of the Bar and 33 1/3% from the judicial services. It is only in the Conference of 4-12-1993 of the Chief Ministers and the Chief Justices that it was decided that the number of vacancies from amongst the judicial officers "might go up to 40%". The decision of 4-12-1993, cannot mean that the number of Judges from the services has to be 40%. The normal practice which has been followed was 2/3rds and 1/3rd from amongst members of the Bar and judicial services respectively and it is only on a rare occasion that the Chief Justice of a High Court can propose more Service Judges being appointed if suitable members of the Bar are not available. But this cannot be more than 40% in any case. It may here also be noted that in the Chief Justices' Conference held in 1999, it was unanimously resolved that the quota should normally be 66 2/3% and 33 1/3% *and it is on this basis the Government should determine the likely numb* *d*

then consider whether the High Court Judges who are appointed from amongst the members of the Bar should not be given the same weightage as is now sought to be given to the members of the Bar who are appointed to this Court as far as pension is concerned."

(Emphasis supplied)

16. The Government, vide Amendment Act, 2005 (46/2005), added Section 13A to the SCJ Act which reads as under:

"Subject to the provision of this Act, a period of ten years shall be added to the service of a Judge for the purpose of his pension, who qualified for appointment as such Judge under sub-clause (b) of Clause (3) of Article 124 of the Constitution."

Therefore, the condition of minimum 7 years of service as a Judge to become eligible for pension was omitted from the Section as well as from Clause 2 of its Schedule. In view of the amendment, the said writ petition was dismissed as withdrawn on 06.12.2005. However, petitioner's writ petition and other connected matters remained pending.

17. In *Govt. of NCT of Delhi & Ors.* vs. *All India Young Lawyers' Association (Registered) And Another*, (2009) 14 SCC 49, a Lawyers' Association filed a writ petition in the High Court of Delhi praying therein that the benefit of 15 years addition of service be given to the Judge, who is directly appointed from the Bar to the Higher Judicial Service for the purposes of pension. The writ petition was allowed and Rule 26B was ordered to be added to the Delhi Higher Judicial Service Rules, 1970. The Govt. of NCT, Delhi challenged the said judgment and order and this Court upheld the validity of Rule 26B, however, the period to be added to the service for the purposes of pension, was reduced to 10 years or actual practice at the Bar whichever is less.

18. In the three-tier judicial system provided by the Constitution, members of the Bar, who join the Higher Judicial Service at the District Judges level, on retirement, get the benefit of 10 years addition to their service for the purposes of pension (Rule 26B of the DHJS Rules). Judges of the Supreme Court, who are appointed from the Bar given a period of 10 years to their service for the purposes of pension (Section 13A of the Amendment Act, 2005). However, the benefit of 10 years addition to their service for the purposes of pension is being denied to the Judges of the High court appointed from the Bar, which is arbitrary and violative of Article 14 of the Constitution of India.

19. The Explanation (aa) appended to Article 217(2) of the Constitution of India envisages that, "in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate." The explanation thus treats the experience of an Advocate at the Bar and the period of judicial office held by him at par.

20. The Judges, who are appointed under Article 217(2)(a) being members of the Judicial Service, even if they serve as a Judge of the High Court for only one or two years, get full pension benefits because of the applicability of Rule 26B or because of their earlier entry into judicial service. However, the Judges of the High Court, who are appointed from the Bar do not get similar benefit of full pension, which is arbitrary and discriminatory.

21. Section 14 of the HCJ Act and Clause 2 of Part I of the First Schedule which governs the pension payable to Judges gives rise to unequal consequences. The existing scheme treats unequally the equals, which is violative of Articles 14 and 21 of the Constitution of India.

22. To remove the above discri[illegible]f

Justices Conference held on April 5 and 6, 2013, it was, *inter alia*, resolved that, "for pensionary benefits, ten years' practice as an advocate be added as a qualifying service, for Judges elevated from the Bar." (Resolution No.18 (viii). It fully supports the petitioner's submission.

23. The ratio of the decision cited by the respondent in *Union of India* vs. *Devki Nandan Agarwal*, AIR 1992 SC 196 is not applicable because the reliefs prayed therein were entirely different and also because it is *per incuriam* in view of the subsequent decisions of this Court of equal strength in *All India Judges Association* vs. *Union of India*, AIR 1992 SC 165; and *All India Judges Association* vs. *Union of India*, AIR 1993 SC 2493 wherein the requirement of independence of the judiciary have been underlined as also two decisions cited above i.e. *Kuldip Singh (supra)* and *All India Young Lawyers' Association (supra)*.

24. When persons who occupied the Constitutional Office of Judge, High Court retire, there should not be any discrimination with regard to the fixation of their pension. Irrespective of the source from where the Judges are drawn, they must be paid the same pension just as they have been paid same salaries and allowances and perks as serving Judges. Only practicing Advocates who have attained eminence are invited to accept Judgeship of the High Court. Because of the status of the office of High Court Judge, the responsibilities and duties attached to the office, hardly any advocate of distinction declines the offer. Though it may be a great financial sacrifice to a successful lawyer to accept Judgeship, it is the desire to serve the society and the high prestige attached to the office and the respect the office commands that propel a successful lawyer to accept Judgeship. The experience and knowledge gained by a successful lawyer at the Bar can never be considered to be less important from any point of view vis-à-vis the experience gained by a judicial officer. If the service of a judicial officer is counted for fixation of pension, there is no valid reason as to why the experience

at Bar cannot be treated as equivalent for the same purpose.

25. The fixation of higher pension to the Judges drawn from the Subordinate Judiciary who have served for shorter period in contradistinction to Judges drawn from the Bar who have served for longer period with less pension is highly discriminatory and breach of Article 14 of the Constitution. The classification itself is unreasonable without any legally acceptable nexus with the object sought to be achieved.

26. The meager pension for Judges drawn from the Bar and served for less than 12 years on the Bench adversely affects the image of the Judiciary. When pensions are meager because of the shorter service, lawyers who attain distinction in the profession may not, because of this anomaly, accept the office of Judgeship. When capable lawyers do not show inclination towards Judgeship, the quality of justice declines.

27. In most of the States, the Judgeship of the High Court is offered to advocates who are in the age group of 50-55 years, since pre-eminence at the Bar is achieved normally at that age. After remaining at the top for a few years, a successful lawyer may show inclination to accept Judgeship, since that is the culmination of the desire and objective of most of the lawyers. When persons holding constitutional office retire from service, making discrimination in the fixation of their pensions depending upon the source from which they were appointed is in breach of Articles 14 and 16(1) of the Constitution. One rank one pension must be the norm in respect of a Constitutional Office.

28. When a Civil Servant retires from service, the family pension is fixed at a higher rate whereas in the case of Judges of the High Court, it is fixed at a lower rate. No discrimination can be made in the matter of payment of family pension. The expenditure for pension to the High Court Judges is charged on the Consolidated Fund of India under Article 112(3)(d)(iii) of the Constitution.

29. In the light of what is discussed, we accept the petitioners' claim and declare that for pensionary benefits, ten years' practice as an advocate be added as a qualifying service for Judges elevated from the Bar. Further, in order to remove arbitrariness in the matter of pension of the Judges of the High Courts elevated from the Bar, the reliefs, as mentioned above are to be reckoned from 01.04.2004, the date on which Section 13A was inserted by the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 2005 (46 of 2005). Requisite amendment be carried out in the High Court Judges Rules, 1956 with regard to post-retiral benefits as has been done in relation to the retired Judges of the Supreme Court in terms of amendment carried out by Rule 3B of the Supreme Court Judges Rules, 1959.

Civil Appeal Nos. of 2014

(Arising out of S.L.P. (C) Nos. 9558-9559 of 2010

30. Leave granted.

31. At the instance of the Association of retired Judges of the Supreme Court and High Courts, the Division Bench of the High Court of Rajasthan at Jaipur directed the State Government to pay a sum of Rs.9,000/- per month to a retired Chief Justice of the High Court to meet expenses of domestic help/peon/driver/telephone expenses and secretarial assistance etc. and Rs. 7,500/- per month to a retired Judge of the High Court for the same purposes. The said order shall be effective from 01.02.2010. Questioning the same, the State of Rajasthan has filed the above appeal.

32. With reference to the above claim and the order of the High Court, in the Conference of Chief Ministers and Chief Justices of the High Courts held on 18.09.2004, the following Resolution was passed:

"18. Augmenting of post-retiral benefits of Judges.

Xxx xxxxx

[vi] As regards post-retiral benefits to the retired Judges of the High Courts, the scheme sanctioned by the State of Andhra Pradesh be adopted and followed in all the States, except where better benefits are already available."

33. It is brought to our notice that in pursuance of the said Resolution, most of the States in the country have extended various post-retiral benefits to the retired Chief Justices and retired Judges of the respective High Courts. By G.O.Ms.No. 28 dated 16.03.2012 issued by Law Department, Government of Andhra Pradesh sanctioned an amount of Rs.14,000/- per month to the retired Chief Justices of the High Court of Andhra Pradesh and an amount of Rs.12,000/- per month to the retired Judges of the High Court of Andhra Pradesh for defraying the services of an orderly, driver, security guard etc. and for meeting expenses incurred towards secretarial assistance on contract basis and a residential telephone free of cost with number of free calls to the extent of 1500 per month over and above the number of free calls per month allowed by the telephone authorities to both the retired Chief Justices and Judges of the High Court of Andhra Pradesh w.e.f. 01.04.2012.

34. While appreciating the steps taken by the Government of Andhra Pradesh and other States who have already formulated such scheme, by this order, we hope and trust that the States who have not so far framed such scheme will formulate the same, depending on the local conditions, for the benefit of the retired Chief Justices and retired Judges of the respective High Courts as early as possible preferably within a period of six months from the date of receipt of copy of this order.

35. All the Writ Petitions and the appeals are disposed of on the above terms. In view of the disposal of the writ petitions, no orders are required in the intervention application.

D.G. Writ Petitions & Appeals disposed of.