RAM NIRANJAN ROY
v.
STATE OF BIHAR AND ORS.
(Criminal Appeal No. 1240 of 2004)

MARCH 31, 2014

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

CONTEMPT OF COURTS ACT, 1971:

s. 14 - Contempt of court - Contemner appearing-in-person before High Court and shouting at court and making false statement before court - High Court holding him guilty of contempt of court and directing him to be taken into custody and to be sent to jail for 24 hours as punishment - Held: The intemperate language used by the appellant while addressing the Judges of the High Court is most objectionable and contumacious - He did not show any remorse - He did not tender any apology, but, continued his rude behaviour of shouting at the court and baiting the court - By this behaviour he lowered the dignity and authority of the High Court - He challenged the majesty of the High Court by showing utter disrespect to it - Undoubtedly, he committed contempt of the High Court in its presence and hearing - He is, therefore, guilty of having committed contempt in the face of the High Court u/s 14 - High Court cannot be faulted for punishing the appellant for contempt of court - Constitution of India, 1950 - Art. 215.

s. 2(c) - Criminal contempt of court - Contemner in appeal before Supreme Court filing copy of judgment of High Court by replacing words in it and filing false affidavit - Held: Contemner is guilty of tampering with High Court's order and filing it in Supreme Court - This would be criminal contempt as defined by s. 2(c) - Further he has filed false affidavit before

Supreme Court - He is guilty of contempt of Supreme Court - He is directed to pay a fine of Rs. 25,000/- - Constitution of India, 1950 - Art. 129.

CONTEMPT OF COURT:

Contempt in the face of court - Held: When a contempt is committed in the face of the High Court or the Supreme Court to scandalize or humiliate the Judge, instant action may be necessary - There was no question of giving the appellant any opportunity to make his defence - Natural justice - Opportunity of hearing.

In a writ petition (C.W.J.C. No.1311 of 2003), filed in public interest, raising several issues relating to law and order problem in the State of Bihar, the High Court directed the Director General of Police to make a list of officers starting from the Station House Officers up to the Additional Director General of Police, of those who had remained in their station for more than four years. The appellant, a Deputy Superintendent of Police, and claiming himself to be the President of Bihar Police Seva Sangh, filed an intervention application, stating that transfers and postings of the officers of Bihar Police Service were done arbitrarily in violation of guidelines framed by the Home Department of the Government of Bihar. He referred to a writ petition filed by him (C.W.J.C. No.12225 of 1999) against the State of Bihar for an order directing the respondents to implement the said guidelines, which was pending in the High Court. He further stated that C.W.J.C. No.12225 of 1999 should be heard along with C.W.J.C. No.1311 of 2003, and prayed for his impleadment in C.W.J.C. No.1311 of 2003. On 27/01/2004, the appellant appeared in-person before the High Court. He was stated to have shouted at the Court. The High Court observed that the appellant baited the court. In view of the contumacious behaviour of the appellant, the High Court directed [illegible] o

custody by the Court Officer and the Sergeant and sent to jail as punishment for a day i.e. for twenty four hours. His intervention application came to be rejected.

Disposing of the appeal, the Court

HELD: 1.1 The appellant wants to create an impression that he is fighting for the cause of police officers of Bihar, but a careful reading of his application makes it clear that he is espousing his own cause. The High Court while dealing with the question of law and order situation in Bihar, was looking into the State Government's policy of postings and transfer of police officers, obviously because that has a direct bearing on efficiency and rectitude of the police officers. The High Court had directed the respondents to submit a list of officers who were not removed from their station for more than four years. Admittedly, the appellant is posted at Patna for several years. The appellant was unhappy and disturbed about the task undertaken by the High Court. It is this that made him intervene in C.W.J.C. No.1311 of 2003. [para 4-5] [590-F-G, H; 591-A, B-C]

1.2 The contents of the impugned order of the High Court reflect the appellant's rude behaviour. He shouted at the Judges. The intemperate language used by the appellant while addressing the Judges of the High Court is most objectionable and contumacious. He told the court that his application should be heard along with Public Interest Litigation as it related to postings and transfers of police officers. On scrutiny, it was found that it mainly related to his transfer. Thus, he made a wrong statement before the court. He, then, stated that he was a protected staff member and had immunity from transfer and he could not be touched. He tried to overawe the court by producing a Cabinet Minister's letter addressed to the Chief Minister recommending his case. The Court deprecates this conduct. [para 9 and 18] [593-F-G; 594-B-C; 601-B]

1.3 The appellant did not show any remorse. He did not tender any apology, but, continued his rude behaviour of shouting at the court and baiting the court. By this behaviour he lowered the dignity and authority of the High Court. He challenged the majesty of the High Court by showing utter disrespect to it. Undoubtedly, he committed contempt of the High Court in its presence and hearing. He is, therefore, guilty of having committed contempt in the face of the High Court. His case is squarely covered by s. 14 of the Contempt of Courts Act, 1971. [para 9] [594-D-E]

Ranveer Yadav v. State of Bihar **2010 (6) SCR 1073 = (2010) 11 SCC 493 ;** *Pritam Pal v. High Court of Madhya Pradesh, Jabalpur, through Registrar* **1993 Supp (1) SCC 529 and** *Prakash Singh and Ors. v. Union of India and Ors.* **2006 (6) Suppl. SCR 473 = (2006) 8 SCC 1 - relied on**

Re: Vinay Chandra Mishra **1995 (2) SCR 638 = (1995) 2 SCC 584 - referred to.**

1.3 When a contempt is committed in the face of the High Court or the Supreme Court to scandalize or humiliate the Judge, instant action may be necessary. If the courts do not deal with such contempt with strong hand, that may result in scandalizing the institution thereby lowering its dignity in the eyes of the public. To prevent erosion of that faith, contempts committed in the face of the court need a strict treatment. Therefore, since the contempt was gross and it was committed in the face of the High Court, the Judges had to take immediate action to maintain honour and dignity of the High Court. There was no question of giving the appellant any opportunity to make his defence. [para 14] [597-D-G]

Leila David(6) v. State of Maharashtra and Others **2009 (15) SCR 317 = (2009) 10 SCC 337 - relied on.**

2.1 In this Court also the appellant's behaviour is far from satisfactory. He stated before this Court that he had filed an application for bail in the High Court, but the High Court did not consider it. There is no bail application in the record of the High Court. Still worse is the tampering of the impugned order. In the copy of the impugned order filed in this Court, by replacing the word 'shouted' by the words 'didn't shout', the appellant has changed the entire meaning of the sentence to suit his case that he did not shout in the court. Thus, he is guilty of tampering with the High Court's order and filing it in this Court. This would be criminal contempt as defined by s. 2(c) of the Contempt of Courts Act, 1971. Further, in this Court the appellant has filed a false affidavit. This amounts to contempt of this Court. Even in this Court he has not tendered apology. [para 14, 15 and 17] [597-G, 598-B, E-G; 600-G]

Chandra Shashi v. Anil Kumar Verma **1994 (5) Suppl. SCR 465 = (1995) 1 SCC 421;** *In Re: Bineet Kumar Singh* **2001 (3) SCR 424 = (2001) 5 SCC 501 - relied on.**

2.2 It cannot be said that since the respondents have not filed affidavit, the appellant's case is unrebutted. A contempt matter is essentially between the contemnor and the court. On the basis of the record and the attendant circumstances, the court has to decide whether there is any contempt or not. The facts of the case are gross. The contempt is in the face of the High Court. The fact that the respondents have not filed affidavit in reply does not dilute the contempt committed by the appellant. [para 19] [601-C-E]

2.3 Therefore, this Court is of the view that the High Court cannot be faulted for punishing the appellant for contempt of court. No interference is necessary with the impugned order. As regards the contempt of this Court committed by the appellant, he is directed to pay a fine of Rs.25,000/-, failing which he shall suffer simple imprisonment for seven days. [para 20] [601-F-G]

Case Law Reference:

2009 (15) SCR 317	**relied on**	**para 8**
1995 (2) SCR 638	**referred to**	**para 10**
2010 (6) SCR 1073	**relied on**	**para 11**
1993 Supp (1) SCC 529	**relied on**	**para 12**
1994 (5) Suppl. SCR 465	**relied on**	**para 15**
2001 (3) SCR 424	**relied on**	**para 16**
2006 (6) Suppl. SCR 473	**relied on**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1240 of 2004.

From the Judgment and Order dated 27.01.2004 of the Division Bench of High Court of Judicature at Patna in CWJC No. 1311 of 2003.

Appellant-in-person.

Siddharth Luthra, ASG (A.C.), Anandana Handa, Aditya Singla, Supriya Juneja, Prerna Singh, Gopal Singh for the Respondents.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. A petition was filed in public interest in the Patna High Court being C.W.J.C. No. 1311 of 2003 by Bihar Vyavsayik Sangharsh Morcha and another raising several issues relating to law and order problem in the State of Bihar. The State of Bihar, the Director General of Police of Bihar and others were made party respondents. The issues raised inter alia were whether the respondents were duty bound to provide safe and healthy atmosphere for the proper development

whether the inaction of the respondents was violative of fundamental rights guaranteed under Articles 19 and 20 of the Constitution of India. The petitioner inter alia sought direction to the respondents to take measures to stop exploitation of shopkeepers, dealers, artisans, labourers and industrial units by officers and police personnel.

2. The High Court issued notices to the respondents pursuant to which they filed affidavits. On 14/08/2003 the High Court directed the Director General of Police to make a list of officers from the Station House Officers upto the Additional Director General of Police, of those who have remained in their station for more than four years. Relevant paragraphs from the High Court's order could be quoted:

"The court suggests the following measures as an ad interim exercise:

a) Let the Director General Police make out a list of officers from the Station House Officer upto the Additional Director General of Police, of those who have remained in their station for more than four years. This dossier is to be supported with information from service record as to which officer throughout their career has remained at which station and for how long. Officers who have remained at one station for over four years must see a posting out within six weeks from today. These would be officers below the rank of Inspector General of Police. Staff below the SHOs who have remained at a particular station beyond three years will be identified by the District heads of police concerned and their movement will be undertaken by the Director General of Police.

It must be mentioned that the period of four years is set because in the normal course of government service, transfers and postings are made for officers if they have been at a particular station for more than three years. This order obviously does not preclude the

Director General of Police from making any transfers should an officer have been at a posting for a lesser period, which is within normal administrative powers."

3. In December, 2003, the appellant, who was holding the post of Deputy Superintendent of Police, Crime Investigation Department (CID), Bihar, filed an intervention application being I.A.No.5588 of 2003. The appellant claimed in the application that he was the President of Bihar Police Seva Sangh, a service association of members of Bihar Police Service. He stated in the application that the transfers and postings of the officers of Bihar Police Service were done arbitrarily in violation of guiding principles framed by the Home Department of Government of Bihar. The appellant referred to a Writ Application filed by him being C.W.J.C. No.12225 of 1999 against the State of Bihar for an order directing the respondents to implement the said guiding principles. He stated that the said writ application has been pending in the High Court for last four years during which the government has tried to victimize him mala fide. He further stated that his application should be heard along with the C.W.J.C. No.1311 of 2003. He, therefore, prayed that he may be impleaded in C.W.J.C. No.1311 of 2003.

4. Admittedly, the appellant is posted at Patna for several years. It is clear from several orders that the High Court has passed in this matter that while dealing with the question of law and order situation in Bihar, the High Court was looking into the State Government's policy of postings and transfer of police officers, obviously because that has a direct bearing on efficiency and rectitude of the police officers. The High Court even recorded the statement of the Advocate General that certain transfers of police officers are being effected. The appellant was unhappy and disturbed about the task undertaken by the High Court. This is evident from the first paragraph of his intervention application where he has referred to the order passed by the High Court directing the respondents to submit a list of officers who have not been rem[illegible]n

for more than four years. It is this that made him intervene in C.W.J.C. No.1311 of 2003.

5. The appellant wanted his writ application pending in the Patna High Court to be heard with C.W.J.C. No. 1311 of 2003. We have, therefore, carefully gone through that petition. The appellant wants to create an impression that he is fighting for the cause of police officers of Bihar, but a careful reading of his application makes it clear that he is espousing his own cause. He has stated that he is continuously posted for seven years in Cabinet Vigilance Department. He has stated that his posting in Criminal Investigation Department is wrong and he should be posted as Sub Divisional Police Officer anywhere in Patna or in any other proper office such as traffic or transport department in Patna, so that he may do government duties and take over the responsibility as the President of Bihar Police Seva Sangh. We shall advert to this Seva Sangh a little later, but, suffice it to say at this stage that the appellant's pending writ application concentrates on his posting and he figures in the prayer clause also.

6. From the impugned order it appears that on 27/01/2004, the appellant appeared in-person before the High Court. He shouted and told the court that he was intervener and that the High Court has not focused its attention on the wrong policies of transfers within the police department. He raised his voice with impertinence and declared that the High Court is not taking up his case wherein he has challenged his transfer and posting made in the police department. Learned Judges, then, asked him whether he had been granted leave by the Director General of Police to present his case. He again shouted at the court and stated that he had applied for leave but whether leave is granted to him or not is not the concern of the court. The High Court has observed that he could not show to the court that leave had been granted to him by the Police Headquarters to argue his case in-person and challenge transfer policy of the police department. The High Court has further observed that

the appellant baited the court. He wanted his writ application to be considered out-of-turn on the ground that it was concerning transfers and postings of police officers. The High Court, therefore, called for the record, perused the appellant's application and found out that it mainly related to his own transfer. The appellant, then, claimed to be an office bearer of Bihar Police Seva Sangh and stated that the Police Manual has declared him a member of the protected staff and he has immunity from transfers and he cannot be touched. He produced a letter addressed by a Cabinet Minister to the Chief Minister of Bihar questioning why he was transferred from one establishment to another, though, within the city. The said letter is quoted in the impugned order. It appears from the impugned order that the appellant did not show the slightest remorse nor regret and instead continued to bait the court and repeat that even the Minister had given him protection and had granted stay of his transfer. In view of this contumacious behaviour, the High Court directed that the appellant may be taken into custody by the Court Officer and the Sergeant and sent to jail as punishment for a day i.e. for twenty four hours. His intervention application came to be rejected. Aggrieved by this order, the appellant has approached this Court.

7. The appellant appeared in-person. Looking to the importance of the matter, we requested Mr. Siddharth Luthra, learned Additional Solicitor General, to assist us. As usual, Mr. Luthra has rendered remarkable assistance to this Court. We heard the appellant at some length. He submitted that he is not guilty of contempt of court. He submitted that he has highest regard for the court and he never shouted in the court as stated in the impugned order. He submitted that he is the President of the Bihar Police Seva Sangh and is espousing the cause of police officers in general. On a query made by this Court, whether the Bihar Police Seva Sangh is a registered society or whether it has got any recognition, he submitted that the application in that behalf is pending. The Bihar Police Seva Sangh, however, has not received any

submitted that the respondents have not refuted any of his contentions by filing any affidavit in reply. He drew our attention to Section 14 of the Contempt of Courts Act, 1971 and submitted that no opportunity, as contemplated therein, was given to him to make his defence. He submitted that he had filed an application for bail. However, no order was passed thereon. He further submitted that the High Court has unnecessarily cast aspersions on him. He urged that the impugned order may be set aside.

8. Mr. Luthra, learned Additional Solicitor General, on the other hand, submitted that the appellant is guilty of contempt committed in the face of the High Court and his case is covered by the judgment of this Court in *Leila David(6) v. State of Maharashtra and Others*[1] where this Court has observed that when a contemnor disrupts the court proceedings by using offensive language, it is permissible to adopt summary proceedings to punish him. Mr. Luthra further submitted that the appellant tried to get his personal application tagged to the Public Interest Litigation petition for his personal gain and he utilized a letter of a Cabinet Minister to overawe the court. Besides, he produced incorrect copy of the impugned order in this Court. He claimed that he had filed bail application when no such application is found in the record. He has committed breach of undertaking given in the affidavit filed in this Court. Mr. Luthra submitted that no leniency should be shown to such a person and the appeal may, therefore, be dismissed.

9. We have extensively referred to the contents of the impugned order of the High Court with a purpose. It reflects the appellant's rude behaviour. The intemperate language used by the appellant while addressing learned Judges of the High Court is most objectionable and contumacious. The appellant is Deputy Superintendent of Police. He claims to be the President of Bihar Police Seva Sangh. A responsible police officer is not expected to behave in such undignified and unruly manner in

1. (2009) 10 SCC 337.

the Court. He shouted at the Judges. When they asked him whether the police headquarters had granted him any permission to argue his case in-person and challenge transfer policy of the police department, he rudely stated that that was not the concern of the court. He was, however, unable to produce any permission. Thereafter, he told the court that his application should be heard along with Public Interest Litigation as it related to postings and transfers of police officers. On scrutiny, it was found that it mainly related to his transfer. Thus, he made a wrong statement before the Court. He, then, stated that he is a protected staff member and has immunity from transfer and he cannot be touched. He tried to overawe the court by producing a Cabinet Minister's letter addressed to the Chief Minister recommending his case. He did not show any remorse. He did not tender any apology, but, continued his rude behaviour of shouting at the court and baiting the court. By this behaviour he lowered the dignity and authority of the High Court. He challenged the majesty of the High Court by showing utter disrespect to it. Undoubtedly he committed contempt of the High Court in its presence and hearing. He is, therefore, guilty of having committed contempt in the face of the High Court. His case is squarely covered by Section 14 of the Contempt of Courts Act, 1971.

10. In *Re: Vinay Chandra Mishra*[2], on a question put to him by a Judge of the Allahabad High Court, the contemnor, who was an advocate, started shouting at the Judge and told him that the question could not have been put to him and he would get the Judge transferred or see that impeachment motion is brought against him in Parliament. He made more such derogatory comments. Learned Judge addressed a letter to the Acting Chief Justice narrating the incident. The Acting Chief Justice forwarded the letter to the then Chief Justice of India. This Court, then, issued a notice to the advocate taking a view that there was a prima facie case of the criminal contempt of the court. This Court treated the said contempt as

2. (1195) 2 SCC 584.

criminal contempt committed in the face of the High Court and sentenced the advocate. Commenting on the contemnor's conduct, this Court observed as under:

> *"To resent the questions asked by a Judge, to be disrespectful to him, to question his authority to ask the questions, to shout at him, to threaten him with transfer and impeachment, to use insulting language and abuse him, to dictate the order that he should pass, to create scenes in the court, to address him by losing temper are all acts calculated to interfere with and obstruct the course of justice. Such acts tend to overawe the court and to prevent it from performing its duty to administer justice. Such conduct brings the authority of the court and the administration of justice into disrespect and disrepute and undermines and erodes the very foundation of the judiciary by shaking the confidence of the people in the ability of the court to deliver free and fair justice."*

The above observations of this Court have a bearing on the present case.

11. In *Ranveer Yadav v. State of Bihar*[3] the appellant and the other contemnors disrupted the court proceedings by aggressively exchanging heated words and created unpleasant scenes in the Court. The decorum and dignity of the court was so much threatened that the Judge was forced to rise. This Court held that the offending acts of the appellant constitute contempt in the face of the court. The relevant paragraph could be quoted.

> "The offending acts of the appellant constitute contempt in the face of court. When contempt takes place in the face of the court, peoples' faith in the administration of justice receives a severe jolt and precious judicial time is wasted. Therefore, the offending acts of the appellant certainly come within the ambit of interference with the due course of judicial proceeding and are a clear case of criminal contempt in the face of the court."

3. (2010) 11 SCC 493.

12. The appellant's contention that no opportunity was given to him to make his defence must be rejected. In *Pritam Pal v. High Court of Madhya Pradesh, Jabalpur, through Registrar*[4], while dealing with the nature and scope of power conferred upon this Court and the High Court, being courts of record under Articles 129 and 215 of the Constitution of India respectively, this Court observed that the said power is an inherent power under which the Supreme Court and the High Court can deal with contempt of itself. The jurisdiction vested is a special one not derived from any other statute but derived only from Articles 129 and 215. This Court further clarified that the constitutionally vested right cannot be either abridged, abrogated or cut down by legislation including the Contempt of Courts Act.

13. In *Leila David(6)* this Court has discussed what is contempt in the face of the Court. In this case, the petitioners made contumacious allegations in the writ petition and supporting affidavits. Notices were issued to them as to why contempt proceedings should not be issued against them. The hearing commenced. The writ petitioners disrupted the proceedings by using very offensive, intemperate and abusive language at a high pitch. One of the petitioners stated that the Judges should be jailed by initiating proceedings against them and threw footwear at the Judges. The petitioners stood by what they had said and done in the Court. One of the learned Judges felt that there was no need to issue notice to the petitioners and held them guilty of criminal contempt of the court. The other learned Judge observed that the mandate of Section 14 of the Contempt of Courts Act, 1971 must be followed before sending the contemnors to jail. The question was, therefore, whether the petitioners were entitled to any opportunity of hearing. The matter was thereafter placed before a three Judge Bench. The

4. 1993 Supp (1) SCC 529.

three Judge Bench resolved the difference of opinion and observed as under:

> "Section 14 of the Contempt of Courts Act no doubt contemplates issuance of notice and an opportunity to the contemnors to answer the charges in the notice to satisfy the principles of natural justice. However, where an incident of the instant nature takes place within the presence and sight of the learned Judges, the same amounts to contempt in the face of the Court and is required to be dealt with at the time of the incident itself. This is necessary for the dignity and majesty of the courts to be maintained. When an object, such as a footwear, is thrown at the Presiding Officer in a court proceeding, the object is not to merely scandalise or humiliate the Judge, but to scandalise the institution itself and thereby lower its dignity in the eyes of the public."

14. Thus, when a contempt is committed in the face of the High Court or the Supreme Court to scandalize or humiliate the Judge, instant action may be necessary. If the courts do not deal with such contempt with strong hand, that may result in scandalizing the institution thereby lowering its dignity in the eyes of the public. The courts exist for the people. The courts cherish the faith reposed in them by people. To prevent erosion of that faith, contempts committed in the face of the court need a strict treatment. The appellant, as observed by the High Court was not remorseful. He did not file any affidavit tendering apology nor did he orally tell the High Court that he was remorseful and he wanted to tender apology. Even in this Court he has not tendered apology. Therefore, since the contempt was gross and it was committed in the face of the High Court, learned Judges had to take immediate action to maintain honour and dignity of the High Court. There was no question of giving the appellant any opportunity to make his defence. This submission of the appellant must, therefore, be rejected.

15. In this Court also the appellant's behaviour is far from

satisfactory. He told us that he had filed an application for bail in the High Court, but the High Court did not consider it. The bail application attached at Annexure-A/6 to the petition is unsigned, supported by unsigned affidavit bearing no name of the lawyer. We have gone through the entire record of the High Court and we find that there is no bail application in the record. Still worse is the tampering of the impugned order. The appellant has not filed the true copy of the impugned order. The first sentence of paragraph 4 of the copy of the impugned order filed in this Court reads as under:

> *"The intervenor who presents himself in person otherwise a police officer didn't shout at the Court that he is an intervenor in this case…."*

However, in the original impugned order the said sentence does not have the words 'didn't shout.' It reads as under:

> *"the intervenor who presents himself in person otherwise a police officer shouted at the Court that he is an intervenor in this case……."*

Thus, the words *'didn't shout'* have replaced the word *'shouted.'* When we asked for an explanation, the appellant stated that there is no tampering, but it is merely a typing error. We refuse to accept this explanation. In this case, by replacing the word *'shouted'* by the words *'didn't shout'* the appellant has changed the entire meaning of the sentence to suit his case that he did not shout in the court. Thus, he is guilty of tampering with the High Court's order and filing it in this Court. This would, in our opinion, be criminal contempt as defined by Section 2(c) of the Contempt of Court Act, 1971. There is abundance of judgments of this Court on this issue. This Court has taken a strict view of such conduct. We may usefully refer to *Chandra Shashi v. Anil Kumar Verma*[5] where in a transfer petition the contemnor had filed a forged experience certificate purportedly issued by the Principal of a college from Nagpur. The Principal

5. (1995) 1 SCC 421.

filed affidavit stating that the said certificate is forged. This Court observed that an act which interferes or tends to interfere or obstructs or tends to obstruct the administration of justice would be criminal contempt as defined in Section 2(c) of the Contempt of Courts Act, 1971. This Court further observed that if recourse to falsehood is taken with oblique motive, the same would definitely hinder, hamper or impede even flow of justice and would prevent the courts from performing their legal duties as they are supposed to do. The contemnor was, therefore, suitably sentenced.

16. In *Re: Bineet Kumar Singh*[6] a forged/fabricated order of this court was used for the purpose of conferring some benefits on a group of persons. This Court took a strict view of the matter and observed as under:

> *"The law of contempt of court is essentially meant for keeping the administration of justice pure and undefiled. It is difficult to rigidly define contempt. While on the one hand, the dignity of the court has to be maintained at all costs, it must also be borne in mind that the contempt jurisdiction is of a special nature and should be sparingly used. The Supreme Court is the highest court of record and it is charged with the duties and responsibilities of protecting the dignity of the court. To discharge its obligation as the custodian of the administration of justice in the country and as the highest court imbued with supervisory and appellate jurisdiction over all the lower courts and tribunals, it is inherently deemed to have been entrusted with the power to see that the stream of justice in the country remains pure, that its course is not hindered or obstructed in any manner, that justice is delivered without fear or favour. To discharge this obligation, the Supreme Court has to take cognizance of the deviation from the path of justice. The sole object of the court wielding its power to punish for contempt is always for the course of administration of justice. Nothing is more incumbent upon the courts of justice than to preserve their proceedings from being misrepresented, nor is there anything more pernicious when the order of the court is forged and produced to gain undue advantage. Criminal contempt has been defined in Section 2(c) to mean interference with the administration of justice in any manner. A false or misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would undoubtedly tantamount to interference with the due course of judicial proceedings. When a person is found to have utilised an order of a court which he or she knows to be incorrect for conferring benefit on persons who are not entitled to the same, the very utilisation of the fabricated order by the person concerned would be sufficient to hold him/her guilty of contempt, irrespective of the fact whether he or she himself or herself is the author of fabrication."*

We respectfully concur with these observations.

17. We shall now turn to the affidavit filed by the appellant in this Court. He has sworn an affidavit stating that the annexures of the criminal appeal are the true copies of the originals and the facts stated in the criminal appeal are true to his knowledge. As already noted by us, the appellant has tampered with the original impugned order. He stated that he had filed a bail application in the High Court. The copy of the said bail application filed in this Court is unsigned and supported by unsigned affidavit bearing no name of the lawyer. The appellant has not made the Registrar of the Patna High Court party to the appeal. The Registrar could have clarified whether any bail application was, in fact, filed by the appellant. In any case, we have perused the record and we find that there is no such bail application in the record. Thus, in this Court the appellant has filed a false affidavit. This amounts to contempt of this Court.

18. Another very disturbing feature of this case is the manner in which the appellant flourished in the High Court a Cabinet Minister's letter addressed [illegible]r

6. (2001) 5 SCC 501.

recommending his case. We do not want to comment on the propriety of the Cabinet Minister in addressing such a letter to the Chief Minister in this case, though this Court has in *Prakash Singh and ors. v. Union of India and Ors.*[7] sought to insulate the police from political interference. In any case, the appellant should not have tried to overawe the High Court by producing the said letter. We deprecate this conduct. We were also taken aback when we were informed that the appellant is the President of the Bihar Police Seva Sangh. We are, however, informed that membership of such association is permitted in the State of Bihar even to the police officers. However, the fact remains that the said association is not registered.

19. The appellant's contention that since the respondents have not filed affidavit, his case is unrebutted is without any merit. A contempt matter is essentially between the contemnor and the court. On the basis of the record and the attendant circumstances the court has to decide whether there is any contempt or not. No doubt, the respondents could have filed an affidavit, but merely because there is no affidavit, the contemnor cannot escape his liability. The facts of the case are gross. The contempt is in the face of the High Court. The fact that the respondents have not filed affidavit in reply does not dilute the contempt committed by the appellant.

20. In the ultimate analysis we are of the view that the High Court cannot be faulted for punishing the appellant for contempt of court. No interference is necessary with the impugned order. We are also concerned with the contempt of this Court committed by the appellant. We direct the appellant to pay a fine of Rs.25,000/-. The fine shall be deposited with the Supreme Court Legal Services Committee within four weeks from today, failing which the appellant shall suffer simple imprisonment for seven days. The amount deposited by the appellant may be utilized for issues concerning juvenile justice.

21. The appeal is disposed of in the afore-stated terms.

R.P. Appeal disposed of.

7. (2006) 8 SCC 1.

STATE OF BIHAR & ORS.
v.
RAJMANGAL RAM
(Criminal Appeal No. 708 of 2014)

MARCH 31, 2014.

[P. SATHASIVAM, CJI AND RANJAN GOGOI, JJ.]

CODE OF CRIMINAL PROCEDURE 1973:

s. 465 r/w s. 197 Cr.P.C. and s. 19 (3) r/w s.19 (1) of PC Act - Interference with criminal prosecution on the ground of defects/omissions/errors in the order granting sanction for prosecution - Held: Both s. 465, Cr.P.C. and s. 19 (3) of PC Act make it clear that any error, omission or irregularity in the grant of sanction will not affect any finding, sentence or order passed by a competent court unless in the opinion of the court, a failure of justice has been occasioned - In the instant case, even assuming that Law Department was not competent to accord sanction, it was still necessary for High Court to reach the conclusion that a failure of justice had occasioned -- Such a finding is conspicuously absent - Order of High Court interdicting the criminal prosecution of respondents is set aside - Prevention of Corruption Act, 1988 - s. 19 (3) r/w s. 19 (1).

The instant appeals were filed by the State Government against two orders passed by the High Court holding that the Law Department of the State was not competent to accord sanction for prosecution of the respondents under the Penal Code, 1860 as well as the Prevention of Corruption Act, 1988, resultantly, interdicting the criminal proceedings instituted against the respondents.

The question for consideration before the Court

was: whether a criminal prosecution ought to be interfered with by the High Court at the instance of an accused who sought mid-course relief from the criminal charges levelled against him on grounds of defects/ omissions or errors in the order granting sanction to prosecute including errors of jurisdiction to grant such sanction.

Allowing the appeals, the Court

HELD: 1.1 Keeping in view the object behind the requirement of grant of sanction to prosecute a public servant, the provisions in this regard either under the Code of Criminal Procedure, 1973 or the Prevention of Corruption Act, 1988 are designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute an honest public servant for acts arising out of due discharge of duty and also to enable him to efficiently perform the wide range of duties cast on him by virtue of his office. The test, therefore, always is- whether the act complained of has a reasonable connection with the discharge of official duties by the government or the public servant. If such connection exists and the discharge or exercise of the governmental function is, prima facie, founded on the bonafide judgment of the public servant, the requirement of sanction will be insisted upon so as to act as a filter to keep at bay any motivated, ill-founded and frivolous prosecution against the public servant. However, realising that the dividing line between an act in the discharge of official duty and an act that is not, may, at times, get blurred thereby enabling certain unjustified claims to be raised also on behalf of the public servant so as to derive undue advantage of the requirement of sanction, specific provisions have been incorporated in s. 19(3) of the Prevention of Corruption Act as well as in s. 465 of the Code of Criminal Procedure which, inter alia, make it clear that any error, omission or irregularity in the

grant of sanction will not affect any finding, sentence or order passed by a competent court unless in the opinion of the court, a failure of justice has been occasioned. This is how the balance is sought to be struck. [Para 5] [607-B-H]

1.2 In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, at the intermediary stage a criminal prosecution cannot be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. [Para 7] [610-F-G]

State of Madhya Pradesh vs. Virender Kumar Tripathi **2009 (7) SCR 89 = (2009) 15 SCC 533;** *State by Police Inspector vs. T. Venkatesh Murthy* **2004 (4) Suppl. SCR 279 = (2004) 7 SCC 763;** *Prakash Singh Badal and Another vs. State of Punjab and Others* **2006 (10) Suppl. SCR 197 = (2007) 1 SCC 1; and** *R. Venkatkrishnan vs. Central Bureau of Investigation* **2009 (12) SCR 762 = (2009) 11 SCC 737 - relied on.**

State of Goa vs. Babu Thomas **2005 (3) Suppl. SCR 712 = (2005) 8 SCC 130 - distinguished.**

1.3 In the instant cases, the High Court had interdicted the criminal proceedings on the ground that the Law Department was not the competent authority to accord sanction for the prosecution of the respondents. Even assuming that the Law Department was not competent, it was still necessary for the High Court to reach the conclusion that a failure of justice has been occasioned. Such a finding is cor t.

Therefore, the impugned orders passed by the High Court cannot be sustained in law and, as such, are set aside. [Para 10 and 12] [612-C-D, G]

Case Law Reference:

2006 (10) Suppl. SCR 197	**relied on**	**Para 7**
2004 (4) Suppl. SCR 279	**relied on**	**Para 8**
2009 (12) SCR 762	**relied on**	**Para 8**
2009 (7) SCR 89	**relied on**	**Para 8**
2005 (3) Suppl. SCR 712	**distinguished**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 708 of 2014.

From the Judgment and Order dated 23.03.2012 of the High Court of Patna in CRLW No. 487 of 2011.

WITH

Criminal Appeal Nos. 709-710 of 2014.

Ranjit Kumar, H.P. Raval, Rajiv Dutta, Gopal Singh, Manish Kumar, Arunabh Chowdhury, Ashish Jha, Gainilung Panmei, Karma Dorjee, Jayant Mohan, Ajit Kumar, Avinash Kumar, Deepali Dwivedi, Siddharth Dutta, Dushyant Kumar for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave, as prayed for, is granted in both the matters.

2. The two appeals are by the State of Bihar against separate orders (dated 23.03.2012 and 03.03.2011) passed by the High Court of Patna, the effect of which is that the criminal proceedings instituted against the respondents under different provisions of the Indian Penal Code as well as the

Prevention of Corruption Act, 1988 have been interdicted on the ground that sanction for prosecution of the respondents in both the cases has been granted by the Law Department of the State and not by the parent department to which the respondents belong.

3. A short and interesting question, which is also of considerable public importance, has arisen in the appeals under consideration. Before proceeding further it will be necessary to take note of the fact that in the appeal arising out of SLP (Crl.) No. 8013 of 2012 the challenge of the respondent-writ petitioner before the High Court to the maintainability of the criminal proceeding registered against him is subtly crafted. The criminal proceeding, as such, was not challenged in the writ petition and it is only the order granting sanction to prosecute that had been impugned and interfered with by the High Court. The resultant effect, of course, is that the criminal proceeding stood interdicted. In the second case (SLP (Crl.) Nos.159-160/2013) the maintainability of the criminal case was specifically under challenge before the High Court on the ground that the order granting sanction is invalid in law. Notwithstanding the above differences in approach discernible in the proceedings instituted before the High Court, the scrutiny in the present appeals will have to be from the same standpoint, namely, the circumference of the court's power to interdict a criminal proceeding midcourse on the basis of the legitimacy or otherwise of the order of sanction to prosecute.

4. Though learned counsels for both sides have elaborately taken us through the materials on record including the criminal complaints lodged against the respondents; the pleadings made in support of the challenge before the High Court, the respective sanction orders as well as the relevant provisions of the Rules of Executive Business, we do not consider it necessary to traverse the said facts in view of the short question of law arising which may be summed up as follows:-

"Whether a criminal prosecution ought to be interfered with by the High Courts at the instance of an accused who seeks mid-course relief from the criminal charges levelled against him on grounds of defects/omissions or errors in the order granting sanction to prosecute including errors of jurisdiction to grant such sanction?"

5. The object behind the requirement of grant of sanction to prosecute a public servant need not detain the court save and except to reiterate that the provisions in this regard either under the Code of Criminal Procedure or the Prevention of Corruption Act, 1988 are designed as a check on frivolous, mischievous and unscrupulous attempts to prosecute a honest public servant for acts arising out of due discharge of duty and also to enable him to efficiently perform the wide range of duties cast on him by virtue of his office. The test, therefore, always is-whether the act complained of has a reasonable connection with the discharge of official duties by the government or the public servant. If such connection exists and the discharge or exercise of the governmental function is, prima facie, founded on the bonafide judgment of the public servant, the requirement of sanction will be insisted upon so as to act as a filter to keep at bay any motivated, ill-founded and frivolous prosecution against the public servant. However, realising that the dividing line between an act in the discharge of official duty and an act that is not, may, at times, get blurred thereby enabling certain unjustified claims to be raised also on behalf of the public servant so as to derive undue advantage of the requirement of sanction, specific provisions have been incorporated in Section 19(3) of the Prevention of Corruption Act as well as in Section 465 of the Code of Criminal Procedure which, inter alia, make it clear that any error, omission or irregularity in the grant of sanction will not affect any finding, sentence or order passed by a competent court unless in the opinion of the court a failure of justice has been occasioned. This is how the balance is sought to be struck.

6. For clarity it is considered necessary that the provisions of Section 19 of the P.C. Act and Section 465 of the Cr.P.C. should be embodied in the present order:-

Section 19 of the PC Act

"19. Previous sanction necessary for prosecution.-(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation.-For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature."

Section 465 of Cr.P.C.

"465. Finding or sentence when reversible by reason of error, omission or irregularity.-(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

(emphasis is ours)

7. In a situation where under both the enactments any error, omission or irregularity in the sanction, which would also include the competence of the authority to grant sanction, does not vitiate the eventual conclusion in the trial including the conviction and sentence, unless of course a failure of justice has occurred, it is difficult to see how at the intermediary stage a criminal prosecution can be nullified or interdicted on account of any such error, omission or irregularity in the sanction order without arriving at the satisfaction that a failure of justice has also been occasioned. This is what was decided by this Court in *State by Police Inspector vs. T. Venkatesh Murthy*[1] wherein it has been inter alia observed that,

1. (2004) 7 SCC 763 (paras 10 and 11).

"14. ……Merely because there is any omission, error or irregularity in the matter of according sanction, that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice."

8. The above view also found reiteration in *Prakash Singh Badal and Another vs. State of Punjab and Others*[2] wherein it was, inter alia, held that mere omission, error or irregularity in sanction is not to be considered fatal unless it has resulted in failure of justice. In *Prakash Singh Badal* (supra) it was further held that Section 19(1) of the PC Act is a matter of procedure and does not go to the root of jurisdiction. On the same line is the decision of this Court in *R. Venkatkrishnan vs. Central Bureau of Investigation*[3]. In fact, a three Judge Bench in *State of Madhya Pradesh vs. Virender Kumar Tripathi*[4] while considering an identical issue, namely, the validity of the grant of sanction by the Additional Secretary of the Department of Law and Legislative Affairs of the Government of Madhya Pradesh instead of the authority in the parent department, this Court held that in view of Section 19 (3) of the PC Act, interdicting a criminal proceeding mid-course on ground of invalidity of the sanction order will not be appropriate unless the court can also reach the conclusion that failure of justice had been occasioned by any such error, omission or irregularity in the sanction. It was further held that failure of justice can be established not at the stage of framing of charge but only after the trial has commenced and evidence is led (Para 10 of the Report).

9. There is a contrary view of this Court in *State of Goa vs. Babu Thomas*[5] holding that an error in grant of sanction goes to the root of the prosecution. But the decision in *Babu*

2. (2007) 1 SCC 1 (para 19).
3. (2009) 11 SCC 737.
4. (2009) 15 SCC 533.
5. (2005) 8 SCC 130.

Thomas (supra) has to be necessarily understood in the facts thereof, namely, that the authority itself had admitted the invalidity of the initial sanction by issuing a second sanction with retrospective effect to validate the cognizance already taken on the basis of the initial sanction order. Even otherwise, the position has been clarified by the larger Bench in *State of Madhya Pradesh vs. Virender Kumar Tripathi* (supra).

10. In the instant cases the High Court had interdicted the criminal proceedings on the ground that the Law Department was not the competent authority to accord sanction for the prosecution of the respondents. Even assuming that the Law Department was not competent, it was still necessary for the High Court to reach the conclusion that a failure of justice has been occasioned. Such a finding is conspicuously absent rendering it difficult to sustain the impugned orders of the High Court.

11. The High Court in both the cases had also come to the conclusion that the sanction orders in question were passed mechanically and without consideration of the relevant facts and records. This was treated as an additional ground for interference with the criminal proceedings registered against the respondents. Having perused the relevant part of the orders under challenge we do not think that the High Court was justified in coming to the said findings at the stage when the same were recorded. A more appropriate stage for reaching the said conclusion would have been only after evidence in the cases had been led on the issue in question.

12. We, therefore, hold that the orders dated 23.03.2012 and 03.03.2011 passed by the High Court cannot be sustained in law. We, therefore, allow both the appeals; set aside the said orders and direct that the criminal proceeding against each of the respondents in the appeals under consideration shall now commence and shall be concluded as expeditiously as possible.

R.P.

FASEELA M.

v.

MUNNERUL ISLAM MADRASA COMMITTEE & ANR.

(Civil Appeal Nos. 4250-4252 of 2014)

MARCH 31, 2014

[R.M. LODHA AND KURIAN JOSEPH, JJ.]

WAKF ACT, 1995:

ss. 6 (1) and 7 (1) -- Jurisdiction of Wakf Tribunal - Suit for eviction of tenant from Wakf property - Held: Is exclusively triable by the civil court, as such a suit is not covered by the disputes specified in ss. 6 and 7 of the Act - Jurisdiction.

Respondent no.1 Committee filed a suit before Wakf Tribunal for eviction of the appellant, stating that respondent no. 1 was the landlord and the appellant was the tenant of the suit property which was described as waqf property. The appellant denied the suit property to be the waqf property and challenged the jurisdiction of the Waqf Tribunal in determining the dispute between the parties. The Waqf Tribunal by its order dated 18.9.2010 directed the plaint to be returned. However, on 19.9.2010, the Waqf Tribunal so motu recalled the order dated 18.9.2010 and posted the matter for 30.9.2010. The appellant filed two revision petitions - one against the order dated 19.9.2010 and the other for declaration that the Waqf Tribunal had no jurisdiction in the matter. The High Court dismissed both the revision petitions.

Allowing the appeals; the court,

HELD:

The suit for eviction against the tenant relating to a waqf property is exclusively triable by the civil court, as

such a suit is not covered by the disputes specified in ss. 6 and 7 of the Wakf Act, 1995. This Court fully concurs with the view taken in Ramesh Gobindram, particularly, with regard to construction put by it upon ss. 83 and 85 of the Act. The decision in Bhanwar Lal is not in any manner inconsistent or contrary to the view taken in Ramesh Gobindram. Therefore, the impugned order cannot be sustained and, as such, is set aside. The order passed by the Waqf Tribunal on 19.09.2010 is also set aside. The order of the Waqf Tribunal passed on 18.09.2010 is restored. The civil court shall proceed with the suit accordingly. [Para 16 - 18] [623-C; 624-C-E]

Ramesh Gobindram (Dead) through LRS. Vs. Sugra Humayun Mirza Wakf **2010 (10) SCR 945 = (2010) 8 SCC 726 - relied on.** *Bhanwar Lal & Anr. Vs. Rajasthan Board of Muslim Wakf and Ors.* **2013 SCR 721 = 2013 (11) SCALE 210 - referred to.**

Board of Wakf, West Bengal & Anr. Vs. Anis Fatma Begum & Anr., **2010 (13) SCR 1063 = (2010) 14 SCC 588** *Sardar Khan and Ors. Vs. Syed Nazmul Hasan (Seth) and Ors.* **2007 (3) SCR 436 = (2007) 10 SCC 727 - cited.**

Case Law Reference:

2010 (10) SCR 945	**relied on**	**para 11**
2013 SCR 721	**referred to**	**para 13**
2010 (13) SCR 1063	**cited**	**para 14**
2007 (3) SCR 436	**cited**	**para 14**

CIVIL APPELLAE JURISDICTION : Civil Appeal No. 4250-4252 of 2014.

From the Judgment and Order dated 28.11.2011 of the High Court of Kerala at Ernakulam in CRP (Wakf Act) Nos. 53 & 56 of 2011 and O.P. (WT) No. 247 o

Hari Kumar, G., A. Venayagam Balan for the Appellant.

Renjith Marar, Bineesh K., Sindhu T.P., P.V. Dinesh for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. Sections 6 and 7 of the Waqf Act, 1995 (for short, 'Act') provide for determination of certain disputes regarding auqaf only by the Waqf Tribunal. These provisions as amended by Act 27/2013 read as under :

"Section 6. Disputes regarding auqaf.- (1) If any question arises whether a particular property specified as waqf property in the list of auqaf is waqf property or not or whether a waqf specified in such list is a Shia waqf or Sunni waqf, the Board or the mutawalli of the waqf or any person aggrieved may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of auqaf.

Provided further that no suit shall be instituted before the Tribunal in respect of such properties notified in a second or subsequent survey pursuant to the provisions contained in sub-section (6) of section 4.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any waqf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party

to any suit under sub- section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of auqaf shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1).

Section 7. Power of Tribunal to determine disputes regarding auqaf.- (1) If, after the commencement of this Act, any question or dispute arises, whether a particular property specified as waqf property in a list of auqaf is waqf property or not, or whether a waqf specified in such list is a Shia waqf or a Sunni waqf, the Board or the mutawalli of the waqf, or any person aggrieved by the publication of the list of auqaf under section 5 therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that-

(a) in the case of the list of auqaf relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of auqaf; and

(b) in the case of the list of auqaf relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be e al

within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any waqf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).

(4) The list of auqaf and where any such list is modified in pursuance of a decision of the Tribunal under sub- section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a civil court under sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

(6) The Tribunal shall have the powers of assessment of damages by unauthorised occupation of waqf property and to penalise such unauthorised occupants for their illegal occupation of the waqf property and to recover the damages as arrears of land revenue through the Collector:

Provided that whosoever, being a public servant, fails

in his lawful duty to prevent or remove an encroachment, shall on conviction be punishable with fine which may extend to fifteen thousand rupees for each such offence."

3. Thus, Sections 6 and 7 of the Act not only confer exclusive jurisdiction upon the Waqf Tribunal for determination of certain disputes regarding auqaf but also take jurisdiction of the civil court away in respect of such disputes.

4. Munnerul Islam Madrasa Committee - respondent No. 1 - filed a suit for eviction against the appellant before the Waqf Tribunal, inter alia, setting up the plea that respondent No. 1 is the landlord and the appellant is the tenant in the subject property. The subject property is described as waqf property.

5. The appellant denied that the subject property was waqf property. He also challenged the jurisdiction of the Waqf Tribunal in determining the dispute between the parties.

6. On 18.09.2010, the Waqf Tribunal, after hearing the parties, directed the plaint to be returned to the civil court having jurisdiction in the matter. However, on the next date, i.e., on 19.09.2010, the Waqf Tribunal suo motu recalled the order passed on 18.09.2010 and passed the following order :-

"Called. It seems that issue framed included whether property is Wakf property or not. Hence to that extent this Tribunal have jurisdiction. But due to oversight and mistake it is ordered to return the Plaint. That order is an error apparent on face of records and suo motu reviewed. Call on 30.9.2010."

7. The appellant filed two revision petitions before the High Court - one, against the order dated 19.09.2010 and the other, for declaration that the Waqf Tribunal has no jurisdiction in the matter.

8. The High Court dismissed both revision petitions and one original petition by the impugned

present Appeals, by special leave.

9. The question, for determination in these appeals, is as to whether the suit for eviction by the landlord against the tenant relating to waqf property is triable by the civil court or the suit lies within the exclusive jurisdiction of the Waqf Tribunal.

10. For determination of the above question, besides Sections 6 and 7, the two other provisions which deserve to be noticed are Sections 83 and 85 of the Act. These provisions read :

"Section 83. Constitution of Tribunals, etc.- (1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals.

(2) Any mutawalli or person interested in a waqf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the waqf.

(3) Where any application made under sub- section (1) relates to any waqf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the waqf actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction

shall not entertain any application for the determination of such dispute, question or other matter.

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the waqf or any other person interested in the waqf or the waqf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such waqf or waqf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred, shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of-

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member;

and the appointment of every such person shall be made either by name or by designation.

(4A) The terms and conditions of appointment including the salaries and allowances payable to the Chairman and other members other than persons appointed as ex officio

members shall be such as may be prescribed.

(5) The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a civil court.

(8) The execution of any decision of the Tribunal shall be made by the civil court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

Section 85. Bar of jurisdiction of civil courts.- No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal."

11. In *Ramesh Gobindram (Dead) through LRS. Vs. Sugra Humayun Mirza Wakf*[1], this Court considered Sections 6(1), 6(5), 7(1), 7(5), 83, 85 and few other provisions of the Act and explained the jurisdiction of the Waqf Tribunal vis-a-vis Civil Court. As regards the suit for eviction against the tenant(s) of waqf property, the Court held that such suit is triable by the Civil Court as it is not covered by Sections 6 and 7 of the Act.

12. The Court in para 35, page 738 held as follows :

"35. In the cases at hand the Act does not provide for any proceedings before the Tribunal for determination of a dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lessor and the lessees of such property. A suit seeking eviction of the tenants from what is admittedly wakf property could, therefore, be filed only before the civil court and not before the Tribunal."

13. Mr. Renjith Marar, learned counsel for respondent No. 1, submits that in a subsequent decision in *Bhanwar Lal & Anr. Vs. Rajasthan Board of Muslim Wakf and Ors.*[2], this Court has taken a different view. According to him, Section 85 of the Act leaves no manner of doubt that the Waqf Tribunal has jurisdiction to decide the suit for eviction. It is so because one of the questions for determination is whether the suit property is waqf property or not.

14. The Court in *Bhanwar Lal*[2] considered the decision in *Ramesh Gobindram*[1] at quite some length. Besides Ramesh Gobindram1, the Court in *Bhanwar Lal*[2] also considered two other decisions, one, *Board of Wakf, West Bengal & Anr. Vs. Anis Fatma Begum & Anr.*[3] and two, *Sardar Khan and Ors. Vs. Syed Nazmul Hasan (Seth) and Ors.*[4]. In *Anis Fatma*

1. (2010) 8 SCC 726.
2. 2013 (11) SCALE 210.
3. (2010) 14 SCC 588.
4. (2007) 10 SCC 727.

Begum[3], this Court had held that the Waqf Tribunal constituted under Section 83 of the Act will have exclusive jurisdiction to deal with the questions relating to demarcation of the waqf property.

15. Pertinently, the Court in *Bhanwar Lal*[2] held that the suit for cancellation of sale deed was triable by the civil court.

16. *Bhanwar La*l[2] follows the line of reasoning in *Ramesh Gobindram*[1]. The decision of this Court in *Bhanwar Lal*[2] is not in any manner inconsistent or contrary to the view taken by this Court in *Ramesh Gobindram*[1]. We fully concur with the view of this Court in *Ramesh Gobindram*[1], particularly with regard to construction put by it upon Sections 83 and 85 of the Act. In *Ramesh Gobindram*[1], the Court said :-

> "32. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the civil courts extends (sic) beyond what has been provided for in Section 6(5), Section 7 and Section 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the civil courts stands completely excluded by reasons of such establishment.
>
> 33. It is noteworthy that the expression "for the determination of any dispute, question or other matter relating to a wakf or wakf property" appearing in Section 83(1) also appears in Section 85 of the Act. Section 85 does not, however, exclude the jurisdiction of the civil courts in respect of any or every question or disputes only because the same relates to a wakf or a wakf property. Section 85 in terms provides that the jurisdiction of the civil court shall stand excluded in relation to only such matters as are required by or under this Act to be determined by the Tribunal.

> 34. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a civil court. If it is not, the jurisdiction of the civil court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the Civil Court would stand excluded."

17. The matter before us is wholly and squarely covered by *Ramesh Gobindram*[1]. The suit for eviction against the tenant relating to a waqf property is exclusive triable by the civil court as such suit is not covered by the disputes specified in Sections 6 and 7 of the Act.

18. In view of the above, the impugned order cannot be sustained and it is liable to be set aside and is set aside. The order passed by the Waqf Tribunal on 19.09.2010 is also set aside. The order of the Waqf Tribunal dated 18.09.2010 is restored. The Civil Court shall now proceed with the suit accordingly.

19. Civil Appeals are allowed with no order as to costs.

R.P. Appeals allowed.

BISHNU BISWAS & ORS.
v.
UNION OF INDIA & ORS.
(Civil Appeal Nos. 4255-58 of 2014)

APRIL 2, 2014

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

SERVICE LAW:

Selection - To Group D posts - Interview not being part of the process, equal marks earmarked for written test and interview - Held: Criterion was changed after conducting the written test and admittedly not at the stage of initiation of the selection process - Marks allocated for oral interview were the same as for written test i.e. 50% for each - The manner in which marks were awarded in the interview to candidates indicated lack of transparency - Some candidates were awarded more marks in interview than they got in written test - Direction of High Court to continue with the selection process from the point it stood vitiated does not require interference.

Appointment of appellants to 8 group 'D' posts was challenged on the ground that though interview was not part of the recruitment process, equal marks were earmarked for written test and interview. The Central Administrative Tribunal quashed the appointments. The appellants filed writ petitions before the High Court, which modified the order of the Tribunal to the extent of continuing the recruitment process from the point it stood vitiated.

Dismissing the appeals, the Court

HELD: 1.1 This Court, time and again, has held that it is not permissible for the employer to change the criteria of selection in the midst of selection process. [Para 4] [630-G-H]

Himani Malhotra v. High Court of Delhi, **2008 (5) SCR 1066 = AIR 2008 SC 2103;** *Ramesh Kumar v. High Court of Delhi & Anr.,* **2010 (2) SCR 256 = AIR 2010 SC 3714;** *P. Mohanan Pillai v. State of Kerala & Ors.,* **2007 (3) SCR 53 = AIR 2007 SC 2840;** *Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.,* **(2013) 4 SCC 540;** *Tamil Nadu Computer Science BEd Graduate Teachers Welfare Society (1) v. Higher Secondary School Computer Teachers Association & Ors.,* **2009 (10) SCR 522 = (2009) 14 SCC 517;** *State of Bihar & Ors. v. Mithilesh Kumar,* **2010 (10) SCR 161 = (2010) 13 SCC 467; and** *Arunachal Pradesh Public Service Commission & Anr. v. Tage Habung & Ors.,* **2013 (2) SCR 1134 = AIR 2013 SC 1601 - relied on.**

1.2 The courts have always frowned upon prescribing higher percentage of marks for interview even when the selection has been on the basis of written test as well as interview. In Jasvinder Singh's case, the Court cautioned observing that in cases of awarding of higher percentage of marks to those who got lower marks in written test in comparison to some who had got higher marks in written examination, an adverse inference from certain number of such instances can be drawn. [para 14 and 19] [634-E; 635-D-E]

Jasvinder Singh & Ors. v. State of J&K & Ors., **(2003) 2 SCC 132;** *Ashok Kumar Yadav & Ors. etc. etc. v. State of Haryana & Ors.* **1985 (1) Suppl. SCR 657 = AIR 1987 SC 454;** *Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors.* **1981(2) SCR 79 = AIR 1981 SC 487;** *Munindra Kumar & Ors. v. Rajiv Govil & Ors.,* **1991 (2) SCR 812 =AIR 1991 SC 1607;** *Mohinder Sain Garg v. State of Punjab & Ors.,* **1990 (3) Suppl. SCR 108 = (1991) 1 SCC 662; and** *Kiran Gupta & Ors. etc. etc. v. State of U.P. & Ors. etc.,* **AIR 2000 SC 3299; and** *Satpal & Ors. v. State of Haryana & Ors.,* **1995 Supp (1) SCC 206 - relied on.**

1.3 The appropriate allocation of marks for interview, where selection is to be made by written test as well as by interview, would depend upon the nature of post and no straight-jacket formula can be laid down. Further, there is a distinction while considering the case of employment and of admission for an academic course. The courts have repeatedly emphasized that for the purpose of admission in an educational institution, the allocation of interview marks would not be very high but for the purpose of employment, allocation of marks for interview would depend upon the nature of post. [para 15] [634-F-H]

Mehmood Alam Tariq & Ors. v. State of Rajasthan & Ors., **1988 (1) Suppl. SCR 379 = AIR 1988 SC 1451;** *State of U.P. v. Rafiquddin & Ors.* **1988 SCR 794 = AIR 1988 SC 162; and** *Anzar Ahmad v. State of Bihar & Ors.,* **1993 (3) Suppl. SCR 434 =AIR 1994 SC 141 - referred to.**

1.4 In the instant case, the rules of the game were changed after conducting the written test and admittedly not at the stage of initiation of the selection process. The marks allocated for the oral interview were the same as for written test i.e. 50% for each. The manner in which marks were awarded in the interview to the candidates indicated lack of transparency. The candidate who secured 47 marks out of 50 in the written test was given only 20 marks in the interview while large number of candidates got equal marks in the interview as in the written examination. Candidate who secured 34 marks in the written examination was given 45 marks in the interview. Similarly, another candidate who secured 36 marks in the written examination was awarded 45 marks in the interview. [para 20] [635-G-H; 636-A-B]

1.5 The fact that today the so called selected candidates are not in employment, is also a relevant factor to decide the case finally. If the whole selection is scrapped most of the candidates would be ineligible at

least in respect of age as the advertisement was issued more than six years ago. Thus, in the facts of this case, the direction of the High Court to continue with the selection process from the point it stood vitiated does not require interference.[para 20] [636-B-C]

Case Law Reference:

2010 (2) SCR 256	**relied on**	**Para 6**
2008 (5) SCR 1066	**relied on**	**Para 7**
2009 (10) SCR 522	**relied on**	**Para 7**
2010 (10) SCR 161	**relied on**	**Para 7**
2013 (2) SCR 1134	**relied on**	**Para 7**
2007 (3) SCR 53	**relied on**	**Para 8**
(2013) 4 SCC 540	**relied on**	**Para 9**
1985 (1) Suppl. SCR 657	**relied on**	**Para 13**
1991 (2) SCR 812	**relied on**	**Para 13**
1990 (3) Suppl. SCR 108	**relied on**	**Para 13**
AIR 2000 SC 3299	**relied on**	**Para 13**
1981 (2) SCR 79	**relied on**	**Para 14**
1995 Supp (1) SCC 206	**relied on**	**Para 14**
1988 (1) Suppl. SCR 379	**referred to**	**Para 16**
1988 SCR 794	**referred to**	**Para 17**
1993 (3) Suppl. SCR 434	**referred to**	**Para 18**
(2003) 2 SCC 132	**relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4255-4258 of 2014.

From the Judgment & Order dated 05.04.2013 of the High Court of Calcutta in WPCT Nos. 607, [illegible] of 2012.

Mahabir Singh, Aishwarya Bhati, Amit, Pawan Kr. Saini, Tarun Kaushik, B.K. Das, Sukesh Ghosh for the Appellants.

Neeraj Shekhar, R. Balasubramaniam, K.V. Jagdeshvaran, G. Indira, Dileep Poolakkot, Harshad V. Hameed for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals arise out of the common judgment and order dated 5.4.2013, passed by the High Court of Calcutta, Circuit Bench at Port Blair in W.P.C.T. Nos.607-610 of 2012 partly allowing the appeals against the judgment and order dated 24.8.2012, passed by the Central Administrative Tribunal, Calcutta (Circuit Bench, Port Blair) (hereinafter referred to as the 'Tribunal') allowing the O.A. No.124/AN/2010 and quashing the appointment orders dated 5.2.2009 and 4.6.2009.

2. Facts and circumstances giving rise to these appeals are:

A. That an advertisement dated 4.2.2008 was published by the respondent authorities calling for applications from eligible candidates as well as from those who were registered with the Employment Exchange for appointment to the 8 posts of Group 'D' staff. The recruitment rules only provided for a written examination having 50 maximum marks.

B. The written examination was held on 25.1.2009 which was given by 870 candidates out of which 573 candidates obtained 20 and above marks.

C. A press notice dated 27.1.2009 was issued calling the successful candidates for interview, though such interview was not part of the recruitment process.

D. The interviews were conducted and a final result sheet was published. In pursuance thereto, appointment letters were

issued to the appellants herein.

E. Challenging the said appointments, the unsuccessful candidates filed Original Application before the Tribunal which was allowed, quashing such appointments as equal marks were earmarked for both the written examination and interview which is impermissible in law and that the interview was never part of the recruitment process and thereby ordering initiation of fresh recruitment process.

F. The appointees/appellants challenged the said order before the High Court. The High Court upheld the reasoning of the Tribunal but modified the order to the extent of continuing the recruitment process from the point it stood vitiated.

G. In pursuance of the judgment and order of the High Court, termination letters were issued to the appellants.

Hence, these appeals.

3. Shri Mahabir Singh, learned senior counsel duly assisted by Ms. Aishwarya Bhati, learned counsel appearing for the appellants has submitted that the employer has a right to prescribe for a higher qualification or a stringent test than prescribed under the statutory rules in order to select the best candidates and once the selection is over and the candidates appeared without any protest, they cannot be permitted to do a to do a somersoult and challenge the selection as a whole. Thus, the judgments impugned i.e. of the Tribunal as well as of the High Court are liable to be set aside.

4. Per contra, Shri R. Balasubramaniam, learned counsel appearing for the respondents has opposed the appeals contending that it was not permissible for the employer to change the rule of the game after the selection process commenced even if the employer is entitled for prescribing a higher qualification or a stringent test than prescribed under the rules. In the instant case as the finding of fact has been recorded

by the courts below that there had been no transparency in awarding the marks in interview and the interview marks could not be same as that of the written test, the court should not grant any indulgence in such case. Hence, the appeals are liable to be dismissed.

5. We have heard learned counsel for the parties and perused the record.

6. This Court has considered the issue involved herein in great detail in *Ramesh Kumar v. High Court of Delhi & Anr.,* AIR 2010 SC 3714, and held as under:

> "11. In Shri Durgacharan Misra v. State of Orissa & Ors., AIR1987 SC 2267, this Court considered the Orissa Judicial Service Rules which did not provide for prescribing the minimum cut-off marks in interview for the purpose of selection. This Court held that in absence of the enabling provision for fixation of minimum marks in interview would amount to amending the Rules itself. While deciding the said case, the Court placed reliance upon its earlier judgments in *B.S. Yadav & Ors. v. State of Haryana & Ors.,* AIR 1981 SC 561, *P.K. Ramachandra Iyer & Ors. v. Union of India & Ors.,* AIR 1984 SC 541 and *Umesh Chandra Shukla v. Union of India & Ors.,* AIR 1985 SC 1351 wherein it had been held that there was no "inherent jurisdiction" of the Selection Committee/Authority to lay down such norms for selection in addition to the procedure prescribed by the Rules. Selection is to be made giving strict adherence to the statutory provisions and if such power i.e. "inherent jurisdiction" is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reason that such deviation from the Rules is likely to cause irreparable and irreversible harm.
>
> 12. Similarly, in *K. Manjusree v. State of A.P.,* AIR 2008 SC 1470, this Court held that selection criteria has to be adopted and declared at the time of commencement of the

> recruitment process. The rules of the game cannot be changed after the game is over. The competent authority, if the statutory rules do not restrain, is fully competent to prescribe the minimum qualifying marks for written examination as well as for interview. But such prescription must be done at the time of initiation of selection process. Change of criteria of selection in the midst of selection process is not permissible.
>
> 13. Thus, the law on the issue can be summarised to the effect that in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written test as well as for viva voce."

7. In *Himani Malhotra v. High Court of Delhi,* AIR 2008 SC 2103, this Court has held that it was not permissible for the employer to change the criteria of selection in the midst of selection process. (See also: *Tamil Nadu Computer Science BEd Graduate Teachers Welfare Society (1) v. Higher Secondary School Computer Teachers Association & Ors.,* (2009) 14 SCC 517; *State of Bihar & Ors. v. Mithilesh Kumar,* (2010) 13 SCC 467; and *Arunachal Pradesh Public Service Commission & Anr. v. Tage Habung & Ors.,* AIR 2013 SC 1601).

8. In *P. Mohanan Pillai v. State of Kerala & Ors.,* AIR 2007 SC 2840, this Court has held as under :

> "It is now well-settled that ordinarily rules which were prevailing at the time, when the vacancies arose would be adhered to. The qualification must be fixed at that time. The eligibility criteria as also the procedures as was prevailing on the date of vacancy [illegible]e

followed."

9. The issue of the change of rule of the game has been referred to the larger Bench as is evident from the judgment in *Tej Prakash Pathak & Ors. v. Rajasthan High Court & Ors.,* (2013) 4 SCC 540.

10. However, the instant case is required to be considered in the light of the findings of facts recorded by the Courts below:-

The Tribunal after appreciating the evidence on record, recorded the following findings:

> "The applicant had secured 47 marks out of 50 in the written examination. He was given only 20 marks in the interview whereas persons like Miss Zeenath Begum, Mr. Mohsin, Mr. Bishnu Biswas, Mr. Mohan Raof, Mr. Bharati Bhusan, Mr. Dilip Bepari and others got equal marks in the interview as in the written examination or more distorting results. For instance, Mr. Bishnu Biswas got 34 marks in the written examination and was given 45 marks in the interview. Similarly, Mr. Dilip Bepari got 36 marks in the written examination and got 45 marks in the interview. In case of Shri Bishnu Biswas he was not qualified as per recruitment rules since he did not possess the prescribed 8th pass certificate for the post. Directions have been sought from the Tribunal to set aside the appointment orders of the private respondents as per orders of 5.2.2009 and 4.6.2009."

11. The High Court considered these issues and recorded the finding of fact that undoubtedly awarding of marks in the above manner indicated lack of transparency in the matter.

12. The High Court has further held that distribution of marks equally both in the written test and in the interview is not permissible at all. In the instant case, there has been 50 marks for the written test as well as 50 marks for interview though the

rules did not envisage holding of the interview at all.

13. This Court in *Ashok Kumar Yadav & Ors. etc. etc. v. State of Haryana & Ors.,* AIR 1987 SC 454 held that allocation of 22.2% marks for the viva voce test was excessive and unreasonably high, tending to leave room for arbitrariness.

(See also : *Munindra Kumar & Ors. v. Rajiv Govil & Ors.,* AIR 1991 SC 1607; *Mohinder Sain Garg v. State of Punjab & Ors.,* (1991) 1 SCC 662; *P. Mohanan Pillai (supra); and Kiran Gupta & Ors. etc. etc. v. State of U.P. & Ors. etc.,* AIR 2000 SC 3299).

14. In *Satpal & Ors. v. State of Haryana & Ors.,* 1995 Supp (1) SCC 206, this Court disapproved allocation of 85% of total marks for interview observing that such fixation was conducive to arbitrary selection. While deciding the said case the court placed reliance upon the Constitution Bench judgment in Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors., AIR 1981 SC 487, wherein the court had held that allocation of more than 15% of the total marks for the oral interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid. Thus, it is evident that the courts had always frowned upon prescribing higher percentage of marks for interview even when the selection has been on the basis of written test as well as on interview.

15. The appropriate allocation of marks for interview, where selection is to be made by written test as well as by interview, would depend upon the nature of post and no straight-jacket formula can be laid down. Further there is a distinction while considering the case of employment and of admission for an academic course. The courts have repeatedly emphasized that for the purpose of admission in an education institution, the allocation of interview marks would not be very high but for the purpose of employment, allocation of marks for interview would depend upon the nature of post.

16. In *Mehmood Alam Tariq & Ors. v. State of Rajasthan & Ors.,* AIR 1988 SC 1451, this Court had upheld fixation of 33% marks as minimum qualifying marks for viva test.

17. In *State of U.P. v. Rafiquddin & Ors.,* AIR 1988 SC 162, this Court upheld the fixation of 35% marks as minimum qualifying marks in the viva test for selection for the recruitment to the post of a judicial magistrate.

18. In *Anzar Ahmad v. State of Bihar & Ors.,* AIR 1994 SC 141, allocation of 50% marks for viva test and 50% marks for academic performance was upheld by this Court while considering the appointment of Unani Medical Officer observing that court must examine as to whether allocation of such higher percentage may tend to arbitrariness.

19. In *Jasvinder Singh & Ors. v. State of J&K & Ors.,* (2003) 2 SCC 132, this Court upheld the allocation of 20% marks for viva test as against 80% marks for written test for selection to the post of Sub-Inspector of Police. However, the Court cautioned observing that the awarding of higher percentage of marks to those who got lower marks in written test in comparison to some who had got higher marks in written examination, an adverse inference from certain number of such instances can be drawn. However, in absence of any allegation of mala fides against the Selection Committee or any Member thereof, a negligible few such instances, would not justify the inference that there was a conscious effort to bring some candidates within the selection zone.

20. In the instant case, the rules of the game had been changed after conducting the written test and admittedly not at the stage of initiation of the selection process. The marks allocated for the oral interview had been the same as for written test i.e. 50% for each. The manner in which marks have been awarded in the interview to the candidates indicated lack of transparency. The candidate who secured 47 marks out of 50 in the written test had been given only 20 marks in the interview

while large number of candidates got equal marks in the interview as in the written examination. Candidate who secured 34 marks in the written examination was given 45 marks in the interview. Similarly, another candidate who secured 36 marks in the written examination was awarded 45 marks in the interview. The fact that today the so called selected candidates are not in employment, is also a relevant factor to decide the case finally. If the whole selection is scrapped most of the candidates would be ineligible at least in respect of age as the advertisement was issued more than six years ago.

Thus, in the facts of this case the direction of the High Court to continue with the selection process from the point it stood vitiated does not require interference.

In view of the above, the appeals are devoid of merit and are accordingly dismissed. No costs.

R.P. Appeals dismissed.

A.P.N.G.O.'S ASSOCIATION
v.
GOVERNMENT OF ANDHRA PRADESH & OTHERS
(Civil Appeal No. 4383 of 2014)

APRIL 3, 2014

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

ANDHRA PRADESH CHARITABLE AND HINDU RELIGIOUS INSTITUTIONS AND ENDOWMENTS ACT, 1987:

s.80 - Sale of land belonging to Charitable and Religious Endowment - Writ petition challenging the sale - Dismissed by single Judge of High Court - Division Bench quashing the sale - Held: Purpose of making an endowment in favour of a deity is to generate income for various services required to be rendered to the deity - It has come on record that the interest on the sale proceeds will fetch much higher than the income the land was getting - Therefore, prospect of getting a higher income is certainly relevant consideration than possibility of appreciation in value of the asset endowed - Order of Division Bench of High Court set aside and that of single Judge restored.

The appellant-Association of non-gazetted Government employees applied to the Executive Officer of the third-respondent Temple to sell the land in question to provide houses to its members. After inviting objections by publication in official gazette in terms of s.80(1)(b) of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 (the Act), the Government issued GOMs No. 911 dated 14.12.2000, purporting to sale of the land in favour of the appellants. One year thereafter a writ petition was filed

challenging the said GOMs No. 911. Subsequently, all the original petitioners withdrew the petition, but another person who had got himself impleaded, filed a Letters Patent appeal against the order of the single Judge dismissing the writ petition. Later, after the registered sale deed had been executed, another writ petition was filed. The Division Bench of the High Court allowed the writ petition and the appeal, set aside the judgment of the single Judge and quashed the G.O.Ms. No. 911.

Allowing the appeals, the Court

HELD: 1. In terms of s.80 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987, normally the sale of any immovable property belonging to any religious institution, such as, the third respondent can only be effected by tender-cum-public auction in the prescribed manner and subject to the prior sanction of the Commissioner. Such a prior sanction can be given by the Commissioner only if he first makes a publication in the official Gazette of the particulars relating to the proposed transaction and invites objections and suggestions (if any) and on receipt of the objections or suggestions comes to the conclusion:

1. it is un-economical for the institution or endowment to own and maintain such immovable property;

2. such a sale is prudent and necessary or beneficial to the institution or endowment;

3. such a sale is likely to fetch adequate and proper consideration for the property. [Para 5 & 6] [641-A; 642-B-E]

1.2 In the instant case, the undi[illegible]t a publication in the official gazette in[illegible]d

suggestions for the sale of the proposed property as required u/s 80(1)(b) of the Act was made. None of the writ petitioners before the High Court ever raised any objection or made any suggestion in response to the notification. The State Government in exercise of the authority under the first proviso to s.80 (1) issued G.O.Ms. No.911 permitting the sale of the land in question otherwise than by public auction. [para 16] [644-C-E]

1.3 As per the pleadings, the land in question was getting an income of Rs.1,00,000/- per annum. On the other hand, the Division Bench recorded that in the counter affidavit filed by the Government, it is stated that the consideration to be received after the sale in question would fetch an interest of Rs.6,00,000/- per annum. The single Judge opined that the prospect of increase in the income as a consequence of the sale in question is a relevant consideration having regard to the scheme of s. 80(1)(b) of the Act. [para 17] [644-E-G]

1.4 The approach of the Division Bench of the High Court is not in tune with the language of s. 80. The purpose of making an endowment in favour of a deity is to generate income for the various services required to be rendered to the deity. Therefore, the prospect of getting a higher income is certainly relevant consideration than the possibility of an appreciation in the value of the asset endowed. On the other hand, the entire higher annual income accruing as interest on the sale proceeds of the asset need not be utilised every year only for the services but part of it can always be reinvested in proper asset to beat the inflation. [para 19] [645-C-E]

1.5 In the totality of the circumstances, this Court is of the opinion that the Division Bench erred in interfering with the judgment of the single Judge. Therefore, the judgment under appeal is set aside and that of the single Judge restored. The validity of G.O.Ms. No.911 dated 14.12.2000 is upheld. [para 21] [645-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4383 of 2014.

From the Judgment and Order dated 28.01.2006 of the High Court of A.P. at Hyderabad in WA no. 1035 and WP No. 8063 of 2004.

B. Adinarayana Rao, G. Ramakrishna Prasad, Syodhan Byrapaneni, Mohd. Wasay Khan, Filza Moonis, Bharat J. Joshi for the Appellant.

Kavin Gulati, D. Bharat Kumar, Sayoj Mohandas M., Abhijit Sengupta, C.K. Sucharita, V. Sridhar Reddy, A.S. Rao, Vineet Mishra, V.N. Raghupathy, Merusagar Samantaray for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. Aggrieved by the common judgment dated 28th January 2006 in Writ Petition No.8063 of 2004 and Writ Appeal No.1035 of 2004 of the High Court of Andhra Pradesh at Hyderabad, the third respondent therein preferred the instant appeal.

3. By the said judgment, the High Court set aside the judgment dated 3rd March 2004 in Writ Petition No.2563 of 2002 rendered by a learned Single Judge and quashed G.O.Ms. No.911 dated 14.12.2000 issued by the Revenue (Endowments) Department, Government of Andhra Pradesh.

4. The appellant is an association of the non-gazetted officers of the Government of Andhra Pradesh. Sometime in the year 1995, the appellant herein requested the Executive Officer of the third respondent Temple to sell an extent of 18 acres of land (Survey No.221/1) to provide houses to its members.

5. The Administration of Charitable and Hindu Religious Institutions and Endowments in Andhra Pradesh is regulated by an Act named the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987. Section 80 of the Act insofar as is relevant for us reads as under:

"Section 80. Alienation of immovable property: 1(a) Any gift, sale, exchange or mortgage of any immovable property belonging to or given or endowed for the purpose of any charitable or religious institution, endowment shall be null and void unless any such transaction, not being a gift, is effected with the prior sanction of the Commissioner.

(b) The Commissioner, may, after publishing in the Andhra Pradesh Gazette the particulars relating to the proposed transaction and inviting any objections and suggestions with respect thereto and considering all objections and suggestions, if any received from the trustee or other person having interest, accord such sanction where he considers that the transaction is-

i) prudent and necessary or beneficial to the institution, or endowment;

ii) in respect of immovable property which is un-economical for the institution or endowment to own and maintain; and

iii) The consideration therefor is adequate and proper.

(c) Every sale of any such immovable property sanctioned by the Commissioner under clause (b) shall be effected by tender-cum-public auction in the prescribed manner subject to the confirmation by the Commissioner within a period prescribed:

Provided that the Government may, in the interest of the institution or endowment and for reasons to be recorded therefor in writing, permit the sale of such

immovable property, otherwise than by public auction.

x x x "

6. It can be seen from the above that normally the sale of any immovable property belonging to any religious institution, such as, the third respondent herein can only be effected by tender-cum-public auction in the prescribed manner and subject to the prior sanction of the Commissioner. Such a prior sanction can be given by the Commissioner if only the Commissioner first makes a publication in the Andhra Pradesh Gazette, the particulars relating to the proposed transaction and invites objections and suggestions (if any) and on receipt of the objections or suggestions if the Commissioner comes to the conclusion:

1. it is un-economical for the institution or endowment to own and maintain such immovable property;

2. such a sale is prudent and necessary or beneficial to the institution or endowment;

3. such a sale is likely to fetch adequate and proper consideration for the property.

7. On receipt of the application from the appellant, the Commissioner, Endowments Department (2nd respondent herein) constituted a three-men Committee to inquire and report the probable price that may be secured if the land is sold in public auction. The District Collector, Guntur within whose territorial jurisdiction the temple (third respondent) is located addressed a letter dated 26th March 1998 to the Commissioner, Endowments Department (2nd respondent) suggesting that the Government be addressed for according permission to sell the land in question to the appellant association at the cost of Rs.3,50,000/- per acre by private negotiations. However, the Commissioner vide letter dated 5th March, 1998 advised the Government and sought the permission of the Government to sell t n

favour of the appellants by private negotiations for a consideration of Rs.4,00,000/- per acre.

8. Subsequently, the Commissioner invited objections for the proposed sale by publication in the official gazette of Andhra Pradesh on 3rd April 1999 in compliance of the requirement of section 80(1)(b) of the Endowments Act, 1987.

9. On 14th December 2000, the Government of Andhra Pradesh issued G.O.Ms. No.911 purporting the sale of land in question in favour of the appellants as proposed by the Commissioner.

10. One year thereafter i.e. on 22nd June 2002, a writ petition no. 2563 of 2002 came to be filed challenging the G.O.Ms. No.911 by 17 persons claiming to be protected tenants of the land in question under the A.P. (Andhra Area) Tenancy and Agricultural Lands Act, 1956. Such a claim was seriously disputed by the official respondents.

11. Be that as it may, 16 of the 17 petitioners eventually prayed that they may be permitted to withdraw the writ petition and the same was permitted to be withdrawn on 26th June 2002 vis-à-vis all the petitioners except petitioner no.9.

12. It appears from the judgment of the learned Single Judge that the said 9th petitioner also subsequently filed an application being W.P.M.P. No.21030 of 2003 seeking permission from the Court to withdraw the writ petition. However, at that stage, one Dr. S. Parthasarathy filed an impleadment petition which was allowed by order dated 10th September, 2003. A learned Judge of the Andhra Pradesh High Court by an elaborate order dated 3rd March 2004 dismissed the writ petition. The newly added petitioner Dr. S. Parthasarathy carried the matter in Letters Patent Appeal No.1034 of 2004.

13. In the meanwhile, on 22nd March, 2004 a registered sale deed came to be executed in favour of the appellants

herein transferring the property in question. A month thereafter on 24th April 2004, another Writ Petition No.8063 of 2004 came to be filed by somebody who is resident of Hyderabad claiming to be interested in the temple.

14. Both the abovementioned Writ Petition and the Letters Patent Appeal came to be disposed of by the judgment under appeal herein.

15. By the judgment under appeal, the judgment of the learned Single Jude in Writ Petition No.2563 of 2002 was set aside and also G.O.Ms. No.911 was quashed.

16. The undisputed facts are that a publication in the official gazette inviting objections and suggestions for the sale of the proposed property as required under section 80(1)(b) was made. Admittedly, none of the writ petitioners before the High Court ever raised any objection or made any suggestion in response to the notification. The Government of Andhra Pradesh in exercise of the authority under the first proviso of section 80(1) issued G.O.Ms. No.911 permitting the sale of the land in question otherwise than by public auction.

17. As per the pleadings, the land in question was getting an income of Rs.1,00,000/- per annum. On the other hand, the Division Bench recorded that in the counter affidavit filed by the Government, it is stated that the consideration to be received after the sale in question would fetch an interest of Rs.6,00,000/- per annum. The learned Single Judge opined that the prospect of increase in the income as a consequence of the sale in question is a relevant consideration having regard to the scheme of section 80(b). The Division Bench thought otherwise on the ground:

> "that the value of land in any part of the State is appreciating day by day, whereas the value of money is depreciating. Therefore, in our view, even if it was true that the institution was receiving only rupees one lakh by way of rent and it could receive rupee[illegible]of

interest after selling the property, even then, the institution is not in benefit, because the appreciation of the value of land and depreciation of value of money was not taken into consideration."

18. Coming to the valuation of the land, it can be seen from the letter of the concerned District Collector (Guntur) dated 14th June 2000 addressed to the Government that the market value of the land in the vicinity of the land in question varies from Rs.1,00,000/- to Rs.1,50,000/- depending upon the fertility, texture and location.

19. We are of the opinion that the approach of the Division Bench is not in tune with the language of Section 80. The purpose of making an endowment in favour of a deity is to generate income for the various services required to be rendered to the deity. Therefore, the prospect of getting a higher income is certainly relevant consideration than the possibility of an appreciation in the value of the asset endowed. On the other hand, the entire higher annual income accruing as interest on the sale proceeds of the asset need not be utilised every year only for the services but part of it can always be reinvested in proper asset to beat the inflation.

20. Apart from that, the learned single Judge recorded a finding that all the original writ petitioners withdrew the writ petitions and rightly observed that there are no bona fides on the part of the petitioners who pursued the litigation subsequent to the withdrawal of the writ petition by the original petitioners.

21. In the totality of the circumstances mentioned above, we are of the opinion that the Division Bench erred in interfering with the judgment of the learned Single Judge. We, therefore, set aside the judgment under appeal, restore the judgment of the learned Single Judge and uphold the validity of G.O.Ms. No.911 dated 14.12.2000. Appeal is allowed. There will be no order as to costs.

R.P. Appeals allowed.

SAROJ @ SURAJ PANCHAL & ANR.

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 734 of 2014)

APRIL 3, 2014

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

Penal Code, 1860 - s.304 Part I r/w s.34 and s.300, First Exception - There was love affair between 'B' and 'S' - On the occurrence night, 'S' went to the house of 'B' to meet her - Annoyed by the presence of 'S' in their house in the night, the father and uncle of 'B' (the appellants) and other accused persons beat 'S' and dragged him through the staircase which resulted in injuries to 'S' and ultimately in his death - Conviction of appellants u/s.302 r/w s.34 IPC - Challenge to - Held: Nobody would tolerate an intruder into their house in the night hours - By no means, can it be held to be a case of pre-meditation - It was a case of grave and sudden provocation and would come under the First Exception to s.300 IPC - Death was caused by the acts of the appellants done with the intention of causing such bodily injury as is likely to cause death - Conviction of appellants accordingly altered to that u/s.304 Part I r/w s.34 IPC alongwith 7 years RI.

There was love affair between 'S' (the brother of PW1) and 'B' (the daughter of accused no.1). The appellants (accused nos.1 and 3) alongwith two other accused beat 'S' with iron rod and lathi and dragged him through the staircase when he went to the house of 'B' at night to meet her. 'S' died of injuries sustained during the occurrence.

The trial court convicted all the four accused under Section 302 read with Section 34 IPC and sentenced each of them to life imprisonment. In appeal, the High

Court affirmed the conviction of accused nos.1 and 3, and therefore the present appeal by the said two accused.

The appellants pleaded before this Court that the occurrence took place on account of sudden provocation and the act was committed by them without premeditation and it would fall under First Exception to Section 300 IPC.

Partly allowing the appeal, the Court

HELD: 1. It is not in dispute that there was a love affair between 'B' and 'S' and it was not liked by the family members of 'B'. On the occurrence night at about 8.00 p.m. 'S' went to the house of 'B' to meet her. Annoyed by the presence of 'S' in the night in their house the appellants and other accused persons beat 'S' and dragged him from the first floor to the ground floor through wooden staircase which resulted in injuries. Nobody would tolerate such an intruder into their house in the night hours. By no means, can it be held to be a case of premeditation and it was a case of grave and sudden provocation and would come under the First Exception to Section 300 IPC. [Para 8] [651-A-C]

Mangesh vs. State of Maharashtra **(2011) 2 SCC 123: 2011 (1) SCR 72;** *State of Punjab vs. Jagtar Singh & Ors.* **(2011) 14 SCC 678: 2011 (9) SCR 494 - referred to.**

2. Looking at the nature of injuries sustained by the deceased and the circumstances, it can be concluded that the death was caused by the acts of the appellants/ accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the first part of Section 304 IPC and the appellants would be liable to be convicted for the said offence. The conviction of the appellants for the offence under Section 302 read with Section 34 IPC

and the sentence of life imprisonment each imposed on them are set aside and instead they are convicted for the offence under Section 304 Part I read with Section 34 IPC and sentenced to undergo seven years rigorous imprisonment each. [Paras 9, 11] [651-D-E, G-H]

Case Law Reference:

2011 (1) SCR 72	**referred to**	**Para 8**
2011 (9) SCR 494	**referred to**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 734 of 2014.

From the Judgment and Order dated 12.05.2008 of the High Court of Calcutta in CRA No. 207 of 2002.

A.K. Chawla (AC) for the Appellant.

Anip Sachthey, Shagun Matta for the Respondent.

The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. Leave granted.

2. This appeal is preferred against the judgment of the High Court of Calcutta in C.R.A. no.207 of 2002.

3. The appellants herein are accused nos.1 and 3 respectively in Sessions Trial Case no.XXX(April) of 2000 on the file of Fourth Additional Sessions Judge at Howrah and they were tried along with two other accused and all of them were convicted for offence under Section 302 read with Section 34 IPC and each of them was sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- and in default to undergo rigorous imprisonment for one year. Aggrieved by the conviction and sentence accused nos.1 to 4 preferred appeal in Criminal Appeal no.207 of 2002 and the High Court by impugned judgment dated 12.5.2008 dismissed the appeal preferred by accused nos.1 and 3. Challenging

preferred the present appeal.

4. The prosecution case in brief is as follows : Accused no.1 Saroj @ Suraj Panchal is the elder brother of accused no.3 Anil Panchal. Accused no.2 Tapan Panchal and accused no.4 Swapan Panchal are sons of accused no.1 Saroj @ Suraj Panchal. PW1 Srikant Ray and PW9 Sameer Ray are brothers of deceased Sukumar Ray. All of them are residents of Bangalpur village and their houses were nearby. There was a love affair between Sukumar Ray and Kumari Bandana Panchal aged about 20 years, daughter of accused no.1 Saroj @ Suraj Panchal. On 10.7.1990 at about 8.00 p.m. a hue and cry was heard from the first floor of the house of accused no.1 Saroj @ Suraj Panchal and PW1 to PW4, PW9 and PW12 went there and saw accused nos.1 to 4 beating Sukumar Ray with iron rod and lathi and dragging him by tying his hands and legs through wooden staircase from the first floor to the ground floor and left him in the dange of Gobinda Mondal. PW11 Tapan Kumar Pramanik took the injured Sukumar Ray to the Bagnan Hospital by his trolley van. PW1 Srikant Ray lodged a written complaint at 23.25 hrs. on 10.7.1990 in Bagnan Police Station. Exh.2 is the G.D. Entry. PW13 the sub-Inspector of the Police registered the case against the accused and Exh.3 is the F.I.R. Sukumar Ray died at 1600 hrs. on 11.7.1990.

5. PW14 Dr. Kumud Ranjan Chatterjee conducted the post-mortem and found the following :

i) One abrasion 2"x2" over left leg;

ii) One bruise mark over left temple region with black eye;

iii) One lacerated wound 4"x1" X bone deep over left occipital region;

iv) One lacerated wound 2"x ½" X bone deep over right temporal region;

On dissection he found multiple diffused and spotted haematoma on the scalp present, depressed fracture over right temporal occipital region with haemorhage inside the brain tissue.

He opined that death was caused due to injuries sustained particularly the head injury. After completing investigation the final report came to be filed against the accused persons 1 to 4. In order to prove its case the prosecution examined PW1 to PW19 and marked documents. No evidence was let in on the side of the defence. The Trial Court found accused nos.1 to 4 guilty of the charge of murder and sentenced them as narrated above. On appeal the conviction and sentence imposed on accused nos.1 and 3 were confirmed. Challenging the same they preferred appeal and this Court by order dated 19.10.2012 issued notice on the question of the nature of offence and sentence only.

6. During the occurrence appellants herein/accused nos.1 and 3 along with two other accused beat Sukumar Ray with iron rod and lathi is established by the testimonies of the eye witnesses namely PW1 to PW4, PW9 and PW12. Sukumar Ray died of injuries sustained during the occurrence is also proved by the medical evidence let in by the prosecution in the case.

7. The learned counsel for the appellants contended that the occurrence took place on account of sudden provocation and the act was committed by the appellants without premeditation and it would fall under First Exception to Section 300 IPC and the first appellant is 80 years old and the second appellant is 76 years old. Per contra the learned counsel appearing for the respondent State submitted that the conviction and sentence imposed on the appellants are proper.

8. It is not in dispute that there was a love affair between Bandana Panchal and Sukumar Ray and it was not liked by the family members of Bandana Panchal. C[illegible]t

at about 8.00 p.m. Sukumar Ray went to the house of Bandana Panchal to meet her. Annoyed by the presence of Sukumar Ray in the night in their house the appellants and other accused persons beat Sukumar Ray and dragged him from the first floor to the ground floor through wooden staircase which resulted in injuries. Nobody would tolerate such an intruder into their house in the night hours. By no means, can it be held to be a case of premeditation and it was a case of grave and sudden provocation and would come under the First Exception to Section 300 IPC. The fact situation bears great similarity to that in the decisions in *Mangesh vs. State of Maharashtra* (2011) 2 SCC 123 and *State of Punjab vs. Jagtar Singh & Ors.* (2011) 14 SCC 678.

9. Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above it can be concluded that the death was caused by the acts of the appellants/accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the first part of Section 304 IPC and the appellants would be liable to be convicted for the said offence. The conviction of the appellants/accused nos.1 and 3 under Section 302 read with Section 34 IPC is liable to be set aside.

10. We are of the considered view that imposition of seven years rigorous imprisonment on each of the appellants for the conviction under Section 304 Part I IPC would meet the ends of justice.

11. In the result the Criminal Appeal is partly allowed and the conviction of the appellants for the offence under Section 302 read with Section 34 IPC and the sentence of life imprisonment each imposed on them are set aside and instead they are convicted for the offence under Section 304 Part I read with Section 34 IPC and sentenced to undergo seven years rigorous imprisonment each.

B.B.B. Appeal partly allowed.

BABUBHAI BHIMABHAI BOKHIRIA & ANR.

v.

STATE OF GUJARAT & ORS.

(Criminal Appeal No. 735 of 2014)

APRIL 3, 2014

[CHANDRAMAULI KR. PRASAD AND PINAKI CHANDRA GHOSE, JJ.]

Code of Criminal Procedure, 1973: s.319 - Scope of - Held: s.319 confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial - The degree of satisfaction for invoking power u/s.319 is much higher though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued - In the instant case, the trial court allowed the application filed u/s.319 on the basis of letter written almost a year ago by the deceased in which it was stated that in the event of his death, the appellant shall be held responsible - Except the apprehension expressed by the deceased, the letter did not relate to the cause of his death or to any circumstance of the transaction which resulted in his death - The said letter did not satisfy the requirement of s.32 of the Evidence Act and, therefore, cannot be considered as such to enable exercise of power u/s.319 of the Code - Evidence Act, 1872 - s.32.

Evidence Act, 1872: s.32 - Dying declaration - Held: As per s.32(1), any statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question - It is an exception to the rule

of hearsay - However, general expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question - In the instant case, a letter written almost a year ago by the deceased was recovered from his purse in which it was stated that in the event of his death, the appellant shall be held responsible as the appellant intended to kill him - Except the apprehension expressed by the deceased, the letter did not relate to the cause of his death or to any circumstance of the transaction which resulted in his death - Therefore, said letter did not satisfy the requirement of s.32 of the Act and was not admissible.

The prosecution case was that during the pendency of trial of a murder case, the wife of the deceased filed an application for further investigation under Section 173(8), Cr.P.C. alleging the appellant's complicity in the crime on the basis of a letter written almost a year ago by the deceased recovered from his purse in which it was stated that in the event of his death, the appellant shall be held responsible as the appellant intended to kill him. The trial court directed for further investigation. During the course of trial of other accused, an application was filed by the son of the deceased praying for arraigning the appellant as an accused in exercise of power under Section 319, Cr.P.C. The trial court allowed the application holding that prima facie strong evidence existed to summon the appellant as the letter recovered from the deceased incriminated him. The High Court upheld the order of the trial court. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. Section 319 of the Code of Criminal Procedure confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has

deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. The degree of satisfaction for invoking power under Section 319 of the Code is much higher though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued. [Para 9] [659-F-H; 660-A]

2. Section 32(1) of the Evidence Act states that a statement of a fact by a person who is dead when it relates to cause of death is relevant. It is an exception to the rule of hearsay. Any statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate to the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question. In the instant case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. The note does not satisfy the requirement of Section 32 of the Act and, therefore, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code. [Para 15] [663-A-E]

Hardeep Singh v. State of Punjab **2014 (1) SCALE 241;** *Pakala Narayanswami v. Emperor* **AIR 1939 PC 47;** *Sharad Birdhichand Sarda v. State of Maharashtra* **1984 (4) SCC 116: 1985 (1) SCR 88 - relied on.**

3. The other evidence sought t r

summoning the appellant was the alleged conversation between the appellant and the accused on and immediately after the day of the occurrence. But, nothing came during the course of trial regarding the content of the conversation and from call records alone, the appellant's complicity in the crime did not surface at all. Thus, no evidence at all came during the trial to show even a prima facie complicity of the appellant in the crime. In that view of the matter, the order passed by the trial court summoning the appellant, as affirmed by the High Court is not sustained. [Paras 21, 22] [666-A-C]

Rattan Singh v. State of Himachal Pradesh 1997 (4) SCC 161: 1996 (9) Suppl. SCR 938 - distinguished.

Case Law Reference:

2014 (1) SCALE 241	**relied on**	**Para 8**
1996 (9) Suppl. SCR 938	**Distinguished**	**Para 13**
AIR 1939 PC 47	**Relied on**	**Para16**
1985 (1) SCR 88	**Relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 735 of 2014.

From the Judgment and order dated 11.12.2008 of the High Court of Gujarat at Ahmedabad in SCRA No. 638 of 2008.

V.A. Bobde, A.M. Singhvi, Huzefa Ahmadi, Sushil Kumar Jain, Aniruddha P. Mayee, Dharmesh D. Nanavati, Charudatta Mahindrakar, Kamna Sagar, Maria Nazir, B.M. Mangukiya, Ejaz Maqbool, V.H. Kanara, Mrigank Prabhakar, Preeti Kunwar, R. Sharma, Hemantika Wahi, Puja Singh, Pratibha Jain for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Before we proceed to consider the case, we must remind ourselves the

maxim "judex damnatur cum nocens absolvitur" which means that a Judge is condemned when guilty person escapes punishment. But, at the same time, we cannot forget that credibility of the justice delivery system comes under severe strain when a person is put on trial only for acquittal.

2. By Order dated 8th December, 2011, Veja Prabhat Bhutia was added as petitioner no. 2. He was an accused in the case and his grievance was that due to pendency of the present petition filed by petitioner Babubhai Bhimabhai Bokhiria, his trial has been stayed and he is unnecessarily rotting in jail. This judgment shall, therefore, will have no bearing on him and the expression "petitioner/appellant" in this judgment would mean petitioner no.1/appellant no.1 Babubhai Bhimabhai Bokhiria.

3. Shorn of unnecessary details, facts giving rise to the present petition are that one Mulubhai Gigabhai Modhvadiya was murdered on 16th of November, 2005 and for that a case was registered at Kalambaug Police Station, Porbandar, under Section 302, 201, 34, 120B, 465, 468 and 471 of the Indian Penal Code and Section 25 of the Arms Act. Police after usual investigation submitted the charge-sheet and the case was ultimately committed for trial to the Court of Session. When the trial was so pending, the wife of the deceased filed an application for further investigation under Section 173(8) of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), alleging petitioner's complicity in the crime, inter alia, stating that the petitioner was a business rival of the deceased whereas one of the main accused is his business partner with whom he conspired to kill the deceased. It was alleged that petitioner was a Minister earlier from the party which was in power in the State and therefore, he was let off during investigation. It was also pointed out that a letter written almost a year ago by the deceased was recovered from his purse in which it was stated that in the event of his death, the petitioner shall be held responsible as he intende[illegible]o

the said application, the Investigating Officer filed his affidavit stating therein that during the course of investigation, nobody supported the plea of the wife that the deceased was apprehending any threat from the petitioner or for that matter, any other person. In another affidavit filed by the Investigating Officer, a firm stand was taken that no material had surfaced to show the complicity of the petitioner in the offence. It was pointed out by the Investigating Officer that the deceased filed an application for arms licence and in that application also he did not disclose any threat or apprehension to his life from any person, including the petitioner herein. Notwithstanding the aforesaid affidavit of the Investigating Officer, the Sessions Judge directed for further investigation. In the light of the aforesaid, the investigating agency submitted further report stating therein that the call records of the period immediately preceding the death of the deceased do not show any nexus between him and the petitioner and the deceased did not have any threat from the petitioner. In this way, the police did not find the complicity of the petitioner in the crime.

4. During the course of trial of other accused, 134 witnesses were examined and at that stage, an application was filed by the son of the deceased praying for arraigning the petitioner as an accused in exercise of power under Section 319 of the Code. Said application was allowed by the learned Sessions Judge on its finding that prima facie strong evidence exists to summon the petitioner as the letter recovered from the deceased incriminated him. It was also observed that the veracity of the letter recovered from the deceased was established by two witnesses who confirmed that the letter was in the handwriting of the deceased.

5. Aggrieved by the aforesaid order, the petitioner preferred Special Criminal Application No. 638 of 2008 before the High Court of Gujarat. The High Court by its order dated 11th December, 2008 dismissed the said application inter alia observing as follows:

> "7. In view of the material placed before the Court, selected by the parties, and in absence of comprehensive and panoramic view of the entire evidence led before the Court in respect of the heinous crime wherein Section 120-B of I.P.C. is clearly alleged, it would be hazardous to record an opinion different from the opinion formed by the Court conducting the case. It is emphasized in the most recent judgment dated 07.11.2008 of the Supreme Court in *Hardeep Singh v. State of Punjab* [Criminal Appeal No. 1750-1751/2008], after reference to most of the previous judgments on the issue and reiterating the ration in *Bholu Ram v. State of Punjab* (2008) 9 SCC 140, that the primary object underlying Section 319 is that the whole case against all the accused should be tried and disposed of not only expeditiously but also simultaneously. Justice and convenience both require that cognizance against the newly added accused should be taken in the same case and in the same manner as against the original accused. In view of the principles laid down by the Supreme Court as adumbrated hereinabove and in view of the further guidelines called for by the recent referring judgment, it would be improper to interfere with the impugned order, particularly when even the State and the prosecution has supported the application at Ex. 225 below which the impugned order was made."

6. It is in these circumstances, the petitioner has preferred this special leave petition and assails the aforesaid order.

7. Leave granted.

8. Before we proceed to deal with the evidence against the appellant and address whether in light of the evidence available, power under Section 319 of the Code was validly exercised, it would be expedient to understand the position of law in this regard. The issue regarding the scope and extent of powers of the court to arraign any person as an accused during the course of inquiry or trial in ex[illegible]er

Section 319 of the Code has been set at rest by a Constitution Bench of this court in the case of *Hardeep Singh v. State of Punjab,* 2014 (1) SCALE 241. On a review of the authorities, this Court summarised the legal position in the following words:

> "98. Power under Section 319 Cr.P.C. is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.
>
> 99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C……."

9. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319

of the Code is much higher.

10. Having summarised the law on the degree of satisfaction required by the courts to summon an accused to face trial in exercise of power under Section 319 of the Code, we now proceed to consider the submissions advanced by the learned counsel. It is common ground that the only evidence that the trial court has relied to summon the appellant to face the trial is the note written by the deceased in his own handwriting apprehending death at the appellant's hand. The same reads as follows:

> "Date: 18.11.2004
>
> I, Mulubhai Modhvadiya write this note that the then Irrigation Minister Babubhai Bokhiriya @ Babulal want to kill me due to personal differences with me. Therefore I inform to the State and to the police by this note that whenever I die, then I request to do thorough investigation because phone calls are coming threatening to kill me. If I will make complaint today then he will by using his influence destroy the complaint, therefore I am keeping this note in my purse and I am clearly stating that If I will die due to murder then my murder will be done by Babu Bokhiriya only, if dumb government listen to my note than take strict action against Babu Bhokhiriya and my soul will be pleased. I am also giving my finger print on this letter and also signing under it. Therefore you have no doubt about it.
>
> Yours sincerely
> Sd/-
> (Mulubhai Modhvadiya)"

11. It is an admitted position that all those who were put on trial have now been acquitted by the trial court.

12. Mr. V.A. Bobde, learned Senior Counsel appearing on

behalf of the appellant submits that in the course of trial of an offence, when it appears from the evidence that any person, not being the accused, has committed any offence for which such person could be tried together with the accused facing trial, the court may proceed against such person for the offence which he appears to have committed. He points out that the power under Section 319 of the Code can be exercised when it appears from the evidence that any person not being the accused, has committed any offence. In his submission, the evidence would obviously mean the evidence admissible in law. He submits that the note allegedly recovered from the deceased expresses mere apprehension of death and, therefore, it is inadmissible in evidence and does not come within the ambit of Section 32 of the Evidence Act (hereinafter referred to as "the Act"). He further submits that the note does not relate to the cause of death nor it describes any circumstance that led to his death. It has also been pointed out that the note recovered is also not relevant under Section 32 of the Act as it has no proximity with the event of his death, as the same was written over a year ago.

13. Dr. A.M. Singhvi, learned senior counsel appearing for Respondent No.2, however, submits that any statement - written or verbal, made under an expectation of death is relevant under Section 32 of the Act and need not necessarily be followed by death immediately. He submits that the letter recovered from the deceased discloses a relevant fact as the same has been made under apprehension of death and relates to its cause. Though he admits that the letter was written over a year ago, it is his contention that it can still be taken into consideration as it is not necessary to have immediate nexus between the words written and the death. In support of the submission, reliance has been placed on a decision of this Court in the case of *Rattan Singh v. State of Himachal Pradesh,* 1997 (4) SCC 161 wherein it has been held as follows:

"15. ……..The collocation of the words in Section 32(1)

"circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death". There need not necessarily be a direct nexus between "circumstances" and death. It is enough if the words spoken by the deceased have reference to any circumstance which has connection with any of the transactions which ended up in the death of the deceased. Such statement would also fall within the purview of Section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstance should be proximate, for, even distant circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death……."

14. We have given our thoughtful consideration to the rival submissions and the first question which falls for our determination is whether the note in question is admissible in evidence or in other words, can be treated as a dying declaration under Section 32 of the Act. Section 32 of the Act reads as follows:

"32.Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

(1) **when it relates to cause of death.-**When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

xxx xxx xxx"

15. From a plain reading of the aforesaid provision, it is evident that a statement of a fact by a person who is dead when it relates to cause of death is relevant. It is an exception to the rule of hearsay. Any statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is relevant in a case in which the cause of death of the person making the statement comes into question. Indian law has made a departure from the English law where the statements which directly relate to the cause of death are admissible. General expressions suspecting a particular individual not directly related to the occasion of death are not admissible when the cause of death of the deceased comes into question. In the present case, except the apprehension expressed by the deceased, the statement made by him does not relate to the cause of his death or to any circumstance of the transaction which resulted in his death. Once we hold so, the note does not satisfy the requirement of Section 32 of the Act. The note, therefore, in our opinion, is not admissible in evidence and, thus, cannot be considered as such to enable exercise of power under Section 319 of the Code.

16. The Privy Council had the occasion to consider the meaning of the expression "circumstances of transaction" used in Section 32 of the Act in the case of *Pakala Narayanswami v. Emperor,* AIR 1939 PC 47 and on page 50 held as follows:

> ".....The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible....."

17. Aforesaid view had been approved by this Court in

Shiv Kumar v. State of Uttar Pradesh, (Criminal Appeal No. 55 of 1966, decision dated 29th July, 1966), wherein it was held as under:

> "It is clear that if the statement of the deceased is to be admissible under this section it must be a statement relating to the circumstances of the transaction resulting in his death. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed, but general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. A necessary condition of admissibility under the section is that the circumstance must have some proximate relation to the actual occurrence. For instance, a statement made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be a circumstance of the transaction, and would be so whether the person was unknown, or was not the person accused. The phrase "circumstances of the transaction" is a phrase that no doubt conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae' [See *Pakala Narayana Swami v. The King Emperor,* AIR 1939 PC 47]. As we have already stated, the circumstance must have some proximate relation to the actual occurrence if the statement of the deceased is to be admissible under s.32(1) of the Evidence Act....."

(underlining ours)

18. This Court in the case of *Sharad Birdhichand Sarda v. State of Maharashtra,* 1984 (4) SCC

large number of decisions of the Privy Council, various High Courts and the Supreme Court, endorsed the view taken by the Privy Council in *Pakala Narayanswami* (supra) in the following words:

> "21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:
>
> (1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice."

19. All these decisions support the view which we have taken that the note written by the deceased does not relate to the cause of his death or to any of the circumstances of the transaction which resulted in his death and therefore, is inadmissible in law.

20. Now we revert to the authority of this Court in *Rattan Singh* (supra) relied on by Dr. Singhvi. In the said case, the deceased immediately before she was fired at, spoke out that the accused was standing nearby with a gun. In a split second the sound of firearm shot was heard and in a trice her life snuffed off. In the said background, this Court held that the words spoken by the deceased have connection with the circumstance of transaction which resulted into death. In the case in hand, excepting apprehension, there is nothing in the note. No circumstance of any transaction resulting in the death of the deceased is found in the note. Hence, this decision in no way supports the contention of Dr. Singhvi.

21. The other evidence sought to be relied for summoning the appellant is the alleged conversation between the appellant and the accused on and immediately after the day of the occurrence. But, nothing has come during the course of trial regarding the content of the conversation and from call records alone, the appellant's complicity in the crime does not surface at all.

22. From what we have observed above, it is evident that no evidence has at all come during the trial which shows even a prima facie complicity of the appellant in the crime. In that view of the matter, the order passed by the trial court summoning the appellant, as affirmed by the High Court, cannot be allowed to stand.

23. To put the record straight, Mr. Bobde has raised various other contentions to show that the appellant cannot be put on trial, but in view of our answer to the aforesaid contentions, we deem it inexpedient to either incorporate or answer the same.

24. In the result, we allow this appeal and set aside the order of the trial Court summoning the appellant to face trail and the Order of the High Court affirming the same.

D.G. Appeal allowed.

T.N. GENERATION & DISTBN. CORPN. LTD.

v.

PPN POWER GEN. CO. PVT. LTD.

(Civil Appeal No. 4126 of 2013)

APRIL 04, 2014

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

ELECTRICITY ACT, 2003:

s. 86 (1) (f) -- Discretion of State Commission either to adjudicate the dispute or to refer it to arbitration - Dispute between parties with regard to accounting details, refund of excess rebate etc. - State Commission exercising the discretion to adjudicate the dispute - Held: It cannot be accepted that since appellant had made a request for a reference of dispute to arbitration, State Commission ought to have made the reference - Appellant chose to contest the claim of respondent on merits and filed written statement before State Commission - Further, appellant participated in the entire proceedings and invited the findings on merits - Besides, applicability of Arbitration and Conciliation Act, 1996 and Arbitration Act, 1940 has been specifically excepted by Article 16 (2) of the Power Purchase Agreement - Commission is required to exercise its discretion reasonably and not arbitrarily - In the instant case, State Commission upon consideration of the entire matter has rightly exercised its discretion.

s.86 - Adjudication of dispute by State Commission - Held: If the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute - Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice -- Similarly, 1% rebate would be available if the payment of the entire invoice is made within

30 days - The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date - Therefore, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days - Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of invoice - The findings of the Appellate Tribunal on this issue do not call for any interference - As regard interest on late payment, Appellate Tribunal has considered the entire matter and has rightly come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA.

DELAY/LACHES:

Plea that claim of respondent was time barred - Held: Claim of respondents cannot be held to be time barred - Principle of delay and laches would not apply, by virtue of the adjustment of payments being made on FIFO (first in first out) basis - Appellant was duly informed that the part payments made would be adjusted by respondents under FIFO system - It has been correctly held that in such circumstances, s.59 of Contract Act would not be applicable - In any event, Limitation Act is inapplicable to proceedings before State Commission - There is no reason to interfere with the findings recorded by Appellate Tribunal - Contract Act, 1872 - ss. 59,60 and 61 - Limitation Act, 1963.

ELECTRICITY ACT, 2003:

ss.111 and 113 -- Appellate Tribunal for Electricity - Appeal - Jurisdiction - Held: Appellate Tribunal exercises jurisdiction over State Commission by way of a first appeal - Therefore, it is the bounden duty of Appellate Tribunal to examine as to whether decisions rendered by State Commission suffer from vice of arbitrariness, unreasonableness or perversity - It is always open to Appellate Tribunal to examine as to whether State Commission has exercised discretion with regard to re o

arbitration, in accordance with well known norms for exercising such discretion - In the instant case, Appellate Tribunal ought not to have brushed aside the submissions of appellant with the observation that State Commission having exercised its discretion, the issue need not be investigated by Appellate Tribunal - However, conclusions reached by Appellate Tribunal, that jurisdiction has not been exercised by State Commission arbitrarily, whimsically or against statutory provisions does not call for any interference.

s.125 - Appeal to Supreme Court - Scope of -- Held: Under s.125 appeal lies in Supreme Court on any one or more of the grounds specified in s.100 of the Code of Civil Procedure, 1908 -- Therefore, unless the Court is satisfied that the findings of fact recorded by the State Commission are perverse, irrational and based on no evidence, it would not interfere.

ss. 84 - Appointment of Chairperson of State Commission - States of Tamil Nadu - Held: State Commission in deciding a lis between appellant and respondent, discharges judicial functions and exercises judicial power of State - It exercises judicial functions of far reaching effect - Therefore, it must have essential trapping of the court - State Government ought to have exercised its power under sub-s. (2) of s. 84 to appoint one or more Judicial Members in State Commission - Till date no judicial Member has been appointed in the Tamil Nadu State Commission - Matter needs to be considered, with some urgency - s.84 enables the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court - It would be advisable for State Government to exercise this enabling power.

The respondent, a generating company, entered into a Power Purchase Agreement (PPA) with the appellant and as per PPA started raising monthly invoices from 26.4.2001 for the electricity supplied by it to the appellant. There arose dispute between the parties with regard to

accounting details. The respondents issued a notice of dispute resolution on 26.4.2007. Since the dispute was not resolved, the respondent filed a petition i.e. D.R.P. No. 12 of 2009 before the T.N. Electricity Regulatory Commission (the State Commission) seeking a direction to the appellant to make the payment. The State Commission, by an order dated 17.6.2011 allowed the petition for refund of excess rebate availed by the appellant contrary to the terms of PPA and also ordered the respondent to redraw the monthly invoices. The Commission also held that it was competent to adjudicate upon the dispute and that the limitation period prescribed under the Limitation Act, 1963 was not applicable to the proceedings. The appeal filed by the appellant was dismissed by the Appellate Tribunal for Electricity (Appellate Tribunal).

Dismissing the appeal, the Court

HELD: 1.1 The issues raised by the appellant with regard to the constitution of the State Commission and its discretion to either adjudicate or refer a particular dispute to arbitration is no longer res integra. This Court has comprehensively addressed all the issues, on the scope and ambit of s.86 in general and s. 86 (1) (f) in particular of the Electricity Act, 2003. It cannot be accepted that since the appellant had made a request for a reference of the dispute to arbitration, the State Commission ought to have made the reference. It cannot be accepted that the State Commission was dealing with only a pure and simple money claim. The Appellate Tribunal in the impugned order has correctly culled out the ratio of the judgment of this Court in Gujarat Urja*. It is also correctly held that the appellant cannot dictate that the State Commission ought to have referred the dispute to arbitration. [Para 34] [699-B-F]

Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. **2008 (4) SCR 822 = (2008) 4 SCC 755 - relied on.**

1.2 The plea that the State Commission failed to exercise its discretion by not making a reference to arbitration and the request made by the appellant, cannot be countenanced in the particular facts of the case. Having taken the plea that the matter ought to be referred to arbitration, the appellant chose to contest the claim of the respondent on merits and filed the written statement before the State Commission. Not only this, the appellant participated in the entire proceedings and invited the findings on merits. Therefore, the appellant cannot be permitted to raise such a plea. Section 86(1) (f) specifically confers jurisdiction on the State Commission to refer the dispute. Undoubtedly, the Commission is required to exercise its discretion reasonably and not arbitrarily. In the instant case, the State Commission upon consideration of the entire matter has exercised its discretion. [Para 39 and 50] [701-G-H; 702-A; 708-A-C]

Svenska Handelsbanken vs. Indian Charge Chrome Ltd. **1994 (1) SCR 261 = 1994 (2) SCC 155 and** *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd.* **2011 (7) SCR 310 = 2011 (5) SCC 532 - relied on.**

1.3 Even if the reference had been made under Article 16 of the PPA, the applicability of the Arbitration and Conciliation Act, 1996 and the Arbitration Act of 1940 have been specifically excepted under Article 16(2)(h). Article 16 indeed provides for informal resolution of disputes by way of arbitration. However, Article 16(2) mandates that arbitration shall be conducted in accordance with the ICC Rules. Under those rules, ICC Court of arbitration is to make the appointment of Arbitral Tribunal. It has been provided in Article 16.2(e) that the seat of arbitration shall be in London. This fact alone would make Part I of the Arbitration Act, 1996 inapplicable

to the arbitration proceedings. There is a further provision that notwithstanding Article 17(8), the laws of England shall govern the validity, interpretation, construction, performance and the enforcement of the provision contained in Article 16(2). Clearly then, the applicability of Arbitration Act, 1996 is totally ruled out by the parties. Therefore, the appellant cannot claim the benefit of s.43 of the Arbitration and Conciliation Act, 1996. [Para 52] [709-C-F; 711-C]

Bhatia International vs. Bulk Trading S.A. & Anr. **2002 (2) SCR 411 = 2002 (4) SCC 105 - relied on.**

Bharat Aluminium Company vs. Kaisar Aluminium Technical Services Inc **2012 (12) SCR 327 = 2012 (9) SCC 552 - referred to.**

1.4 However, the Appellate Tribunal ought not to have brushed aside the submissions of the appellant with the observation that the State Commission having exercised its discretion, the issue need not be investigated by the Appellate Tribunal. It would always be open to the Appellate Tribunal to examine as to whether the State Commission has exercised the discretion with regard to the question whether the dispute ought to have been referred to arbitration, in accordance with the well known norms for exercising such discretion. The Appellate Tribunal exercises jurisdiction over the State Commission by way of a First Appeal. Therefore, it is the bounden duty of the Appellate Tribunal to examine as to whether all the decisions rendered by the State Commission suffer from the vice of arbitrariness, unreasonableness or perversity. This would be apart from examining as to whether the State Commission has exercised powers in accordance with the statutory provisions contained in Electricity Act, 2003. However, the conclusions reached by the Appellate Tribunal, that the jurisdiction has not been exercised by the State Com

whimsically or against the statutory provisions does not call for any interference. [Para 39] [702-A-E]

2.1 The claim of the respondents cannot be held to be time barred. On the facts of the case, the principle of delay and laches would not apply, by virtue of the adjustment of payments being made on FIFO (First in first out) basis. The procedure adopted by the respondent, as observed by the State Commission as well as by the Appellate Tribunal, would be covered u/ss 60 and 61 of the Contract Act. The Appellate Tribunal, upon a detailed consideration of the correspondence between the parties, has confirmed the findings of fact recorded by the State Commission that the appellant had been only making part payment of the invoices. It has been pointed out that the payment of entire invoices was to be made each time which was never adhered to by the appellant. Therefore, the respondents were constrained to adopt FIFO method. In any event, the Limitation Act is inapplicable to proceeding before the State Commission. [Para 48] [706-F-H; 707-A-B, D]

2.2 It cannot be said that the appellants have wrongly adopted the system of FIFO for adjustment of the payments made by the appellant. The State Commission as well as the Appellate Tribunal having considered the matter in detail, it would not be appropriate to re-examine the issue in these proceedings. Under s.125 of the Electricity Act, 2003, the appeal lies in the Supreme Court on any one or more of the grounds specified in s.100 of the Code of Civil Procedure, 1908. Therefore, unless the Court is satisfied that the findings of fact recorded by the State Commission are perverse, irrational and based on no evidence, it would not interfere. The findings recorded by the State Commission and Appellate Tribunal would not give rise to a substantial question of law. In any event, the appellant never refuted or rejected the practice adopted by the respondent. Rather the appellant claimed

that it was under temporary financial strain and, therefore, requested to make only part payment. The invoices having been accepted in full, the appellant unilaterally withheld some of the payments on the ground that the claims were disputed. Under Article 10 of the PPA, the appellant was required to make the payment for the entire invoice and, thereafter, raise the dispute. The appellant had been duly informed that the part payments made would be adjusted by the respondents under the FIFO system. It has been correctly held that in such circumstances, s.59 of the Contract Act would not be applicable. There is no reason to interfere with the conclusions reached by the Appellate Tribunal. [Para 53] [711-C-H; 712-A]

2.3 The real dispute between the parties is on the question whether the appellant was entitled to avail 2.5% rebate on part payment of the monthly invoices within 5 business days. It was a pre- condition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, the Appellate Tribunal has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices, it would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. There is no reason to interfere with the findings recorded by the Appellate Tribunal. [Para 54] [712-B-D]

2.4 Under Article 10.2(b) (i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Thus, it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate [illegible] if

the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. The findings of the Appellate Tribunal on this issue do not call for any interference. [Para 54] [712-D, G-H; 713-A-B]

2.5 It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. It cannot be said that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. [Para 55] [713-D-F]

3.1 With regard to the issue raised about the interest on late payment, the Appellate Tribunal has considered the entire matter and has rightly come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. [Para 55] [713-F]

Central Bank of India vs. Ravindra & Ors. **2001 (4) Suppl. SCR 323 = 2002 (1) SCC 367;** *Indian Council of Enviro-Legal Action vs. Union of India & Ors.* **2011 (9) SCR 146 = 2011 (8) SCC 161 - referred to.**

3.2 The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. It has been pointed out

that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This cannot be said to be unfair as the same principle would also apply to the appellants. [Para 57] [715-E-G]

4.1 This Court emphasizes that adjudicatory functions generally ought not to be conducted by the State Commission in the absence of a Judicial Member. Especially in relation to disputes which are not fairly relative to tariff fixation or the advisory and recommendatory functions of the State Commission. The tribunal such as the State Commission in deciding a lis between the appellant and the respondent, discharges judicial functions and exercises judicial power of State. It exercises judicial functions of far reaching effect. Therefore, it must have essential trapping of the court. This can only be achieved by the presence of one or more judicial members in the State Commission which is called upon to decide complicated contractual or civil issues which would normally have been decided by a civil court. Not only the decisions of the State Commission have far reaching consequences, they are final and binding between the parties, subject, of course, to judicial review. [Para 40 and 43] [702-E-F; 704-D-F]

Harinagar Sugar Mills Ltd. vs. Shyam Sundar Jhunjhunwala **1962 (2) SCR 339 - relied on.**

Kihoto Hollohan vs. Zachillhu **1992 (1) SCR 686 = (1992 Supp. (2) SCC 651 - referred to.**

4.2 Section 113 of the Act mandates that the Chairman of the Appellate Tribunal shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. This would clearly show that the legislature was aware that the functi e

State Commission as well as the Appellate Tribunal are judicial in nature. Necessary provision has been made in s. 113 to ensure that the Appellate Tribunal has the trapping of a court. This essential feature has not been made mandatory u/s 84 although provision has been made in s.84(2) for appointment of any person as the Chairperson from amongst persons who is or has been a Judge of a High Court. Section 84(2) enables the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court. Such appointment shall be made after consultation with the Chief Justice of the High Court. The provision contained in s. 84 (2) is notwithstanding the provision contained in s. 84 (1). Till date no judicial Member has been appointed in the Tamil Nadu State Commission. The matter needs to be considered, with some urgency, by the appropriate State authorities. It would be advisable for the State Government to exercise the enabling power u/s 84(2) to make appointment of a person who is or has been a Judge of a High Court as Chairperson of the State Commission. [para 44-46] [704-F-G; 705-F-G, H; 706-A-D]

Union of India vs. R.Gandhi, President, Madras Bar Association **2010 (6) SCR 857 = (2010 (11) SCC 1);** *Institute of Chartered Accountants of India vs. L.K.Ratna & Ors.* **1986 (3) SCR 1048 = (1986) 4 SCC 537;** *Union Carbide Corporation & Ors. vs. Union of India & Ors.* **1991(1) Suppl. SCR 251 = 1991 (4) SCC 584;** *Brahm Dutt vs. Union of India* **2005 (2) SCC 431;** *S.P. Sampath Kumar vs. Union of India & Ors.* **1987 (1) SCR 435 = 1987 (1) SCC 124;** *State of M.P. vs. Bhailal Bhai & Ors.* **1964 (6) SCR 261;** *Municipal Corporation of greater Bombay vs. Bombay Tyres International Ltd. & Ors.* **1998 (4) SCC 100;** *Corporation Bank & Anr. vs. Navin J. Shah* **2000 (2) SCC 628;** *Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Ors.* **2008(5) SCR 1108 = 2008 (7) SCC 169;**

and *Central Bank of India Vs. Ravindra & Ors.* **2001(4) Suppl. SCR 323 = 2002 (1) SCC 367 - cited.**

Case Law Reference:

2008 (4) SCR 822	**relied on**	**para 13**
2010 (6) SCR 857	**cited**	**para 20**
1992 (1) SCR 686	**referred to**	**para 20**
1986 (3) SCR 1048	**cited**	**para 20**
1991 (1) Suppl. SCR 251	**cited**	**para 20**
2005 (2) SCC 431	**cited**	**para 20**
1987 (1) SCR 435	**cited**	**para 20**
1964 (6) SCR 261	**cited**	**para 22**
1998 (4) SCC 100	**cited**	**para 22**
2000 (2) SCC 628	**cited**	**para 22**
1994 (1) SCR 261	**relied on**	**Para 30**
2011 (7) SCR 310	**relied on**	**Para 30**
2008 (5) SCR 1108	**cited**	**Para 30**
2001 (4) Suppl. SCR 323	**cited**	**Para 30**
1962 (2) SCR 339	**relied on**	**para 42**
2002 (2) SCR 411	**relied on**	**para 52**
2012 (12) SCR 327	**referred to**	**para 52**
2001 (4) Suppl. SCR 323	**referred to**	**para 55**
2011 (9) SCR 146	**referred to**	**para 56**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4126 of 2013.

From the Judgment and Order da[illegible]e

Appellate Tribunal for Electricity, New Delhi in Appeal No. 176 of 2011.

Rohinton F. Nariman, Pravin H. Parekh, E.R. Kumar, Vallinayagam, Faisal Sherwani, Utsav Trivedi, S. Lakshmi Iyer, Vishal Prasad (for Parekh & Co.) for the Appellant.

Harish N. Salve, Jayant Bhushan, Senthil Jagadeesan, Rahul Balaji, Sony Bhatt, Govind Manoharan for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This statutory appeal under Section 125 of the Electricity Act, 2003 (hereinafter referred to as the "Act") is directed against the final judgment and order dated 22nd February, 2013 passed by the Appellate Tribunal for Electricity (hereinafter referred to as "APTEL" or "Appellate Tribunal"), at New Delhi in Appeal No. 176 of 2011, whereby it has dismissed the appeal preferred by the appellant against the final judgment and order dated 17th June, 2011 of Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the "State Commission") in D.R.P. No. 12 of 2009. The facts have been noticed in detail both by the State Commission and the APTEL, therefore, we shall make a reference only to the very essential facts necessary for deciding this appeal.

2. The respondent, a generating company, has entered into a Power Purchase Agreement (PPA) with the appellant on 3rd January, 1997 for the supply of the entire Electricity to be generated by the respondent for a period of 30 years. The respondent commenced commercial operations on 26th April, 2001. Under the PPA, the respondent has to submit an annual invoice indicating the amounts owed under the Tariff. The amounts receivable from the appellant for the previous year are to be reconciled against the sum of monthly estimated payment made by the appellant as soon as possible after the end of

each year. Accordingly, respondent started raising monthly invoices from 26th April, 2001 for the Electricity supplied by it to the appellant. According to the appellant, invoices of the respondent inter alia included interest on debt sanctioned but not disbursed, charges towards energy consumed at the residential quarters at the generating station etc. The appellant claims that substantial payments towards the monthly invoices raised by the Respondent for every month were paid against the admitted amount in the invoice. The disputed amount was withheld. The respondent accepted the admitted amount paid against each invoice without raising any dispute either with respect to the disputed amount or the substantial payment made by the appellant.

3. Government of India by Notification dated 30th March, 1992 incorporated a rebate scheme on the receivables. Under this scheme, the purchaser, i.e., appellant is entitled to a rebate @ 2.5% if the payment is released within 5 days from the date of invoice and @ 1% if the payment is released within 30 days from the date of invoice. Accordingly, while making the payment of the admitted amount under each invoice, the appellant deducted the 2.5% rebate, as payments were made within 5 days from the date of the receipt of the invoice. These payments were accepted by the appellants. On the other hand, respondent adjusted the amount received by it in the following month against the unpaid amount of the previous month. The balance was carried forward by the respondent. Since June, 2001, the appellant had been making payments as noticed above, and the respondent had been adjusting the same on a "FIFO" basis. The appellant claims that the monthly invoices raised by the respondent were only estimated invoices. On the other hand, the respondent claims that the appellant, from inception only made adhoc payments periodically against the monthly invoices raised. Therefore, each side is claiming that the other did not provide any details with regard to the amounts due and the amounts paid. It is also the claim of the respondent that the appellant had unilaterally made s

without informing the respondent of the same.

4. It appears that both the parties were dissatisfied with accounting details provided by the other. Ultimately, the respondent issued a notice of dispute resolution on 26th April, 2007 and appointed its Vice President, Shri B. Sundaramurthy as the representative. Continuous correspondence was exchanged between the parties from August, 2007 to March, 2009. On 1st April, 2009, respondent sent a Notice to the appellant in terms of Article 16 of the PPA claiming amounts due/overdue from the appellant and interest on late payments. The Notice gives a summary of claims of the respondent till 30th March, 2009 other than towards specified taxes, which was stated to be subjudice, and, therefore, not included therein. The balance of amount payable, according to the respondent was Rs.1,787,272,534. The appellant in reply informed the respondent on 16th April, 2009 that the matter was under scrutiny and examination. Since, there was no response, the respondent sent a reminder. Instead of making the payment of the amounts claimed, the appellant issued letter dated 4/5th May, 2009 claiming that according to its accounts, sum of Rs.31.12 crores was due to the appellant. On 8th May, 2009, the respondent requested the appellant "to provide the particulars and details forming the basis of your claim before 15th May, 2009." The respondent also requested the appellant to fix a meeting on or before 19th May, 2009 to discuss the issues and resolve the same. A meeting took place on 19th May, 2009 but the dispute was not resolved.

5. Since the dispute was not resolved, the respondent filed the petition - D.R.P. No. 12 of 2009 before the State commission, seeking a direction to the appellant to make a payment of sum of Rs. 1,89,91,17,264 being a sum due as on 19th March, 2009, under the invoices raised under the PPA and interest thereon in terms of Article 10.6 of the PPA from the due date till the date of actual payment. After setting out the details of the amounts due as narrated above, the respondent

claimed that, under Article 10.2(b) of the PPA, in the event of any dispute as to all or any of the portion of an invoice, the appellant was required to pay the full amount of the disputed charges and thereafter serve a notice on the respondent indicating the amount in dispute. The dispute is to be resolved under Article 16, which provides for informal resolution of dispute. Firstly, under Article 16(1), by mutual discussions through the designated representatives of the parties. Secondly, in case the parties are unable to resolve the dispute pursuant to Article 16.1, it is to be resolved through finally by arbitration in accordance with Article 16.2.

6. Under Article 16.2, the arbitration has to be conduced in accordance with the rules of Conciliation and Arbitration of International Chamber of Commerce (ICC), in effect on the date of the agreement. The Arbitration Tribunal is to consist of three arbitrators, of whom each party should select one. The two arbitrators appointed by the parties shall select the third arbitrator, to act as the Chairman of the Tribunal. If the two arbitrators appointed by the parties, fail to agree on a third arbitrator, the ICC Court of Arbitration shall make the appointment. The arbitration shall be held in England. It is further provided that notwithstanding Article 16.8, the laws of England shall govern the validity, interpretation, construction, performance and enforcement of the provisions contained in Article 16.2. The arbitration proceedings shall be conducted and the award shall be rendered in English language. It is further provided that the rights and obligations of the parties shall remain in full force and effect pending the award in any arbitration proceedings. The costs of the arbitration shall be determined by the arbitral tribunal in accordance with the Rules. The arbitration clause specifically provides that the Indian Arbitration Act (Act No. X(10) of 1940/The Arbitration and Conciliation Act, 1996 shall not be applicable to this arbitration provision, to any arbitration proceedings or award rendered or any dispute or difference arising out of or in relation to the agreement. It is further provided that awa[illegible]er

shall be a foreign award within the meaning of the Foreign Awards Act, 1961.

7. Clause 16.2(i) specifically provides that the parties hereby waive any rights of application or appeal to the Courts of India to the fullest extent permitted by law in connection with any question of law arising in the course of arbitration or with respect to any award made.

8. Clause 16.3 of the arbitration agreement provides that the award of the arbitrators shall be final and binding. The other provisions with regard to the arbitration clause are incidental and, therefore, not necessary to be mentioned. Article 17.8 of the PPA provides as under:-

> "17.8 Governing Law: Subject to Sections 16.2(b) and 16.2(e) hereof, this agreement and the rights and obligations hereunder shall be interpreted, construed and governed by the substantive laws of India."

9. As noticed above, Article 16.2(b) provides that the arbitration shall be conducted in accordance with the ICC Rules notwithstanding Article 17.8. Similarly, Article 16.2(e) provides for exclusion of Article 17.8.

10. Upon completion of the pleadings and after hearing the parties, the State Commission by an order dated 17th June, 2011, allowed the petition filed by the respondent for refund of the excess rebate availed by the appellant contrary to the terms of PPA and also ordered the respondent to redraw the monthly invoices in accordance with the directions issued by the State Commission. The State Commission held that it is competent to adjudicate upon the dispute. The limitation period prescribed in the Limitation Act, 1963 would not apply to the proceeding before the Commission, delay and laches would apply. The appellant is liable to pay interest to the respondent in terms of Clause 10.6 of the PPA till payment. Conversely, if the appellant has made excess payment against each monthly invoice

compared to the corresponding redrawn monthly invoice, the respondent is liable to pay interest in terms of Article 10.6 of the PPA. The rebate would be admissible to the appellant, if the redrawn monthly invoice and the original payment made by the appellant against the invoice of that month matches or if the appellant has made excess payment, the respondents were directed to redraw the annual invoice for 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 and 2006-2007, as at September of each year to capture the gains to the appellant on account of lower interest rates and gains to the respondent on account of higher floating rate. Certain other directions were also issued. The petition was accordingly disposed of.

11. Aggrieved by the aforesaid directions, the appellant filed Appeal No. 176 of 2011before the APTEL. Before the APTEL, in the appeal, the appellant raised the following issues:-

(a) Entitlement of the Appellant to Rebate.

(b) Jurisdiction of the State Commission u/s 86(1)(f) of the Act, 2003;

(c) First in First Out method; for adjustment of payment.

(d) Limitation, delay and laches;

(e) Bar under Order 2 Rule 2 CPC;

(f) Non filing of Annual Invoices;

(g) Determination of capital cost;

(h) Deduction on the monthly invoices;

(i) Excess Claims in the monthly invoice - unjust enrichment;

(j) Interest on Late Payments.

12. After hearing the learned co[illegible]s,

APTEL has held that under Article 10.2(a), 10.2(b)(i) and 10.2(e), the appellant is obliged to pay full amount of the invoice within the due date to be eligible for the rebate of 2.5% or 1% as the case may be. Admittedly, the appellant neither paid the full amount for every invoice nor raised the dispute within one year. The appellant was held to be not eligible for rebate for reduction of the invoice funds.

13. With regard to the second issue, i.e., jurisdiction and scope of Section 86(1)(f) of the Act, relying on the judgment of this Court in the case of *Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.*[1], it is held that the State Commission has the discretion to decide as to whether the dispute should be adjudicated by itself or it should be referred to an arbitrator. The appellant can not dictate that the State Commission ought to have referred the dispute to an arbitrator. It is further held that the State Commission can adjudicate all the disputes including the dispute on money claims between the Licensees and the Generating Companies. In coming to the aforesaid conclusion, APTEL relied on its earlier order rendered in *Neyveli Ignite Corporation Vs. Tamil Nadu Electricity Board* in Appeal No. 49 of 2010 dated 10th September, 2010.

14. On the third issue on the method adopted by the respondent for adjustment of the payment made by the appellant on the "FIFO" basis, APTEL has approved the decision of the State Commission that the respondent was justified in adopting the aforesaid method, in accordance with Section 60 of the Indian Contract Act, 1872.

15. On the fourth issue relating to the applicability of the limitation Act or delay and laches, it has been held that the Limitation Act would not apply to the proceedings under the Electricity Act. On facts, it has been held that the issue of limitation does not arise since Sections 60 and 61 of the Indian Contract Act would permit the creditor to adjust the amount on

1. (2008) 4 SCC 755.

"FIFO" method. APTEL has also held that the bar under Order 2 Rule 2 of the CPC would not be applicable in the facts of this case. With regard to the non-filing of the annual invoices by the respondent, it has been held that the respondent should have filed the annual invoices in time. Therefore, the direction issued by the State Commission to the respondent to redraw the annual invoices has been affirmed. The seventh issue related to determination of capital costs, the State Commission in its order under appeal had directed the appellant to pay the invoice in full as claimed by the respondent without determining the capital costs by getting the petition for finalization of capital costs, which was pending in the State Commission finally adjudicated. APTEL has approved the findings of the State Commission that the appellant had adopted delaying tactics by not cooperating in the finalization of the capital costs.

16. On issue No. 9, it has been held that as the respondent has given up the claim on account of capital costs incurred on Gas Boosting Station and Conditioning System and that the Power Company has been directed to redraw the monthly invoices by the State Commission, the issue would not survive. Finally, on issue No. 10, which related to interest on late payments, it has been held that the respondent company is entitled to interest on late payment of dues under the provisions of the PPA.

17. The present appeal is directed against the aforesaid directions issued by APTEL.

18. We have heard learned counsel for the parties.

19. Mr. R.F.Nariman, learned senior counsel appearing for the appellant has submitted that the disputes raised in the present proceeding are not adjudicable by the State Commission. Mr. Nariman submitted that the primary functions of the State Commission being advisory, regulatory and recommendatory, the adjudication permitted under Section 86(1)(f) is only restricted to the disputes v e

to the primary functions. The cardinal issue, according to Mr. Nariman, which ought to have been decided by the State Commission, was with regard to the nature of a dispute. The State Commission has failed to address the issue whether the dispute is unconnected to advisory functions. This was necessary as the respondent had made only a pure money claim which could only be adjudicated either by the Civil Court or the Arbitral Tribunal upon a reference being made to that effect. Mr. Nariman submits that the State Commission illegally declined to exercise its discretion to refer the dispute to arbitration. The dispute between the parties being purely of civil nature required decision on complex issues of fact and law. Since the dispute arises out of the working and interpretation of the PPA, the State Commission would not have sufficient knowledge of law to adjudicate the issues involved.

20. The next submission of Mr. Nariman is that the State Commission cannot be an adjudicatory body, as it does not have the trappings of a court, which is normally manned exclusively by Judges. Under Section 84, there is no requirement for the Chairperson or member of the State Commission to be a Judge of a High Court. The Members are required to be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in dealing with problems relating to engineering, finance, commerce, economics, law or management. Although sub-section (2) permits the State Commission to appoint any person as the Chairperson from amongst person who is or has been a Judge of a High Court, no appointment from the aforesaid category of persons has been made to the State Commission. Mr. Nariman pointed out that the State Commission which heard the petition filed by the respondent did not have a Judicial Member. He further submits that the State Commission functioning without a Judicial Member is contrary to the law laid down by this Court in *Union of India vs. R.Gandhi, President, Madras Bar Association*[2]. Learned

2. (2010 (11) SCC 1).

senior counsel elaborated that by virtue of Section 94(1), the State Commission has been vested with the power of a Civil Court under the Code of Civil Procedure. Under sub-section (2) of Section 94, the State Commission has the power to issue interim orders. Section 55 provides that all proceedings before the State Commission shall be deemed to be judicial proceedings within Sections 193 and 228 of the IPC. It is further provided that appropriate commission shall be deemed to be a civil court for the purpose of Sections 345 and 346 of the Code of Criminal Procedure, 1903. (2 of 1974). By virtue of Section 146, the State Commission has been empowered to impose punishment including imprisonment, fine and additional fine. He further emphasized that the State Commission in deciding a lis, between the respondent and the appellant, discharged judicial functions and exercised judicial power of the State. Such exercise of judicial power can be either by the Civil Court or a Tribunal having atleast one Judicial Member. The State Commission exercises judicial functions of far reaching effect, therefore, it must have essential trappings of a court. In support of this submission, learned senior counsel relied on *Kihoto Hollohan vs. Zachillhu*[3]. Subsequently, the appellant has submitted additional written submission which can also be appropriately noticed at this stage. It is submitted that the aforesaid infirmity in the constitution of the State Commission can not be cured on the basis that the Appellate Tribunal would always be headed by either a sitting Judge/ former Judge of the Supreme Court or Chief Justice/former Chief Justice of a High Court as well as having other Judicial Members. In support of this submission, learned senior counsel relied on *Institute of Chartered Accountants of India vs. L.K.Ratna & Ors.*[4] and *Union Carbide Corporation & Ors. vs. Union of India & Ors.*[5]. Learned senior counsel submitted that an adjudication of a lis by a tribunal without a judicial member would be an anathema to judicial process. It would directly

3. (1992 Supp. (2) SCC 651).

4. (1986) 4 SCC 537.

5. (1991) 4 SCC 584.

impinge on the impartiality and the independence of the Judiciary. It would also undermine the principle of separation of powers which is sought to be strictly maintained by the Constitution of India. Mr. Nariman emphasized that this Court carved out an exception to the rule of necessarily having a Judicial Member of a Tribunal, only, in the case of highly specialized fact - finding tribunals. In the written submissions, the appellant has also relied upon judgments of this Court in *Brahm Dutt vs. Union of India*[6], *S.P. Sampath Kumar vs. Union of India & Ors.*[7]. It is further submitted by Mr. Nariman that the disputes arising between the generating company and a licensee are decided by the Commission by holding meetings of the Members. In case the members of the Commission are equally divided, the Presiding Member would have the casting vote. Such procedure, submits Mr. R.F. Nariman, is unknown to judicial proceedings.

21. Mr. Nariman then submitted that the Chairman of APTEL is required under Section 113 of the Electricity Act to be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A person can also be appointed as a Member of the Appellate Tribunal who is or has been or is qualified to be a Judge of the High Court. This, according to him, clearly shows that the adjudicatory functions performed by the State Commission as well as the Appellate Tribunal are judicial in nature and ought to be performed only by the tribunal which has either a Chairman or a Member(s) who are or were Judges of the Supreme Court or a High Court. Mr. Nariman submitted that since the State Commission was not constituted in accordance with law and the order having been passed without any judicial member, is a nullity non-est in law. He submitted that the proceedings of the Commission are coram non judice and, therefore, liable to be set aside.

22. The next submission of Mr. Nariman is that the claim

6. (2005) (2) SCC 431.
7. (1987) (1) SCC 124.

of the respondent would have been held to be time barred on reference to arbitration. The respondent made a money claim in the year 2009 for the alleged dues starting from the year 2001 onwards. Therefore, had the dispute been referred to arbitration in terms of dispute resolution clause, contained in Article 16 of the PPA, the proceeding of the arbitral tribunal would be governed by the Limitation Act, 1963. The State Commission has erred in law in holding that by virtue of Section 2(4) of the Arbitration Act, 1996, the applicability of Section 43 would be excluded. This, according to Mr. Nariman, is one more reason why the State Government ought not to have entertained the money claim of the respondent and ought to have relegated the parties to arbitration. In any event, the claim of the respondent ought to have been dismissed for delay and laches. He submits that even if the Limitation Act was not applicable, the maximum period of time for filing a suit, in a Civil Court, ought to be taken as a reasonable standard by which the issues with regard to such delay and laches can be measured. In support of this submission learned counsel relied on the judgment of this Court in *State of M.P. vs. Bhailal Bhai & Ors.*[8]. He made a reference to the observations made by this Court at Para 273. Learned senior counsel also relied on *Municipal Corporation of greater Bombay vs. Bombay Tyres International Ltd. & Ors.*[9] and *Corporation Bank & Anr. vs. Navin J. Shah*[10].

23. Mr. Nariman then submits that the "FIFO" method of adjustment of payment was not available to the respondents. It is submitted that the reliance placed on Sections 60 and 61 of the Contract Act by the respondents is misconceived. He submits that the respondents have wrongly claimed that they have been adjusting the monthly payment made by the appellant not against the monthly invoices but against the earlier pending bills. The respondents are also wrongly claiming that the

8. (1964 (6) SCR 261.
9. 1998 (4) SCC 100 (at page 104 para 9).
10. 2000 (2) SCC 628 (at page 635 para 12).

appellant had been duly informed that the payments have been received on "FIFO" basis. Mr. Nariman points out that the respondents are wrongly relied on letters dated 25th June, 2001, 2nd December, 2003 and 10th September, 2001. According to Mr. Nariman, none of three letters support the case of the respondents that the appellant had either agreed to or acquiesced in the monthly payments made by him within 5 business days of the presentation of the monthly invoices being adjusted on the FIFO basis. Mr. Nariman points out that the respondent's own letter dated 20th November, 2006 demolishes the case of respondent based on FIFO. He further submits that if the parties are agreed to the FIFO and had been acting on the same, as claimed by the respondents, then there would have been no need for the respondents to write letters dated 20th November, 2006 and 23rd April, 2007 regarding their objections to the disallowance made by the appellant or seeking an explanation/clarification from the appellant with respect to the payments made by the appellant and referred to in the said letters. The respondent was well aware that the appellant had been making the monthly payments against the respective monthly invoices. Therefore, the respondents can take no benefit of Sections 60 and 61 of the Contract Act. Therefore, the impugned order passed by the State Commission as well as APTEL being based on these two sections are unsustainable.

24. It is further submitted by Mr. Nariman that the respondents have failed to file annual invoices at the end of each year for the years 2001-2006. The invoices for these years were filed only on 18th July, 2007. This is in breach of Clause 10.2(b)(ii) of the PPA which required the respondents to submit annual invoices setting of the details of the amounts owed under the tariff and reconciliation of the actual amounts receivable from the appellant for the prior year against the sum of monthly estimated payments made by the appellant. Similarly, if payments are due by the respondent to the appellant, the stated amount has to be paid to the appellant and vice versa. The

State Commission rejected the explanation given by the respondent for failure to submit the annual invoices, but instead of dismissing the claim of the respondents, a direction has been made to redraw the annual invoices of each year as on 30th September of each year. Mr. Nariman further points out that the respondent, upon redrawal of the invoices, had agreed to refund/adjust a sum of Rs.45 crores, being the excess amount charged by the respondent from the appellant. The said amount has not been paid till date.

25. Mr. Nariman points out that the only dispute between the parties in the present litigation is only with regard to the question as to whether the appellant was entitled to avail rebate of 2.5 % on the part payment of the monthly invoice within 5 business days from the date of the presentation of the monthly invoice. It is submitted that in the initial petition filed by the State Commission it was not the claim of the respondent that the appellant wrongly availed rebate of 2.5%. There were no pleadings to that effect. Therefore, the findings and conclusions of the State Commission are liable to be set aside. Mr. Nariman submits that if one reads the PPA as a whole, it would become apparent that the payment of the full invoice amount within 5 days of the date of raising of invoice is not a pre-condition for seeking a rebate of 2.5% of the invoice amount. Clause 10.2(a) does not make it a pre-condition for payment of the full amount of invoice within 5 business days in order to avail the rebate of 2.5%. Clause 10.2(b)(i) indicates that the full amount is to be paid on the due date of an invoice. Due date is defined in Article 10.2 (a) as 30 days from the date of handing over of the invoice. Mr. Nariman then submits that a conjoint reading of these clauses would show that in order to be eligible for a rebate, at the rate of 2.5%, the payment has to be made on the 30th day of the presentation of the invoice. Therefore, any payment made within 5 business days entitled the appellant to claim 2.5% rebate on such payment. It is further submitted by Mr. Nariman that rebate is nothing but refund of a part of the interest loaded upfront on th e

estimated monthly tariff invoice has two components - (i) the fixed capacity charges (FCC) and (ii) variable fuel charges (VFC). The rebate of 2.5 % is allowed in view of the notification dated 30th March, 1992 issued by the Ministry of Power, Government of India, in exercise of powers under sub-section (2) of Section 43 of the Electricity Supply Act, 1948. The aforesaid notification has been made part of the PPA as Schedule U thereof. Schedule A of the PPA deals with Tariff. Interest on the receivable equivalent to 2 months' average billing for sale of electricity is loaded upfront on the monthly invoice. Part of this is refunded by way of rebate of 2.5 % if payment is made within 5 days and at 1% if it is made after 5 days but upto the 29th day from the presentation of the monthly invoice. Interest of the respondent upto the 30th day loaded upfront in the invoice. Thereafter the interest of the respondent is protected from the due date till payment is made in accordance with the Clause 10.6(e) of the PPA. Therefore, the appellant is entitled to rebate if payment is made within 5 days or within 29th day of the presentation of the invoice. Lastly, it is submitted by Mr. Nariman that the appellant has been made the payment within 5 days only to avail rebate of 2.5%. One such payment was made, the respondent had the use of money for a period of 25 days and correspondingly the appellant had been deprived of the use of such money for a period of 25 days every month. He submits that absent the contract between the parties, the appellant would have made the payment only on the 30th day and not within 5 days. In any event, 60 days of interest on the Working Capital had already been loaded upfront. Only 30 days interest was being returned in the form of rebate on the amount paid by the appellant within 5 days. In order to make the payment within 5 days, the appellant often had to avail the loan. Out of Rs.240 crores, which the appellant has already paid to the respondent under the Orders of the State Commission, almost Rs.235 crores is rebate. The respondent is now claiming more than Rs.500 crores towards interest at compound rate on Rs. 240 crores paid by the appellant, contrary to the provisions of the PPA. On the basis of the above, he

submits that allowing the claim of the respondent for refund of the rebate amount would amount to unjust enrichment. Further, the award of interest on the aforesaid amount of rebate would amounts to double unjust enrichment.

26. On the other hand, it is submitted by Mr. Harish Salve and Mr. Jayant Bhushan learned senior counsel that orders passed by the State Commission as well as the Appellate Tribunal are just and proper and do not call for any interference. The appellant has been granted instalments to make the payment of Rs. 240 crores. It is also pointed out that the following order passed by the State Commission in the independent legal proceeding relating to fixation of capital cost on 15th July, 2013, the claim was updated upto 20th August, 2013 for invoices raised till 30th June, 2011, in a gross sum of Rs.695 crores. After giving credit of Rs.145 crores (including interest computed at the interest rates applicable to PPN) the net claim, subject-matter of the present appeal, stands at Rs.550 crores.

27. With regard to the submission of the appellant relating to Section 86(1)(f), it is submitted that the matter is no longer res integra as it is squarely covered by the judgment of this Court in *Gujarat Urja Vikas Nigam Ltd.* (supra). It is submitted by Mr. Salve and Mr. Bhushan learned senior counsel appearing for the respondent that Section 86(1)(f) gives the discretion the State Commission either to adjudicate the disputes itself or to refer the same to arbitration. By making detailed reference to the findings recorded by APTEL, Mr. Salve and Mr. Bhushan submit that all the issues raised by the appellant are without any merit as it cannot be supported either in facts or in law.

28. It is submitted by the learned senior counsel that even Article 16(2) provides for international arbitration under the ICC Rules. Article 16.2(h) specifically excludes the application of the Arbitration and Conciliation Act of 1996 and the Arbitration Act of 1940. Article 16.2(e) provides that the

govern the arbitration agreement in contra-distinction to Indian law applying to the PPA. In any event, the appellant cannot be permitted to claim a reference of arbitration as a matter of right. He points out that at the initial stage, the appellant only referred to the existence of an informal dispute resolution provision and provision for arbitration under Article 16 of the PPA. Having taken such a preliminary objection, the appellant proceeded to subject itself to the jurisdiction of the State Commission. In fact the entire claim of the respondent was answered by the appellant on merit in the written statement, filed before the State Commission. Even if the written submissions before the State Commission, the appellant principally contended that the matter ought to be referred to the adjudication by a civil court. The appellant failed to make any application either under Section 8 or Section 45 of the Arbitration and Conciliation Act, 1996 seeking reference to arbitration. It is further pointed out that this Court in *Gujarat Urja Vikas Nigam Ltd.* (supra) has clearly laid down the law that the existence of an arbitration clause in a contract does not act as an ouster of jurisdiction of the jurisdictional forum. The appellant having submitted to the jurisdiction of the State Commission and having invited the findings cannot now seek to challenge the jurisdiction on the ground of existence of arbitration clause. Mr. Salve and Mr. Bhushan relied on the judgment of this Court in *Svenska Handelsbanken vs. Indian Charge Chrome Ltd.*[11] and *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd.*[12]. It is further submitted that the proceeding before the State Commission would not be vitiated on the ground that its constitution is contrary to the ratio of law laid down in the case of *R. Gandhi* (supra). The appellant has not even raised a single ground of any prejudice being caused by the absence of a judicial member before the State Commission. In any event, the aforesaid submission contradicts the appellant's other submission that the matter ought to have been referred to arbitration under the Arbitration Act. There is no requirement

11. 1994 (2) SCC 155.

12. 2011 (5) SCC 532.

that the arbitrator should be a judicial person. Even in the absence of Electricity Act, 2003 and the regulatory bodies contemplated therein, the instant dispute would have been subject matter of an arbitration proceeding as per the provision of the PPA and not a civil suit in the civil court.

29. Answering the submission of the appellant that the respondent has illegally adjusted the payments on the concept of FIFO. It is submitted that the State Commission as well as the Appellate Tribunal have correctly held that the procedure adopted by the respondent is covered under Section 60 and 61 of the Contract Act. Mr. Salve and Mr. Bhushan submit that admittedly the appellant did not make full payment in relation to any of the invoices. The State Commission as well as the Appellate Tribunal have concurrent findings that the appellant was duly notified that the payment/part payment made were being adjusted on FIFO basis. The appellant never refuted or rejected to such practice adopted by the respondent. The appellant submitted that it was undergoing temporary financial strain. It is also pointed out by Mr. Salve and Mr. Bhushan that the invoices were accepted in full. The statement was made by the appellant that part payment being made would not prejudice the right of respondent to receive the full payment against the invoices. The correspondence between the parties has been noticed by the APTEL in extenso. Coming to the legal position, Mr. Salve and Mr. Bhushan submit that APTEL having considered the statutory provisions as well as judicial precedents have come to the conclusion that the appellant was duly intimated that the payment made would be applied by the respondents on FIFO basis. Therefore, Section 59 of the Indian Contract Act would not be applicable. On the issue of limitation, it is submitted that neither the Limitation Act nor the principle of delay and laches would apply to the present case. It is submitted by Mr. Salve and Mr. Bhushan that the provision of Limitation Act, 1963 would not be applicable to the proceedings before the State Commission. The Electricity Act, 2003 being a complete code, which d

comprehensive, the provision of Limitation Act, 1963 would not apply. Mr. Salve and Mr. Bhushan relied on the *Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & Ors.*[13] In support of this submission, the Limitation Act would be inapplicable to Tribunals and quasi-judicial authorities. Replying to the submission of Mr. Nariman that in arbitration proceedings, the appellant would be entitled to the benefit of Limitation Act, 1963, Mr. Salve and Mr. Bhushan submit that in view of the specific provisions contained in Section 2(4) of the Arbitration and Conciliation Act, 1996, Section 43 of the Arbitration Act would not be applicable. In any event, the matter is squarely covered by the judgment in *Gujarat Urja* (supra). Mr. Salve and Mr. Bhushan reiterated that the issue of limitation does not even arise in the present dispute due to the FIFO adjustment effected by the respondent.

30. Addressing the issue of the rebate being available to the appellant, Mr. Salve and Mr. Bhushan submit that APTEL has rendered detailed findings on the issue. The submissions made before this Court is a repetition of the submissions made before the APTEL. They submit that such findings recorded by the APTEL can not be reopened in this Court except on the ground that such findings are either arbitrary or based on no evidence. In fact, the appellant has illegally arrogated to itself the right to adjudicate, by unilaterally assuming rights, which are not available to it. Rather than complying with the requirements of the PPA of making payment within due date, the appellant had disallowed certain payments on the ground that the claims of the appellant were doubted. These actions of the appellant were contrary to Articles 10.3 and 10.4 of the PPA which deals with Letter of Credit and Escrow. Even if the claim of the appellant is accepted that the invoices were only based on the estimates the appellant had no authority of making unilateral deductions in the monthly invoices and make only ad-hoc payments contrary to the provisions of PPA. It is submitted that the monthly invoices consists of both actual as also estimates

13. (2008) 7 SCC 169.

in respect of certain items. The annual invoices raised on the basis of a reconciliation at the end of the year, since actuals become known in respect of such portions of monthly invoices, which were calculated on the basis of the estimates. Mr. Salve and Mr. Bhushan then submit that interest on late payments have been rightly granted both by the State Commission as well as the APTEL. The interest has been calculated on the basis of Article 10.6 of the PPA. Since the loans taken by the respondent are payable at compounded interest rates, the later payment interest payable by the appellant would also be at the compounded interest rate as per Article 10.6 of the PPA. Mr. Salve and Mr. Bhushan relied on the judgment of this Court in *Central Bank of India Vs. Ravindra & Ors.*[14] and *Indian Council for Legal Action Vs. Union of India*[15]

31. During the course of hearing, the appellant had taken out I.A. No. 5 of 2013 and I.A. No. 6 of 2013. I.A. No. 6 is for the impleadment and I.A. No. 5 is for the direction.

I.A. Nos. 5 and 6 of 2013

32. It is submitted by Mr. Salve and Mr. Bhushan that in I.A. No. 6, the appellant has made a prayer to implead IOCL as the respondent. This application can not be allowed as IOCL is not a party to the contract. The attempt to implead third party is only an effort to delay the proceedings by the appellant. It is pointed out that IOCL is either necessary or a proper party for adjudication of the disputes arising between the appellant and the respondents.

33. I.A. No. 5 of 2013, according to Mr. Salve and Mr. Bhushan has been filed with the sole object of avoiding payments. The appellant has made wild allegations of fraud without any foundational facts being pleaded either before the State Commission or before the APTEL. The appellant ought not to be permitted to resolve such disputes. The application

14. (2002) 1 SCC 367.

15. (2011) 8 SCC 161.

according to Mr. Salve and Mr. Bhushan deserves to be dismissed.

34. We have considered the submissions made by the learned counsel for the parties. In our opinion, the issues raised by the appellant with regard to the constitution of the State Commission and its discretion to either adjudicate or refer a particular dispute to arbitration is no longer res integra. Therefore, even though, Mr. Nariman has very forcefully contended that the issue ought to be reconsidered, we are not inclined to adopt such a course. In our opinion, this Court has comprehensively addressed all the issues, on the scope and ambit of Section 86 in general and Section 86(1)(f) in particular of the Act. We are also not inclined to accept the submission that since the appellant had made a request for a reference of the dispute to arbitration, the State Commission ought to have made the reference. We are also not able to accept the submission of Mr. Nariman that the State Commission was dealing with only a pure and simple money claim. We also do not find much substance in the submission that the issues having been raised being complex and intricate ought to have been left to be decided either by the Arbitral Tribunal or by the Civil Court. APTEL in the impugned order, in our opinion, has correctly culled out the ratio of the judgment of this Court in *Gujarat Urja* (supra). It is also correctly held that the appellant can not dictate that the State Commission ought to have referred the dispute to arbitration.

35. In the aforesaid judgment, the question that arose before this Court was whether the application for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 was maintainable in view of the statutory provisions contained in the Electricity Act, 2003.

36. It was submitted on behalf of the appellant (licensee) that by Virtue of Section 86(1)(f) of the Act of 2003, the dispute between the licensees and the generating companies can only be adjudicated upon by the State Commission either by itself

or by an arbitrator to whom the Commission refers the dispute. Therefore, the High Court had no jurisdiction under Section 11(6) to refer the dispute between the licensees and the generating company to an arbitrator, since such power of adjudication of reference has been specifically vested in the State Commission. Since the Electricity Act is a special law, dealing with arbitrations of dispute between the licensees and the generating companies, the provision of Section 11 of the Arbitration and Conciliation Act would be inapplicable. The High Court has, therefore, committed an error of jurisdiction in allowing the application under Section 11(6) and referring the matter to arbitration to a Former Chief Justice of India. On the other hand, it was submitted on behalf of the generating companies that the provisions of the Electricity Act are in addition to and not in derogation of any other law for the time being in force. The provisions contained in Sections 173 and 174 would not affect the applicability of the Arbitration Act, 1996, in view of the provisions contained in Section 175 of the Electricity Act. Upon consideration of the aforesaid submission, this Court has held as follows:-

> "26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in Section 86(1)(f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 404).
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> 27. In our opinion in Section 86(1)(f) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anoma[illegible]e

obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in Section 86(1)(f) means "or".

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies, and only Section 86(1)(f) shall apply in such a situation.

37. This Court also negated the submission that the provision contained in Section 86(1)(f) would be violative of Article 14 (See Para 30-31).

38. Considering the provisions contained in Sections 173, 174 and 175 of the Electricity Act, this Court observed that since Section 86(1)(f) provides a special manner of making reference to an arbitrator in disputes between a licensee and a generating company, by implication all other methods are barred. Considering the applicability of Sections 174 and 175, this Court has held that Section 174 would prevail over Section 175 in matters where the where there is any conflict (but no further). In our opinion, the observations made by this Court in Paragraphs 59 and 60 are a complete answer to the submissions of Mr. Nariman that upon an application being made, the State Commission was bound to refer the matter to arbitration.

39. Section 86(1)(f) specifically confers jurisdiction on the State Commission to refer the dispute. Undoubtedly, the Commission is required to exercise its discretion reasonably and not arbitrarily. In the present case, the State Commission upon consideration of the entire matter has exercised its

discretion. However, in our opinion, the APTEL ought not to have brushed aside the submissions of the appellant with the observation that the State Commission having exercised its discretion, the issue need not be investigated by the APTEL. It would always be open to APTEL to examine as to whether the State Commission has exercised the discretion with regard to the question whether the dispute ought to have been referred to arbitration, in accordance with the well known norms for exercising such discretion. APTEL exercises jurisdiction over the State Commission by way of a First Appeal. Therefore, it is the bounden duty of the Appellate Tribunal to examine as to whether all the decisions rendered by the State Commission suffer from the vice of arbitrariness, unreasonableness or perversity. This would be apart from examining as to whether the State Commission has exercised powers in accordance with the statutory provisions contained in Electricity Act, 2003. Having said this, we are not inclined to interfere with the conclusions reached by APTEL, as in our opinion, the jurisdiction has not been exercised by the State Commission arbitrarily, whimsically or against the statutory provisions.

40. We, however, find substance in the submission of Mr. Nariman that adjudicatory functions generally ought not to be conducted by the State Commission in the absence of a Judicial Member. Especially in relation to disputes which are not fairly relative to tariff fixation or the advisory and recommendatory functions of the State Commission.

41. A Constitution Bench of this Court in *Kihoto Hollohan* (supra) has examined the nature of the power of the Speaker or the Chairman under paragraph 6(1) of the Tenth Schedule of the Constitution of India which contains "PROVISIONS AS TO DISQUALIFICATION ON GROUND OF DEFECTION" of a Member of either House of Parliament. Upon consideration of the entire matter, it was observed as follows :

"95. In the present case, the power to decide disputed disqualification under Paragraph 6 of

a judicial complexion."

42. The Constitution Bench relied on the earlier judgment of this Court in *Harinagar Sugar Mills Ltd. vs. Shyam Sundar Jhunjhunwala*[16]. In that case, Hidayatullah, J. said

> "… By 'courts' is meant courts of civil judicature and by 'tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. Among the powers of the State is included the power to decide such controversies. This is undoubtedly one of the attributes of the State, and is aptly called the judicial power of the State. In the exercise of this power, a clear division is thus noticeable. Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary courts of civil judicature. Their procedures may differ but the functions are not essentially different. What distinguishes them has never been successfully established. Lord Stamp said that the real distinction is that the courts have 'an air of detachment'. But this is more a matter of age and tradition and is not of the essence. Many tribunals, in recent years, have acquitted themselves so well and with such detachment as to make this test insufficient."

Again in para 99, it is observed as follows :

> "99. Where there is a lis - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a Court. In *Associated Cement Companies Ltd. v. P.N. Sharma*[36] this Court said: (SCR pp. 386-87)
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> "… The main and the basic test however, is whether

16. 1962 (2) SCR 339.

> the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under Rule 6(5) and Rule 6(6) is a part of the State's judicial power…. There is, in that sense, a lis; there is affirmation by one party and denial by another, and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding."

43. In view of the aforesaid categorical statement of law, we would accept the submission of Mr. Nariman that the tribunal such as the State Commission in deciding a lis, between the appellant and the respondent discharges judicial functions and exercises judicial power to the State. It exercises judicial functions of far reaching effect. Therefore, in our opinion, Mr. Nariman is correct in his submission that it must have essential trapping of the court. This can only be achieved by the presence of one or more judicial members in the State Commission which is called upon to decide complicated contractual or civil issues which would normally have been decided by a Civil Court. Not only the decisions of the State Commission have far reaching consequences, they are final and binding between the parties, subject, of course, to judicial review.

44. As noticed earlier, Section 84(2) enables the State Government to appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court. Such appointment shall be made after consultation with the Chief Justice of the High Court. The provision contained in Section 84(2) is notwithstanding the provision contained in Section 84(1). In our opinion, the State Government ought to have exercised its power under sub-section (2) to appoint one or more Judicial Members on the State

when complicated issues are raised involving essentially civil and contractual matters. A Constitution Bench of this Court in the case of *R.Gandhi* (supra) recognized that :

> "87. ……..that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals."
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> "90. But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members……."

45. Keeping in view the aforesaid observations of this Court, in our opinion, the State of Tamil Nadu ought to make necessary appointments in terms of Section 84(2) of the Act. We have been informed that till date no judicial Member has been appointed in the Tamil Nadu State Commission. We are of the opinion that the matter needs to be considered, with some urgency, by the appropriate State authorities about the desirability and feasibility for making appointments, of any person, as the Chairperson from amongst persons who is, or has been, a Judge of a High Court.

46. We have noticed earlier that Section 113 of the Act mandates that the Chairman of APTEL shall be a person who

is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A person can be appointed as the Member of the Appellate Tribunal who is or has been or is qualified to be a Judge of a High Court. This would clearly show that the legislature was aware that the functions performed by the State Commission as well as the Appellate Tribunal are judicial in nature. Necessary provision has been made in Section 113 to ensure that the APTEL has the trapping of a court. This essential feature has not been made mandatory under Section 84 although provision has been made in Section 84(2) for appointment of any person as the Chairperson from amongst persons who is or has been a Judge of a High Court. In our opinion, it would be advisable for the State Government to exercise the enabling power under Section 84(2) to make appointment of a person who is or has been a Judge of a High Court as Chairperson of the State Commission.

47. These observations, however, do not in any manner affect the jurisdiction exercised by the State Commission in the present matter. It has been rightly pointed out by the respondent that having filed the written statement in reply to the petition filed by the respondent, the appellant willingly participated in the proceedings and invited the findings recorded by the State Commission. It would be too late in the day, to interfere with the jurisdiction exercised by the State Commission in these proceedings.

48. The next submission of Mr. Nariman is that the claim of the respondents would have been held to be time barred on reference to arbitration. We are not able to accept the aforesaid submission of Mr. Nariman. On the facts of this case, in our opinion, the principle of delay and laches would not apply, by virtue of the adjustment of payments being made on FIFO basis. The procedure adopted by the respondent, as observed by the State Commission as well as by the APTEL, would be covered under Sections 60 and 61 of the Contract Act. APTEL, upon a detailed consideration of the co

the parties, has confirmed the findings of fact recorded by the State Commission that the appellant had been only making part payment of the invoices. During the course of the hearing, Mr. Salve has pointed out that the payment of entire invoices was to be made each time which was never adhered to by the appellant. Therefore, the respondents were constrained to adopt FIFO method. Learned senior counsel also pointed out that there was no complaint or objection ever raised by the appellant. The objection to the method adopted by the respondents on the method of FIFO, was only raised in the counter affidavit to the petition filed by the appellant before the State Commission. According to learned senior counsel, the plea is an afterthought and has been rightly rejected by the State Commission as well as the APTEL. We also have no hesitation in rejecting the submission of Mr. Nariman on this issue. In any event, the Limitation Act is inapplicable to proceeding before the State Commission.

49. The submission of the appellant that the Limitation Act would be available in case the reference was to be made to arbitration, in our opinion, is also without merit. Firstly, the State Commission exercised its jurisdiction to decide the dispute itself. The matter was not referred to arbitration, therefore, the Limitation act would not be applicable. Secondly, Section 43 of the Arbitration and Conciliation Act would not be applicable even if the matter was referred to arbitration by virtue of Section 2(4) of the Arbitration Act, 1996. Section 2(4) of the Arbitration Act reads as under :

> "This part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

50. By virtue of the aforesaid provision, the provision with

regard to the Limitation Act under Section 43 would not be applicable, to statutory arbitrations conducted under the Electricity Act, 2003. We are unable to accept the submission of Mr. Nariman that the State Commission failed to exercise its discretion by not making a reference to arbitration and the request made by the appellant. Such a submission cannot be countenanced in the particular facts of this case. Having taken the plea that the matter ought to be referred to arbitration, the appellant chose to contest the claim of the respondent on merits and filed the written statement before the State Commission. Not only this, the appellant participated in the entire proceedings and invited the findings on merits. Therefore, the appellant cannot now be permitted to raise such a plea. This view of ours will find support in two earlier judgments of this Court. In *Svenska Handelsbanken* (supra) it has been observed as follows:

> "53. It may be that even after entering into an arbitration clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration clause and satisfying the terms of the provisions of law empowering the court to stay the suit……."

Admittedly, in this case the appellant did not file any application under Section 8 or Section 45 of the Arbitration Act, 1996. No prayer for stay of the proceedings was filed.

51. In the case of *Booz Allen & Hamilton Inc.*(supra) this Court observed a follows:

> "29. Though Section 8 does not prescribe any time-limit for filing an application under that section, and only states that the application under Section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingl

proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn around and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit."

These observations are squarely applicable to the facts in this case.

52. Even if the reference had been made under Article 16 of the PPA, the applicability of the Arbitration Act, 1996 and the Arbitration Act of 1940 have been specifically excepted under Article 16(2)(h). In the earlier part of the judgment, we have noticed that Article 16 indeed provides for informal resolution of disputes by way of arbitration. However, Article 16(2) mandates that the arbitration shall be conducted in accordance with the ICC Rules. Under those rules, ICC Court of arbitration is to make the appointment of the Arbitral Tribunal. To make the matters worst for the appellant, it has been provided in Article 16.2(e) that the seat of the arbitration shall be in London. This fact alone would make Part I of the Arbitration Act, 1996 inapplicable to the arbitration proceedings. There is a further provision that notwithstanding Article 17(8), the laws of England shall govern the validity, interpretation, construction, performance and the enforcement of the provision contained in Article 16(2). Clearly then, the applicability of Arbitration Act, 1996 is totally ruled out by the parties. This Court in *Bhatia International vs. Bulk Trading S.A. & Anr.*[17] has clearly held that the parties are at liberty by agreement to opt out of any or all the provisions of 1996 Act. It would be useful to make a reference to the observations made by this Court in paragraph 21 and 32 which are as follows:

"21. The legislature is emphasising that the provisions of

17. 2002 (4) SCC 105.

Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

"32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

The aforesaid observations will be fully applicable to the facts and circumstances of this case as [illegible] or

to 6th September, 2012. The declaration of law in *Bharat Aluminium Company vs. Kaisar Aluminium Technical Services Inc.*[18] that Part I of the arbitration would not be applicable to International Commercial Arbitration outside India applies to the Arbitration Agreements executed after 6th September, 2012. Though by virtue of the provisions contained in Article 16 of the PPA, the legal effect remains the same, that is applicability of 1996 Act is ruled out, therefore, the appellant cannot claim the benefit of Section 43 of the Arbitration Act, 1996.

53. We also do not find any merit in the submission of Mr. Nariman that the appellants have wrongly adopted the system of FIFO for adjustment of the payments made by the appellant. The State Commission as well as the APTEL having considered the matter in detail, we are inclined to accept the submission of Mr. Salve and Mr. Bhushan that it would not be appropriate to re-examine the issue in these proceedings. Under Section 125 of the Electricity Act, 2003, the appeal lies in the Supreme Court on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908. Therefore, unless the court is satisfied that the findings of fact recorded by the State Commission are perverse, irrational and based on no evidence, it would not interfere. The findings recorded by the State Commission and APTEL would not give rise to a substantial question of law. In any event, the appellant never refuted or rejected the practice adopted by the respondent. Rather the appellant claimed that it was under temporary financial strain and, therefore, requested to make only part payment. The invoices having been accepted in full, the appellant unilaterally withheld some of the payments on the ground that the claims were disputed. Under Article 10 of the PPA, the appellant was required to make the payment for the entire invoice and, thereafter, raise the dispute. The appellant had been duly informed that the part payments made would be adjusted by the respondents under the FIFO system. It has been

18. 2012 (9) SCC 552.

correctly held that in such circumstances, Section 59 of the Contract Act would not be applicable. We see no reason to interfere with the conclusions reached by the APTEL.

54. The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part payment of the monthly invoices within 5 business days. We have noticed earlier that it was a pre-condition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, APTEL has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by the APTEL. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Under Article 10.3(a) to (c) of the PPA, Letter of Credit is to be established covering three months estimated billing, one month prior to Commercial Operation Date. Under Article 10.3 (d) of the PPA, an Escrow Account is to be established by the appellant in favour of the Power Company into which collections from designated circles are to flow in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of the appellant. Under Article 10.2 (e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring e

date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of APTEL on this issue do not call for any interference.

55. In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for Compensation Payment and Billing. We are also not able to accept the submission of Mr. Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in *Central Bank of India vs. Ravindra & Ors.*[19]. In this judgment it has been held as follows:

> "……The essence of interest in the opinion of Lord Wright, in *Riches v. Westminster Bank Ltd.*All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab speaking through Tek Chand, J. in CIT v. Dr Sham Lal Narula thus articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money. … In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

56. Similar observations have been made by this Court in *Indian Council of Enviro-Legal Action vs. Union of India & Ors.*[20] wherein it has been held as follows:

> "178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money,

19. 2002 (1) SCC 367.

20. 2011 (8) SCC 161.

restitution and unjust enrichment noted above-or to simply levelise-a convenient approach is calculating interest. But here interest has to be calculated on compound basis-and not simple-for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out.

180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws."

57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. It is submitted by Mr. Salve and Mr. Bhushan that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This can not be said to be unfair as the same principle would also apply to the appellants.

58. This now bring us to applications for impleadment of IOCL and for direction. I.A.No.6 of 2013 is for the impleadment of IOCL. It is submitted that during the pendency of these proceedings, the respondents have received rebates,

discounts, credits, refunds in the fuel price being extended by fuel supplier i.e. Indian Oil Corporation Ltd. (IOCL). Such benefits have been received by the respondent from January 2001 till date It is pleaded that the respondents have failed to give details about the discounts and credits received the benefit of which ought to have been passed on to the appellant. Therefore, IOCL be made parties to respondent No.2 to the present appeal. I.A.No.5 of 2013 seeks direction to IOCL to furnish details of all the documents of the matter. Further directions are also sought on the respondent to refund a sum of Rs.240 crores paid by the appellant under the order passed by the State Commission along with interest at the rate as mentioned in PPA.

59. The respondents in a common counter statement to the applications have submitted that the applications are not maintainable. The applications have been evidently preferred purely as dilatory tactics, to delay and deny substantial payments that are due and payable to the respondent pursuant to the orders passed by the State Commission which have been upheld by APTEL. We are not inclined to entertain either of the applications at this stage. The issue sought to be raised in both the applications ought to have been raised by the appellant at the relevant time. The applications are, therefore, accordingly dismissed.

60. For the foregoing reasons, we see no merit in the appeal and the same is accordingly dismissed.

R.P. Appeal dismissed.

HITENDRA SINGH S/O BHUPENDRA SINGH & ORS.

v.

DR. P. D. KRISHI VIDYAPEETH BY REG. & ORS.

(Civil Appeal No. 4412 of 2014 etc.)

APRIL 04, 2014

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

MAHARASHTRA AGRICULTURE UNIVERSITY ACT, 1983:

ss. 6, 11 and 15 - Power of Chancellor to appoint Committee to inquire into illegalities and irregularities in selection and appointment of Senior Research Assistants and Junior Research Assistants - HELD: Inquiry directed by Chancellor into illegalities and irregularities of selection process in appointment of Senior and Junior Research Assistants was legally permissible -- Exercise of such power is not subject to any limitation or impediment because the power is vested in a high constitutional functionary who is expected to exercise the same only when such exercise becomes necessary to correct aberrations and streamline administration so as to maintain the purity of the procedures and process undertaken by the University in all spheres dealt with by it.

ss. 11 and 15 - Report of Justice Dhabe Committee that entire selection process was vitiated by illegalities, irregularities and improprieties and, therefore, appointments made need to be set aside - Accepted by Chancellor and appointments cancelled - Compliance of principles of natural justice - Held: Justice Dhabe Committee had issued notices to the appointees who had in turn responded to the same - Therefore, it cannot be said that principles of natural justice were violated by the Committee especially when no prejudice is demonstrably caused to petitioners on account of

procedure which the Committee followed in concluding the enquiry proceedings - Further, in compliance with orders passed by Chancellor, Vice Chancellor of University issued notices to appointees calling upon them to appear before him for a personal hearing in support of their selection and appointment as SRAs/JRAs -- The appointees filed their responses in required format - They were also given an opportunity of being heard by Vice Chancellor -- Thus, Vice Chancellor had acted fairly, and fully complied with principle of natural justice - No further hearing was required to be repeated by Chancellor, who had before him the recommendations of Executive Committee and Vice Chancellor and took a final view of the matter having regard to the totality of circumstances - Continuance in office of those selected by means that are not fair, transparent and reasonable will amount to perpetuating the wrong - Therefore, appointments were rightly set aside by Chancellor - Directions give for constituting of Selection Board in terms of Amendment Act 32 of 2013 and for selection afresh giving age relaxation to appellants, and on their selection to give them benefit of continuity of service - Service law - Administrative law - Principles of natural justice - Audi alteram partem.

Complaints to the Governor and Chancellor of the University and writ petitions before the High Court were filed alleging illegalities and irregularities in the selection of 76 Senior Research Assistants and 55 Junior Research Assistants. The Chancellor in terms of s. 11 of the Maharashtra Agriculture Universities Act, 1983, appointed Justice Dhabe Committee to examine the papers relating to the selection and appointments of the candidates and to submit a report as to its fairness. The Committee submitted its report concluding that the entire selection process and selection of the candidates to the posts of SRA and JRA was vitiated by the illegalities, irregularities and improprieties e

appointments made pursuant thereto, need to be set aside. The Chancellor cancelled the appointments both of Senior Research Assistants and of Junior Research Assistants. Ultimately, individual letters were issued to them terminating their services. The writ petitions filed by the appointees were dismissed by the High Court.

In the instant appeals, the following questions arose for consideration of the Court:

1) Was the Chancellor competent to appoint a single Member Committee headed by Justice H.W. Dhabe to examine the illegalities, irregularities, fairness and impropriety of the selection process and consequent appointments to the cadre of SRAs and JRAs?

2) Were the inquiry proceedings entrusted to Justice Dhabe Committee conducted in accordance with the principles of natural justice?

3) Were the findings recorded by Justice Dhabe Committee in any manner illegal or perverse to warrant interference with the same by a writ Court?

4) Was the procedure adopted by the University and the Vice Chancellor fair and reasonable and in consonance with the principles of natural justice?

5) Was the Chancellor of the respondent-University and the High Court justified in declining the prayer of the petitioners for continuance in service on account of the time lag between the date of their appointments and the date on which their services were terminated?

Dismissing the appeals, the Court

HELD:

Question No. 1:

1.1 Creation of teaching, research and education posts required by the University being one of the functions of the University and appointment of suitable persons against such posts being also one of such functions, the power of the Chancellor to direct an inquiry u/s. 11(1) of the Maharashtra Agriculture University Act, 1983, can extend to any process leading to such appointments. The term 'administration of the University' appearing in sub-s. (1) of s. 11 would, include every such activity as is relatable to the functions of the University, u/s. 6. Selection of persons suitable for appointment and appointments of such persons would logically fall within the expression "administration of the University" within the meaning of s. 11(1) of the Act. Section 15 (5) vests the Chancellor with the power to annul any proceeding of any officer or authority if the same is not in conformity with the provisions of the Act, the statutes or the Regulations or which is prejudicial to the interest of the University. A conjoint reading of ss. 11 and 15, leaves no manner of doubt that the Chancellor exercises ample powers in regard to the affairs of the University and in particular in regard to the affairs of the administration of the University. The power vested in the Chancellor u/s. 11 to direct an inspection or an inquiry into matters referred to in the said provision is very broad and vests the Chancellor with the authority to direct an inspection or an inquiry whenever warranted in the facts and circumstances in a given case. The exercise of such power is not subject to any limitation or impediment understandably because the power is vested in a high constitutional functionary who is expected to exercise the same only when such exercise be[illegible]o

correct aberrations and streamline administration so as to maintain the purity of the procedures and process undertaken by the University in all spheres dealt with by it. Therefore, the inquiry directed by the Chancellor into the illegalities and irregularities of the selection process culminating in the appointment of Senior and Junior Research Assistants was legally permissible. [Para 15 - 16] [739-H; 740-A-D; 741-E-H; 742-A]

1.2 Justice Dhabe Committee was constituted by the Chancellor for holding a detailed inquiry into the allegations. The petitioners were not only aware of the fact about the pending writ proceedings but also about the constitution of Justice Dhabe Committee, which had issued notices to the appointees who had in turn responded to the same. The constitution of Justice Dhabe Committee was never questioned by the petitioners. While the findings recorded by the Inquiry Committee could be assailed, the challenge to the setting up of the Committee was clearly untenable not only because there was no merit in that contention but also because having taken a chance to obtain a favourable verdict, the petitioners could not turn around to assail the constitution of the Committee itself. [Para 17] [742-E-F, G-H; 743-B-C]

Question No. 2:

2. The petitioners had unsuccessfully challenged Justice Dhabe Committee Report before the High Court on the ground that principles of natural justice had not been complied with by the Committee. The High Court has rightly noted that Justice Dhabe Committee had issued notices to each one of the petitioners asking for their explanation which the petitioners had submitted. The petitioners had candidly admitted in the writ petition itself that upon receipt of notices from the Committee they had appeared and filed their affidavits before the Committee. The Committee had, associated the petitioners with the proceedings by inviting them to appear and participate in the same, heard them and considered their version. Therefore, it cannot be said that principles of natural justice were violated by the Committee especially when no prejudice is demonstrably caused to the petitioners on account of the procedure which the Committee followed in concluding the enquiry proceedings. [Para 18] [743-C-E, F-H; 744-F-G]

Question No. 3:

3.1Findings recorded by Justice Dhabe Committee were based on facts discovered in the course of the inquiry. No serious attempt was made before the High Court nor even before this Court to challenge the said findings of fact. Even otherwise, a fact finding inquiry instituted by the Chancellor was bound to involve appraisal of evidence, documentary and oral. The conclusions drawn on the basis of such appraisal were open to critical evaluation by the authorities before whom the conclusions and the Report was submitted for action but once such conclusions, are upon a careful re-appraisal found to be justified, a writ court will be very slow in interfering with the same. [Para 19] [744-H; 745-A-C]

3.2 In the instant case, upon receipt of the report from Justice Dhabe Committee, the matter was directed to be placed before the Executive Council of the University, which without any reservation approved the findings recorded by Dhabe Committee, no matter with a recommendation to the Chancellor to take a lenient view in the matter, having regard to the fact that the petitioners had already served the University for nearly six years. The recommendation of the Executive Council did not, however, find anything amiss with the conclusions drawn by the Dhabe Committee as to the

selection process culminating in illegal appointments of the selected candidates. The Chancellor also took the view that the entire selection stood vitiated by widespread irregularities. There is no reason to interfere with the findings recorded by Justice Dhabe Committee that the sanctity of the entire selection process was vitiated by irregularities and acts of nepotism. [Para 20] [745-C, D-F, G-H; 746-A]

Question No. 4:

4.1 In compliance with the orders passed by the Chancellor, the Vice Chancellor of the University issued notices to the appointees calling upon them to appear before him for a personal hearing in support of their selection and appointment as SRAs/JRAs. The appointees filed their responses in the required format and were also given an opportunity of being heard by the Vice Chancellor. The High Court has correctly concluded that the petitioners had failed to establish that the Vice Chancellor had either violated the principles of natural justice or that any prejudice was caused by the procedure adopted by him in offering them a hearing. Thus, the Vice Chancellor acted fairly and he fully complied with the principle of natural justice. [Para 21] [746-B-D, E-F, G-H]

4.2 The requirements of audi alteram partem are not capable of a strait jacket application. Their application depends so much upon the nature of the tribunal that is deciding the matter, the nature of the inquiry that is being made and the consequences flowing from the determination. A notice to the petitioners who were likely to be affected and a hearing afforded to them apart from written responses filed in reply to the notices was a substantial compliance with the principles of natural justice. No further hearing was required to be repeated by the Chancellor, who had before him the

recommendations of the Executive Committee and the Vice Chancellor and took a final view of the matter having regard to the totality of the circumstances. There is no error of law in the view taken by the High Court to warrant interference. [Para 21 & 22] [746-H; 747-A-C]

Question No. 5:

5.1 The Chancellor declined to show any leniency to the petitioners, no matter they had served the University for over six years, primarily because the entire selection process was in his opinion vitiated by widespread irregularities in the selection process. The findings recorded by Justice Dhabe Committee upon a detailed and thorough examination of the matter fully supported that view of the Chancellor. The reasons that prevailed with the Chancellor cannot be said to be illusory or irrelevant so as to call for interference from a writ Court. The Chancellor was dealing with a case where the Selection Committee had called a large number of candidates for interview without following the proper procedure as prescribed by the State Government leading to the appointment of undeserving candidates by manipulation and favouritism. The Chairman and the Member Secretary of the Selection Committee had on their own increased the number of posts of SRAs and JRAs to be filled upon. All aspects were considered by Justice Dhabe Committee in its report which concluded that the entire selection process was vitiated. That beneficiaries of such faulty selection process should hold on to the benefit only because of lapse of time would be travesty of justice especially when deserving candidates were left out. [Para 23] [747-H; 748-A-C, F-G]

5.2 Continuance in office of those selected by means that are not fair, transparent and reasonable will amount to perpetuating the wrong. Continuance of the petitioners in service would not, be justified h e

background in which the selection and appointments were made and eventually set aside by the University. All that the long years of service rendered with the University may secure for the appellants is a direction to the effect that in any future selection against the vacancies caused by their ouster and other vacancies that may be available for the next selection, the petitioners shall also be considered in relaxation of the upper age limit prescribed. Such of the petitioners who appear in the next selection and succeed, will also have the benefit of continuity of service. [Para 23 - 24] [748-H; 749-E-G]

Constituting of Selection Board and recruitment afresh:

6.1 In view of the amendment of 1983 Act in term of Maharashtra Act No. XXXII of 2013, establishment of a Selection Board and formulation of proper procedure to be followed by the Board will go a long way in making the process of selection and recruitment objective, fair and reasonable apart from bringing transparency to the norms and the process by which such recruitments were made. [Para 25] [750-A-B, E]

6.2 This Court directs that the respondent-University shall take necessary steps for constituting the Selection Board in terms of s. 58 of the Act as amended by Maharashtra Act No. XXXII of 2013 and advertise the vacancies currently available, together with the posts that are held by the appellants for recruitment in accordance with the procedure that may be prescribed in accordance with law. The appellants shall also be allowed to apply and participate in the selection process against the vacancies so advertised in relaxation of the upper age limit prescribed for such recruitment. For a period of six months or till the process of selection and appointment based on the selection process is completed by the respondent, whichever is earlier, the appellants shall be allowed to continue in service on the same terms as are currently applicable to them. In case any one of the

appellants is selected by the new selection process, he shall be granted benefit of continuity of service. [Para 26] [750-G-H; 751-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4412 of 2014.

From the Judgment and order dated 16.08.2012 of the High Court of Bombay at Nagpur in WP No. 238 of 2012.

WITH

Civil Appeal Nos. 4413, 4414 and 4415 of 2014.

P.P. Rao, Shantanuu Khedkar, Satyajit A. Desai, somanath Padhan, Anagha S. Desai, Anuradha Mutatkar for the Appellants.

Sanjay Kharde, Abhay Sambhre, Preshit Surshe, Amol Nirmalkumar Suryawanshi, Akshat Kulsreshtha, Swarnendu Chatterjee, Surajit Bhaduri for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals arise out of a common Judgment and Order dated 16th August, 2012 passed by the High Court of Judicature at Bombay, Nagpur Bench whereby writ petitions No.238, 247, 251 and 389 of 2012 filed by the appellants, herein, have been dismissed and the orders passed by the respondents terminating their services affirmed.

3. Dr. Punjabrao Deshmukh Krishi Vidyapeeth invited applications for appointment against 24 vacancies in the cadre of Senior Research Assistants and 37 vacancies in the cadre of Junior Research Assistants. As many as 3214 applications were received from eligible candidates against 61 posts so advertised. Appointments based on the selection conducted by the Selection Committee concerned were all the same made for as many as 131 posts out of which 76 appointments were made against the posts of Senior Resea

remaining 55 were made in the cadre of Junior Research Assistants. It is common ground that the selection process was based on a total weightage of 100 marks for each candidate out of which 40 marks were reserved for educational qualification of the candidate and his/her experience while the remaining 60 marks were set apart for viva-voce examination.

4. Several complaints appear to have been made against the selection process and the resultant appointments made by the University. Some of these complaints were in the form of writ petitions filed before the High Court of Bombay at Nagpur while some others were addressed to His Excellency, the Governor of Maharashtra who happens to be the Chancellor of the University. Out of the writ petitions filed against the selection and appointment process, Writ Petition No.4771 of 2006 inter alia prayed for a direction to the Chancellor to institute an inquiry under Section 11 of the Maharashtra Agriculture Universities (Krishi Vidyapeeth) Act, 1983 in regard to the illegalities and irregularities committed in the selection and consequent appointments against the vacancies referred to above. By an Order dated 21st April, 2007 passed by the High Court in the said petition, the Chancellor was directed to take a decision in the matter on or before the 14th August, 2007. Two other writ petitions were similarly filed before the High Court of Nagpur challenging the selection and appointment process. In writ petition No.342 of 2006 filed by Shri H.S. Bache, the High Court passed an interim order to the effect that the selection of the candidates shall remain stayed subject to the further orders of the Court. Writ Petition No.905 of 2006 filed by Archana Bipte and another also assailed the validity of the selection and appointment process undertaken by the University on several grounds.

5. It was in the above backdrop that the Chancellor invoked his powers under Section 11 (1) of the Maharashtra Agricultural Universities Act, 1983 and appointed Mr. Justice H.W.Dhabe, a former Judge of the High Court of Bombay to

examine the papers relating to the selection and appointment of the candidates concerned against the posts referred to above and to submit a report to the Chancellor as to the fairness of the selection of the candidates appointed by the University. A reading of the order passed by the Chancellor would show that apart from several allegations made by Dr. B.G. Bhathakal, Ex-Vice Chancellor of the University and four others, the Chancellor had before him, a report dated 8th November, 2006 submitted by the Director General MCAER Pune from which the Chancellor noticed several irregularities allegedly committed in the process of selection such as violation of Statute 52, holding of common interviews for both Senior and Junior Research Assistants, appointing meritorious candidates from the reserved category seats instead of appointing them in the open merit category, selection of as many as 22 relatives of officers/employees of the University, absence of any short-listing of candidates for purposes of interview even when the applications were far in excess of the advertised vacancies. There were also allegations of the selection process not being transparent apart from allegations to the effect that the norms for academic evaluation and viva voce examination had been flouted.

6. With the constitution of the Justice Dhabe's Committee writ petition No.4771 of 2006 titled Dr.Balwant and Anr. versus His Excellency the Chancellor of Dr.Punjabrao Deshmukh Krishi Vidyapeet & Ors. and writ Petition No.905 of 2006 titled Ms. Archana and Anr. V. State and Ors. were both disposed of with the observation that Justice Dhabe Committee was constituted to examine the complaints made by the writ petitioners and connected issues was expected to submit its report to the Chancellor making it unnecessary for the Court to undertake any such exercise in the said petitions.

7. Proceedings before Justice Dhabe Committee started with the issue of notices to those appointed informing them about the establishment of the Commi[illegible]e

fairness of the selection process and calling upon them to appear in person before the Committee and to file affidavits and documents, if any, to justify their selection and appointment. It is not in dispute that the appellants received the said notices and acknowledged the same by filing their respective affidavits. The appellants were in the meantime informed by the University that they had completed their period of probation satisfactorily but the declaration to that effect was to remain subject to the outcome of writ petitions No.342 of 2006 and 4771 of 2006.

8. Justice Dhabe Committee took nearly 3½ years to complete the inquiry and to submit its report to the Chancellor in which the entire process of selection and appointment came under severe criticism questioning the fairness of the selection process and the resultant appointments. The High Court has summed up the substance of the findings and conclusions arrived at by Justice Dhabe in the following words:

1) As large numbers of candidates were called for interview, without following proper ratio as prescribed by the State government, it has led to selection of undeserving and less meritorious candidates by manipulation, favouritism and other malpractices etc.

2) Although the posts of SRA and JRA belonged to two separate cadres with different pay scales, different qualifications and duties and responsibilities, the Selection Committee held common interviews for the said posts and vitiated the selection of the candidates as their suitability could not have been properly judged in such interviews for the said posts.

3) The criteria for assessment of the candidates for the posts of SRA/JRA were illegal.

4) The Selection Committee has awarded marks for

Ph.D. Thesis submitted, research papers/popular articles published and significant contribution made after the last date of application i.e. 15.09.2004 by resorting to illegal marking system.

5) The Selection Committee gave higher weightage to the performance in interview as compared to academic performance.

6) The procedure followed by the Selection Committee for awarding marks to the candidates for academic performance and performance in interview was illegal and invalid.

7) There was tinkering in mark seats of the candidates. In some of the cases the mark sheets were not prepared in the meeting of the Selection Committee and they were also not placed before any of its meeting for its consideration and approval.

8) The Chairman and the Member Secretary of the Selection Committee on their own without any authority or power in them increased the number of posts of SRA and JRA to be filled in.

9) Category wise distribution of 55 posts of SRA and 76 posts of JRA was not made according to the prescribed percentage for each of the backward classes and open category as per the relevant GRs.

10) The selection lists for the posts of SRA and JRA were not prepared or considered and approved in the meeting of the Selection Committee. There were lacunae, deficiencies, illegalities and irregularities in preparation of the selection list.

11) Though in the advertiseme y

provided for wait lists to be prepared for the near future vacancies, no wait lists were prepared by the Selection Committee.

12) The Selection Committee did not discharge any of its duties and responsibilities in the selection process.

13) The entire selection process and selection of candidates pursuant thereto for the posts of SRA and JRA is vitiated by bias of Dr. V.D. Patil, Chairman of the Selection Committee.

14) As per the findings of Justice Dhabe, favouritism has occurred in the process of selection to the posts of SRA and JRA

15) The qualification of Bachelor's degree in Agriculture Engineering was introduced as an additional qualification for the post of JRA as per the addendum dated 06.09.2004 to the advertisement dated 14.08.2004 in which the posts of JRA were advertised with the qualification of Bachelor's degree in Agriculture.

16) Preparation of the minutes of various meetings of the Selection Committee were not recorded faithfully and confirmed by its other members. The proceedings/minutes of the meetings of the Selection Committee were probably prepared after the appointment orders were issued on 16.09.2005 and 17.09.2005.

17) There were more than 2 months delay in handing over the Selection lists to the then Vice Chancellor. The reasons given by the then Vice Chancellor for the delay in not receiving the selection lists towards the end of June or July

2005 are not convincing.

18) The Reservation policy of the Government was not followed by the University. Reservations of the posts for backward classes (social/ vertical reservation) were not made according to their prescribed percentage as per the relevant GRs. of the State Government.

19) The graduates of the Yashwantrao Chavan Maharashtra Open University were not considered in the University for appointment and promotion in the post of JRA.

20) There were illegalities, flaws and consequential reshuffling of the Selection Lists and other infirmities in preparation of the existing selection lists of these posts of SRA and JRA. Thus, the appointments made in the posts of SRA and JRA are highly irregular.

21) The routine procedures for making appointment in the university was not followed in the appointments made to the posts of SRA and JRA. In the report it is concluded that the entire selection process and selection of the candidates to the posts of SRA and JRA is vitiated by the illegalities, irregularities and improprieties and therefore the appointments made pursuant thereto, need to be set aside.

9. On receipt of the report from Justice Dhabe Committee the Chancellor directed the Vice Chancellor of the University to place the matter before the Executive Council for its opinion. The matter was accordingly placed before the Executive Council of the University on 14th February 2011. The Council while accepting the findings recorded by the Dhabe Committee recommended that a lenient view be ta[illegible]r

and the appointments already made protected having regard to the fact that those appointed had already served the University for over six years during the interregnum. The petitioners also appear to have made a representation to the Chancellor in which they once again asserted that their appointments had been properly made on the basis of their merit and that the termination of their services after more than six years will be grossly unfair. The Chancellor, however, felt that Justice Dhabe Committee had reported illegalities and irregularities in the procedure adopted by the Selection Committee which findings having been accepted by the Executive Council left no room for any leniency in the case, considering the gravity and seriousness of the matter. The Chancellor found that the entire process of selection of candidates and their appointments stood vitiated because of such irregularities. Directions were accordingly issued to the Vice Chancellor to initiate action to cancel the appointments of the candidates concerned after following the procedure prescribed by law and to fix the responsibility of those who had committed lapses in the matter of selection of the candidates and take disciplinary action against them including the Chairman of the Selection Committee and the then Registrar and Member Secretary of the said Committee. The Chancellor further directed the Vice Chancellor to consider the suggestions made by Justice Dhabe Committee in order to avoid recurrence of such illegalities and irregularities in future recruitments.

10. In obedience to the directions issued by the Chancellor, disciplinary action appears to have been initiated against those comprising the Selection Committee in which the officials are accused of having made illegal selection of 131 candidates including the petitioners thereby not only causing financial loss to the University but also bringing disrepute to it. We are in the present appeals not concerned with the fate of the said proceedings which appear to be lingering on even at present. As regards the petitioners, they were served notices calling upon them to appear before the Vice Chancellor for a personal hearing against their selection and appointment as SRAs/JRAs in the University. It is not in dispute that the petitioners in reply to the said notices filed their respective responses before the Vice Chancellor and were heard on different dates mentioned in the communications received by them. It is also not in dispute that the petitioners submitted their representations before the Vice Chancellor in writing in which they stated that their appointments were regular and legally sound apart from relying upon the fact that they had served the University for nearly six years thereby entitling them to protection against ouster on equitable grounds. The Vice Chancellor then reported the result of the hearing provided by him to the petitioners by his letter dated 1st November 2011. Consideration of the report received from the Vice Chancellor, the opinion offered by the Executive Council of the University and the entire material including the report submitted by Justice Dhabe Committee led the Chancellor to pass an order on 16th December 2011 in which the Chancellor held that the entire process of selection and appointment having lost its sanctity on account of irregularities in the same could not be approved or rectified. The Chancellor felt that a lenient view on humanitarian grounds alone would be against the principles of governance and fair selection process in the matter of recruitment. He accordingly turned down the recommendation of the Vice Chancellor that out of 83 SRAs and JRAs, selection of 65 candidates could be saved as valid while remaining 18 could be ousted. He directed that Justice Dhabe Committee Report did not leave any room for the Vice Chancellor to strike a discordant note or sit in judgment over the conclusions drawn by the Committee. The Chancellor accordingly cancelled the appointments of 83 candidates of SRAs and JRAs who had been selected and taken into the service of the University on the basis of a process which the Chancellor found was vitiated and void ab initio.

11. In compliance with the directions issued by the Chancellor the Vice Chancellor issued ir h

case terminating the services of the appointees concerned. Aggrieved by the said orders the petitioners filed Writ Petition Nos. 238/12, 389/12, 247/12 and 251/12 before the High Court of Judicature at Bombay, Nagpur Bench which petitions have now been dismissed by the said Court in terms of the common order impugned in these appeals.

12. We have heard learned counsel for the parties at length. The following questions arise for our consideration:

1) Was the Chancellor competent to appoint a Single Member Committee headed by Justice H.W. Dhabe to examine the illegalities, irregularities, fairness and impropriety of the selection process and consequent appointments to the cadre of SRAs and JRAs?

2) Were the inquiry proceedings entrusted to Justice Dhabe Committee conducted in accordance with the principles of natural justice?

3) Were the findings recorded by Justice Dhabe Committee in any manner illegal or perverse to warrant interference with the same by a Writ Court?

4) Was the procedure adopted by the University and the Vice Chancellor fair and reasonable and in consonance with the principles of natural justice?

5) Was the Chancellor of the respondent-University and the High Court justified in declining the prayer of the petitioners for continuance in service on account of the time lag between the date of their appointments and the date on which their services were terminated?

We shall deal with the question ad seriatim.

Reg. Question No. 1

13. Maharashtra Agricultural Universities (Krishi Vidyapeeths) Act, 1983 was enacted to consolidate and amend the law relating to the agricultural universities in the State of Maharashtra. The legislation provides for better governance, more efficient administration and financial control of the Universities and for better organisation of teaching, research and extension education therein apart from providing better facilities in agricultural and allied matters in particular for the development of agricultural sciences which is one of the prime objects underlying the Act. Chapter II of the Act comprises Sections 3 to 11. Section 4 of the Act states that each University shall be deemed to be established and incorporated for the purposes enumerated therein. The purposes mentioned in the said provision includes education in agriculture in allied sciences and in humanities besides furthering the advancement of learning and research in agriculture, undertaking and guiding extension education programmes; integrating and coordinating the teaching of subjects in the different faculties, coordinating agricultural education, research and extension education activities, teaching and examining students and conferring degrees and diplomas. Section 6 of the Act deals with the powers and functions of the Universities. It inter alia provides that each University shall have the powers and functions enumerated under the said provision, in particular the power to institute teaching, research and extension education posts required by the University and to appoint persons to such posts. Sub-section (x) to Section 6 is in this regard relevant which reads:

> *"to institute teaching, research and extension education posts required by the University and to appoint persons to such posts."*

14. Section 11 of the Act empowers the Chancellor to cause an inspection and inquiry on matters stipulated therein.

We may gainfully extract the said provision in extenso as the power of the Chancellor to direct an inquiry into the validity of the selection and appointments has been questioned before us in these appeals. Section 11 reads as under:

"SECTION 11: Chancellor to cause inspection and inquiry on various matters:

(1) The Chancellor shall have the right to cause an inspection to be made, by such person or persons or body of persons, as he may direct, of any University,, its buildings, farms, laboratories, libraries, museums, workshops and equipments of any college, institution or hostel maintained, administered or recognised by the University and of the teaching and other work conducted by or on behalf of the University or under its auspices of and of the conduct of examinations or other functions of the University, and to cause to inquiry to be made in like manner regarding any matter connected with the administration or finances of the University.

(2) The Chancellor shall, in every case, give due notice to the University of his intention to cause an inspection or inquiry to be made, and the University shall be entitled to appoint a representative, who all have the right to be present and to be heard at the inspection or inquiry.

(3) After an inspection or inquiry has been caused to be made, the Chancellor may address the Vice-Chancellor on the result of such inspection or inquiry and the Vice-Chancellor shall; communicate to the Executive Council the views of the Chancellor and call upon the Executive Council to communicate to the Chancellor through him its opinion thereon within such time as may have been specified by the Chancellor. If the Executive Council communicates, its opinion within the specified time limit, after taking into consideration that opinion, or where the Executive Council fails to communicate its opinion in time, after the specified time limit is over, the Chancellor may proceed and advise the Executive Council upon the action to be taken by it, and fix a time limit for taking such action

(4) The Executive Council shall, within the time limit so fixed, report to the Chancellor through the Vice-Chancellor the action which has been taken or is proposed to be taken on the advice tendered by him.

(5) The Chancellor may, where action has not been taken by the Executive Council to his satisfaction with in the time limit fixed, and after considering any explanation furnished or representation made by the Executive Council, issue such direction, as the Chancellor may think fit, and the Executive Council and other authority concerned shall comply with such directions.

(6) Notwithstanding anything contained in the preceding sub-section if at any time the Chancellor is of the opinion that in any matter the affairs of the University are not managed in furtherance of the objects of the University or in accordance with the provisions of this Act and the statutes and Regulation or that special measures are desirable to maintain the standards of University teaching, examinations, research, extension education, administration or finances, the Chancellor may indicate to the Executive Council through the Vice-Chancellor any matter in regard to which he desir[illegible]d

call upon the Executive Council to offer such explanation within such time as may be specified by him. If the Executive Council fails to offer any explanation within the time specified or offers an explanation which, in the opinion of the Chancellor is not satisfactory , the Chancellor may issue such directions as appear to him to be necessary , and the Executive Council and other authority concerned shall comply with such directions.

(7) The Executive Council shall furnish such information relating to the administration and finances of the University as the Chancellor may from time to time require.

(8) The Executive Council shall furnish to the State Government such returns or other information with respect to the property or activities of the University as the State government may from time to time require".

(emphasis supplied)

15. A careful reading of the above would leave no manner of doubt that the Chancellor is vested with the power to cause an inspection to be made by such person or persons as he may direct of any University, its building, farms, laboratories, libraries etc. or of hostels administered and recognised by the University or of the teaching or other workshops conducted on behalf of the University or any conduct of examinations or other functions of the University. The inspection so directed is, however, distinct from the inquiry which the Chancellor may direct regarding any matter connected with the administration or finance of the University. The expression 'administration or finance' of the University are in our opinion, wide enough to include an inquiry into any matter that falls under Section 6(x) (supra). If creation of teaching, research and education posts required by the University is one of the functions of the University and if

appointment of suitable persons against such posts is also one of such functions, there is no reason why the power of the Chancellor to direct an inquiry under Section 11(1) should not extend to any process leading to such appointments. The term 'administration of the University' appearing in sub-Section 1 of Section 11 would, in our opinion, include every such activity as is relatable to the functions of the University, under Section 6. Selection of persons suitable for appointment and appointments of such persons would logically fall within the expression "administration of the University" within the meaning of Section 11(1) of the Act. We have, therefore, no hesitation in holding that the inquiry directed by the Chancellor into the illegalities and irregularities of the selection process culminating in the appointment of Senior and Junior Research Assistants was legally permissible. The power vested in the Chancellor under Section 11 to direct an inspection or an inquiry into matters referred to in the said provision is very broad and vests the Chancellor with the authority to direct an inspection or an inquiry whenever warranted in the facts and circumstances in a given case. We may also refer to Section 15 of the Act whereunder the Governor of Maharashtra is ex-officio Head of each of the Universities who shall, when present, preside at any convocation of the University. Section 15 reads:

"(1) The Governor of Maharashtra, shall be the Chancellor of each of the Universities.

(2) The Chancellor shall, by virtue of his office, be the head of the University and shall, when present, preside at any convocation of the University.

(3) The Chancellor may call for his information any papers relating to the administration of the affairs of the University and such requisition shall be complied with by the University.

(4) Every proposal to confer any honorary degree shall be subject to confirmation by the

(5)The Chancellor may, by order in writing, annul any proceeding of any officer or authority of the University, which is not in conformity with this Act, the Statutes or the Regulations, or which is prejudicial to the interest of the University;

Provided that, before making any such order, he shall call upon the officer or authority to show cause why such an order should not be made, and if any cause is shown within the time specified by him in this behalf, he shall consider the same.

(6) The Chancellor shall exercise such other powers and perform such other duties as are laid down by this Act."

(emphasis supplied)

16. A plain reading of the above shows that apart from being the ex officio Head of the University, the statute specifically confers upon the Chancellor the power to call for his information any paper relating to the administration of the affairs of the University and upon such request the University is bound to comply with the same. Sub-section 5 vests the chancellor with the power to annul any proceeding of any officer or authority if the same is not in conformity with the provisions of the Act, the statutes or the Regulations or which is prejudicial to the interest of the University. A conjoint reading of Sections 11 and 15, in our opinion, leaves no manner of doubt that the Chancellor exercises ample powers in regard to the affairs of the University and in particular in regard to the affairs of the administration of the University. The power to direct an inquiry into any matter concerning the administration of the University is only one of the facets of power vested in the Chancellor. The exercise of any such power is not subject to any limitation or impediment understandably because the power is vested in a high constitutional functionary who is expected to exercise the same only when such exercise becomes necessary to correct aberrations and streamline administration so as to maintain the

purity of the procedures and process undertaken by the University in all spheres dealt with by it. The power to direct an inquiry is meant to kickstart corrective and remedial measures and steps needed to improve the functioning of the University as much as to correct any illegal or improper activity in the smooth running of the administration of the University. As a father figure holding a high constitutional office, the Chancellor is to be the guiding spirit for the Universities to follow a path of rectitude in every matter whether it concerns the administration or the finances of the University or touches the teaching and other activities that are undertaken by it. The legislature, it is obvious, has considered the conferment of such powers to be essential to prevent indiscipline, root out corruption, prevent chaos or deadlock in the administration of the University or any office or establishment under it that may tend to shake its credibility among those who deal with the institution.

17. The Chancellor had, in the case at hand, directed an inquiry into the illegalities and irregularities in the selection and appointment process in the light of widespread resentment against the same as is evident from the fact that three writ petitions had been filed in the High Court challenging the selection and the appointment process. Two of the writ petitions had been disposed of as noticed earlier no sooner Justice Dhabe Committee was constituted by the Chancellor for holding a detailed inquiry into the allegations. The petitioners were not only aware of the fact about the pending writ proceedings but also about the constitution of Justice Dhabe Committee. As a matter of fact with the disposal of Writ Petitions No.4771 of 2006 and 905 of 2006 the petitioner had known that Justice Dhabe Committee will eventually determine whether or not their selection and appointment was proper. Justice Dhabe Committee had even issued notices to the petitioners who had in turn responded to the same. The constitution of Justice Dhabe Committee was, despite all this, never questioned by the petitioners. On the contrary the petitioners merrily participated in the proceedings and too a

favourable verdict from it. Having failed to do so, they turned around to challenge not only the findings recorded by the Committee but even the authority of the Chancellor to set up such a Committee. While the findings recorded by the Inquiry Committee could be assailed, the challenge to the setting up of the Committee was clearly untenable not only because there was no merit in that contention but also because having taken a chance to obtain a favourable verdict the petitioners could not turn around to assail the constitution of the Committee itself. Question 1 is accordingly answered in the negative.

Reg. Question No. 2

18. The petitioners had unsuccessfully challenged Justice Dhabe Committee Report before the High Court on the ground that principles of natural justice had not been complied with by the Committee. The High Court has noted and in our opinion rightly so that Justice Dhabe Committee had issued notices to each one of the petitioners asking for their explanation which the petitioners had submitted. The High Court noted that the inquiry proceedings before Justice Dhabe had continued for nearly three years during which period the petitioners had made no grievance either before the Committee or before any other forum regarding non-compliance with the principles of natural justice. There is nothing on record to suggest that any point relevant to the controversy was not considered by Justice Dhabe Committee or that there was any impediment in their offering an effective defence before the Committee. The petitioners had on the contrary candidly admitted in the writ petition itself that upon receipt of notices from the Committee they had appeared and filed their respective affidavits before the Committee. Some of the petitioners had even furnished some additional information which was summoned from them. The Committee had, it is evident, associated the petitioners with the proceedings by inviting them to appear and participate in the same, heard the petitioners and considered their version. There is neither an allegation nor any material to suggest that

there was any reluctance or refusal on the part of the Committee to entertain any material which the petitioner intended to place in their defence or to summon any record from any other quarter relevant to the questions being examined by the Committee. The argument that the petitioners did not know as to what the complaint against them was has been rejected by the High Court and quite rightly so. Once the petitioners were informed about the setting up of the Committee and invited to participate in the same and once they had appeared before the Committee and filed their affidavits it is difficult to appreciate the argument that the petitioners did so without knowing as to why was the Committee set up and what was the inquiry all about. Assuming that any of the petitioners did not fully comprehend the nature of allegations being inquired into by the Committee or the purpose of the inquiry nothing prevented the petitioners from taking suitable steps at the appropriate stage assuming that they were so naïve as to simply appear before the Committee without being aware of the purpose for which they were invited. They could indeed approach the Committee to secure the relevant information to fully acquaint themselves about the on-going process and the nature of the defences that was open to them. Having remained content with their participation in the inquiry proceedings for nearly three years and having made no grievance at all against the procedure adopted by the Committee in dealing with the subject till the writ petitions challenging the termination orders were filed, we see no merit in the specious contention that principles of natural justice were violated by the Committee especially when no prejudice is demonstrably caused to the petitioners on account of the procedure which the Committee followed in concluding the enquiry proceedings. Question No.2 is also in that view answered in the negative.

Reg. Question No. 3

19. Findings recorded by Justice Dhabe Committee were based on facts discovered in the cou[illegible]o

serious attempt was made before the High Court nor even before us to challenge the said findings of fact. Even otherwise a finding inquiry instituted by the Chancellor was bound to involve appraisal of evidence, documentary and oral. The conclusions drawn on the basis of such appraisal were open to critical evaluation by the authorities before whom the conclusions and the Report was submitted for action but once such conclusions are upon a careful re-appraisal found to be justified, a writ Court will be very slow in interfering with the same.

20. In the present case, upon receipt of the report from Justice Dhabe Committee the matter was directed to be placed before the Executive Council of the University. That direction was meant to give the Executive Council an opportunity to examine the findings of fact and the conclusions drawn from the same critically and to determine whether the same were justified. The Executive Council, it is common ground, had without any reservation approved the findings recorded by Dhabe Committee, no matter with a recommendation to the Chancellor to take a lenient view in the matter, having regard to the fact that the petitioners had already served the University for nearly six years. The recommendation of the Executive Council did not, however, find anything amiss with the conclusions drawn by the Dhabe Committee as to the irregularities in the selection process culminating in illegal appointments of the selected candidates. The 'fact finding' aspect thus stood concluded with the approval of the Executive Council of the University. The Vice Chancellor no doubt made an attempt at segregating what according to him was the valid part of the selection from that which was not, but the Chancellor did not approve of that exercise. The Chancellor took the view that the entire selection stood vitiated by widespread irregularities, leaving hardly any room for a distinction between the so called valid and invalid parts of the selection process. Be that as it may the fact remains that we have not been able to find any reason to interfere with the findings recorded by the

Justice Dhabe Committee. The sanctity of the entire selection process having been vitiated by irregularities and acts of nepotism, question No. 3 shall have to be answered in the negative, which we accordingly do.

Reg. Question No. 4

21. It is also not in dispute that in compliance with the orders passed by the Chancellor, the Vice Chancellor of the University had issued notices to the petitioners calling upon them to appear before him for a personal hearing in support of their selection and appointment as SRAs/JRAs. It is also not in dispute that upon receipt of the said notices the petitioners had filed their responses in the required format and were also given an opportunity of being heard by the Vice Chancellor. In the course of the hearing the petitioners obviously relied upon the written responses and sought a direction against ouster from service. There is, therefore, no merit in the submission that upon submission of the recommendations by Justice Dhabe Committee the petitioners did not have any opportunity to present their version before the Vice Chancellor nor is it possible to dub the hearing provided by the Vice Chancellor as a farce. The High Court has, in our opinion, rightly rejected a similar contention urged before it and correctly concluded that the petitioners had failed to establish that the Vice Chancellor had either violated the principles of natural justice or that any prejudice was caused by the procedure adopted by him in offering them a hearing. As a matter of fact the Vice- Chancellor had in his anxiety to help the petitioners tried to sit in judgment over the findings and conclusions of the inquiry Committee and taken a stance that was overtly sympathetic towards the petitioners. The uncharitable expression used by the petitioners as to the nature of the process undertaken by the Vice Chancellor is not, therefore, justified. The Vice Chancellor had in our view acted fairly and fully complied with the principle of natural justice. There is no gainsaid that the requirements of audi alteram partem are not capab

application. Their application depends so much upon the nature of the Tribunal that is deciding the matter, the nature of the inquiry that is being made and the consequences flowing from the determination. A notice to the petitioners who were likely to be affected and a hearing afforded to them apart from written responses filed in reply to the notices was in our opinion a substantial compliance with the principles of natural justice. No further hearing was required to be repeated by the Chancellor who had before whom the recommendations of the Executive Committee and the Vice Chancellor who took a final view of the matter having regard to the totality of the circumstances. The High Court has, in this regard, observed:

> "Thus, the Chancellor was not required to give any personal hearing to the petitioners while disagreeing with them. If we hold that prior to passing of the final order the Chancellor was required to hear the petitioners once again, that would mean that although the facts are undisputed and although no prejudice is demonstrated, we agree with the submissions of the petitioners. This would mean second round or second opportunity being made available to the petitioners to show cause against the findings and conclusions in the Inquiry Committee's report. That would mean reopening of the matter in its entirety which was not permissible and feasible in the peculiar facts of the case. This could be equated with an opportunity to show cause against the proposed punishment as is available in service jurisprudence. Those principles cannot be imported into the exercise that has been undertaken in the facts and circumstances of this case."

22. We see no error of law in the view taken by the High Court to warrant our interference. Question No. 4 is accordingly answered in the negative.

Reg. Question No. 5

23. The Chancellor declined to show any leniency to the

petitioners no matter they had served the University for over six years primarily because the entire selection process was in his opinion vitiated by widespread irregularities in the selection process. The findings recorded by Justice Dhabe Committee upon a detailed and thorough examination of the matter fully supported that view of the Chancellor. The reasons that prevailed with the Chancellor cannot be said to be illusory or irrelevant so as to call for interference from a writ Court. The Chancellor was dealing with a case where the Selection Committee had called a large number of candidates for interview without following the proper procedure as prescribed by the State Government leading to the appointment of undeserving candidates by manipulation and favouritism. It was a case where the posts of SRAs/JRAs although carrying different pay scales were clubbed for holding a common interview. Even the criterion for assessment of the merit of the candidates was found to be faulty. Marks were awarded for qualifications although the thesis for such qualifications was submitted after the date prescribed for such advertisement. Marking system itself was found to be erroneous. Higher weightage was given to the performance in the interview as compared to academic merit. There was tinkering in the mark sheets of the candidates in certain cases and mark sheets were not made available in the meetings of the Selection Committee. The Chairman and the Member Secretary of the Selection Committee had on their own increased the number of posts of SRAs and JRAs to be filled upon. All these among other aspects were considered by Justice Dhabe Committee in its report which concluded that the entire selection process was vitiated. That beneficiaries of such faulty selection process should hold on to the benefit only because of lapse of time would be travesty of justice especially when deserving candidates were left out with a brooding sense of injustice and cynicism against the efficacy of the system that was meant to act fairly and objectively. Continuance in office of those selected by means that are not fair, transparent and reasonable will amount to perpetuating the wrong. The

by the candidates who were selected on the basis of such a faulty selection process may be one of the considerations that enters the mind of the Court but there are other weighty considerations that cannot be given a go bye or conveniently forgotten lest those who do not adopt such malpractices or those who expect the system to protect their interest and their rights are eternally disappointed and left to believe that a wrong once done will never be corrected just because the legal process by which it is to be corrected is a long and winding process that often takes years to reach fruition.

24. Having said that we must say that the main contention which the petitioners have urged in support of their continuance in service is that they have become overage for any government employment at this stage. If ousted from service the petitioners will have no place to go nor even an opportunity to compete for the vacancies against which they were appointed. That is an aspect which can be and ought to be considered especially when there is no allegation leave alone evidence about any bribery having taken place in the issue of appointment orders by the officials concerned. Even so, continuance of the petitioners in service would not, in our opinion, be justified having regard to the background in which the selection and appointments were made and eventually set aside by the University. All that the long years of service rendered with the University may secure for the petitioners a direction to the effect that in any future selection against the vacancies caused by their ouster and other vacancies that may be available for the next selection the petitioners shall also be considered in relaxation of the upper age limit prescribed for them. Such of the petitioners who could try their luck in the next selection and who succeed in the same will also have the benefit of continuity of service.

25. That brings us to the method of selection that may be followed falling up the vacancies that will be caused by the ouster of the petitioners. An affidavit has in that regard been filed by

the Shri Dnyaneshwar Ashru Bharati, Registrar of the respondent-University stating that in terms of Maharashtra Act No. XXXII of 2013 the Maharashtra State legislature has amended Maharashtra Agricultural Universities (Krishi Vidyapeeths) Act, 1983. Section 58 of the principal Act as substituted by Act XXXII aforementioned provides that no person shall be appointed by the University as a member of the academic staff, except on the recommendation of a Selection Board constituted for the purpose in accordance with the provisions of the Statutes made in that behalf. The posts of SRAs and JRAs are classified as academic as per Statute 71 of the MAU statutes 1990. The process of amendment to the statute 75 and 76 is now underway. The affidavit further states that the University will not be in a position to undertake the selection process of posts advertised on 23rd March 2012 and that selection will be done by Recruitment Board as per the new selection procedure. The affidavit is, however, silent as to the procedure that shall be followed by the Selection Board constituted for the purpose. Be that as it may the establishment of a Selection Board and formulation of proper procedure to be followed by the Board will go a long way in making the process of selection and recruitment objective, fair and reasonable apart from bringing transparency to the norms and the process by which such recruitments were made. We only hope that the process of amendment of relevant statute is expedited by the University and concluded as far as possible within six months from today and process of filling up of posts of SRAs and JRAs currently held by the petitioners and those that were advertised in terms of advertisement dated 23rd March 2012 undertaken in accordance with such procedure.

26. In the result, the appeals fail and are hereby dismissed but in the circumstances without any order as to costs. We however direct that the University-respondent shall take necessary steps for constituting the Selection Board in terms of Section 58 of the Act as amended by Maharashtra Act No. XXXII of 2013 and advertise the vacanc e,

together with the posts that are presently held by the appellants for recruitment in accordance with the procedure that may be prescribed in accordance with law. The entire process shall be completed by the University within six months. The appellants shall also be allowed to apply and participate in the selection process against the vacancies so advertised in relaxation of the upper age limit prescribed for such recruitment. For a period of six months or till the process of selection and appointment based on the selection process is completed by the respondent, whichever is earlier, the appellants shall be allowed to continue in service on the same terms as are currently applicable to them. In case any one of the appellants is selected by the new selection process, he shall be granted benefit of continuity of service. But such of the appellants who do not compete for the selection or are not selected for the posts that may be advertised shall stand ousted from service on completion of the period of six months hereby granted. No costs.

R.P. Appeals dismissed.

VINOD KUMAR
v.
STATE OF KERALA
(Criminal Appeal No. 821 of 2014)

APRIL 04, 2014

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

PENAL CODE, 1860: s.376 - Rape - Consent - Consensual sexual relationship - Allegation against appellant that he entered into marital relations with the prosecutrix without disclosing to her the fact of his being already married - Defence case that the prosecutrix was well aware that the appellant was married and, still persuaded appellant for registration of marriage - Trial court convicted u/s.376 - High Court though noted that friendship between the couple strengthened into close acquaintance and eventually leading them to elope, still convicted the appellant and treated prosecutrix as victim - On appeal, held: Testimony of the Sub-registrar and the Deed writer who prepared the agreement of marriage independently indicated that the prosecutrix was made aware by knowledgeable and independent persons that no legally efficacious marriage had occurred - The Court is duty bound when assessing the presence or absence of consent, to satisfy itself that both parties are ad idem on essential features - It is not possible to convict a person who did not hold out any promise or make any misstatement of facts or law or who did not present a false scenario which had the consequence of inducing the other party into the commission of an act - In the instant case, the couple was infatuated with each other and wanted to live together in a relationship as close to matrimony as the circumstances would permit - Prosecutrix was aware that the appellant was already married but, possibly because a polygamous relationship was not anathema to her religion, she was willing

to start a home with the appellant - In these premises, it cannot be concluded that the appellant was culpable for the offence of rape - Prosecutrix was a graduate and even otherwise was not a gullible women of feeble intellect as was evident from her conduct in completing her examination successfully even on day of elopement - She was aware that a legal marriage could not be performed and, therefore, was content for the time with the registration of marriage - The conviction of the appellant is set aside.

WITNESS: Hostile witness - Evidence of - Held: A witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the court is satisfied that the witness bore hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth - In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities - The court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

The prosecution case was that at the material time, prosecutrix (PW2) was twenty years old and was studying in college. The appellant had introduced himself as a student of a college to PW2 and after they had daily telephonic conversations, they started meeting each other in person. On 17.1.2000, she accompanied him to Ponmudi, where he proposed marriage to her and they were in each others company from 11.00 a.m. to 4.30 p.m. On the insistence of the appellant, on the morning of 19th April, 2000, she accompanied him to the office of the Registrar, where she signed a paper in a van after which she was dropped back to college where she wrote her

last examination. After the examination, she accompanied the appellant and went to several places and had sex with the appellant. Her uncle saw them in a market and showed the photograph of the appellant's marriage to PW2. A verbal altercation ensued and the appellant departed in the van. PW2 adopted a stand that the appellant had not disclosed the factum of his being married.

The trial court convicted the appellant under Section 376 IPC and under Sections 417 and 419 IPC. The High Court set aside conviction under Sections 417 and 419 IPC however upheld conviction under Section 376 IPC. Despite arriving at the conclusion that the telephonic friendship between the appellant and PW2 strengthened into close acquaintance which later blossomed into love and eventually leading them to elope, the High Court termed PW2 as victim.

In the instant appeal, it was contended for the appellant that he had met PW2 in the University College and after some meetings and their getting to know each other better she had threatened to commit suicide if he did not marry her; that he immediately informed her that he was already married and had two children and that he had even given his marriage photographs to her, which she had entrusted to her friend, 'F'; that she asked him to divorce his wife; that she informed him that since her religion permitted a man to marry four times at least some documentation should be prepared to evidence their decision and compact to marry each other; that sexual intercourse transpired post 19.4.2000 only and was with the free consent of both persons.

Allowing the appeal, the Court

HELD: 1. The statement of PW2 formed the fulcrum of the case. PW2 inter alia, stated that the appellant had told her that after conversion [illegible]e

performed and to know about it went to meet Imam of Palayam Mosque who told him that conversion was not possible just for marriage and therefore conversion was possible only after a registered marriage and the appellant had told her that the marriage would be registered on 19th. This statement is indeed telltale. PW2 was a graduate having exercised exemplary steadfastness, responsibility, resolve and discipline in appearing in and passing her last examination for graduation on the very same day when, in the morning she had appeared before the Sub-Registrar for registration of an agreement for marriage, and, later, she had proceeded and participated in her elopement. PW4, the Sub-Registrar had deposed that he had registered a "marriage agreement" between the appellant and PW2 on 19.4.2000 and the document was in the handwriting of a deed-writer (PW5). In cross-examination, he stated that he had informed the couple that the marriage would not be complete on the registration of that agreement, which in his opinion was executed by them without any hesitation and with their free consent. The statements made by PW5 in Examination-in-Chief did not appear to run contrary to the prosecution case, yet, inexplicably he was declared hostile. A witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the court is satisfied that the witness bore hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets

out the truth without any hostile intention. The cross-examination of PW5 has the effect of weakening the prosecution case. All too frequently the cross-examiner is oblivious to the danger that is fraught in asking questions the answers to which are not known or predictable and which invariably prove to be detrimental to his interests. It seemed that details of 'S', the social worker who was a witness to the marriage agreement were available and being a relevant witness to elucidate the state of mind of PW2, she ought to have been examined by the prosecution. To compound it for the prosecution, it was in the re-examination of PW5 that it emerged that his opinion that document of marriage was deficient if not devoid of legal validity and efficacy was conveyed to PW2 by PW5 on 18.4.2000, i.e. the day previous to the date of registration. The testimony of PW5 is of importance because he has stated that both PW2 as well as the appellant, as also the social worker named 'S', had instructed and engaged him on 18.4.2000 with regard to the drafting of the subject agreement and that he had told PW2 that the registration would not create a legal marriage. [Paras 5, 6] [764-B, C-H; 765-A-B-H; 766-A-B]

Rabindra Kumar Dey v. State of Orissa **1976 (4) SCC 233: 1977 (1) SCR 439 - relied on.**

2. PW12, was the wife of the accused/appellant and her statement was also very damaging for the prosecution inasmuch as before the subject elopement, in the course of a telephone call she had informed the speaker that she was the wife of the appellant and that PW2 had subsequently in the course of that conversation disclosed her name and had told PW12 that she would talk to the appellant directly. This witness was also declared hostile; and she subsequently tendered the information that she has separated from the appellant and was living in her father's home. No

stance of the appellant was elicited by the Public Prosecutor in her cross-examination. [Para 7] [766-B-D]

Kaini Rajan vs. State of Kerala **(2013) 9 SCC 113 - relied on.**

3. The appellant was found guilty and was punished by both the courts below for the reprehensible crime of the rape of PW2. However, the verdict manifested a misunderstanding and misapplication of the law and misreading of the facts unraveled by the examination of the witnesses. Firstly, PW2 was a graduate and even otherwise was not a gullible women of feeble intellect as was evident from her conduct in completing her examination successfully even on the eventful day, i.e. 19.4.2000. In fact she displayed mental maturity of an advanced and unusual scale. She was aware that a legal marriage could not be performed and, therefore, was content for the time being that an agreement for marriage be executed. Secondly, the testimony of PW4 and PW5 independently indicated that PW2 was made aware by knowledgeable and independent persons that no legally efficacious marriage had occurred between the couple. Thirdly, this state of affairs can reasonably be deduced from the fact that, possibly on the prompting of PW2, the appellant had consulted an Imam, who both the parties were aware, had not recommended the appellant's conversion to Islam, obviously because of his marital status. Palpably, had he been a bachelor at that time, there would have been no plausible reason for the Imam's reluctance to carry out his conversion. Nay, in the ordinary course, he would have been welcomed to that faith, as well as by his prospective wife's family, making any opposition even by the latter totally improbable. For reasons recondite, the Imam was also not examined by the prosecution. Fourthly, if he was a bachelor there would have been no impediment whatsoever for them to

marry under the Special Marriage Act. Fifthly, the statement attributed to PW2 that her faith permitted polygamy would indicate that she was aware that the appellant was already married and nevertheless she was willing to enter into a relationship akin to marriage with the appellant, albeit, in the expectation that he may divorce his wife. Sixthly, the prosecution should have investigated the manner in which PW2's uncle came into possession of the appellant's marriage photograph, specially since it was his defence that he had given the photograph to PW2 when she had insisted, on the threat of suicide, that they should marry each other. The appellant also stated that this photograph was entrusted to 'F' on PW2's own showing, was her confidant. Again, for reasons that are unfathomable, the prosecution did not produce these witnesses, leading to the only inference that had they been produced, the duplicity in professing ignorance of the appellant's marital status would have been exposed. The role of the prosecution was to unravel the truth, and to bring to book the guilty, and not to sentence the innocent. But this important responsibility was cast to the winds. The Court can fairly deduce from such an argument that had 'F' been examined she would have spoken in favour of the appellant. Seventhly, it was not controverted by PW2 that the appellant had made all arrangements requisite and necessary for setting up a home with PW2. The instant case was not one where the appellant has prevailed on PW2 to have sexual intercourse with him on the assurance that they were legally wedded; PW2 was discerning and intelligent enough to know otherwise. The facts as emerged are that the couple were infatuated with each other and wanted to live together in a relationship as close to matrimony as the circumstances would permit. Eighthly, 'S' should have been examined by the prosecution as she was a material witness and would have testified as to the state of min[illegible]rt

is duty bound when assessing the presence or absence of consent, to satisfy itself that both parties are ad idem on essential features; in the case in hand that PW2 was laid to believe that her marriage to the appellant had been duly and legally performed. It was not sufficient that she convinced herself of the existence of this factual matrix, without the appellant inducing or persuading her to arrive at that conclusion. It is not possible to convict a person who did not hold out any promise or make any misstatement of facts or law or who presented a false scenario which had the consequence of inducing the other party into the commission of an act. There may be cases where one party may, owing to his or her own hallucinations, believe in the existence of a scenario which is a mirage and in the creation of which the other party has made no contribution. If the other party is forthright or honest in endeavouring to present the correct picture, such party cannot obviously be found culpable. [Para 9] [767-C-H; 768-A-H; 769-A-E]

Deelip Singh vs. State of Bihar **2005 (1) SCC 88: 2004 (5) Suppl. SCR 909 - relied on.**

4. PW2 was aware that the appellant was already married but, possibly because a polygamous relationship was not anathema to her because of the faith which she adheres to, PW2 was willing to start a home with the appellant. In these premises, it cannot be concluded beyond reasonable doubt that the appellant is culpable for the offence of rape; nay, reason relentlessly points to the commission of consensual sexual relationship, which was brought to an abrupt end by the appearance in the scene of the uncle of PW2. Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt. Thus, there was no

seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship. [Para 10] [770-B-E]

5. The appellant was not an innocent man inasmuch as he had willy-nilly entered into a relationship with PW2, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realise that retribution in another form has duly visited him. It can only be hoped that his wife will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly PW2 has found. The conviction of the appellant is set aside. [Para 11 and 12] [770-E-G]

Case Law Reference:

1977 (1) SCR 439	**Relied on**	**Para 6**
(2013) 9 SCC 113	**Relied on**	**Para 8**
2004 (5) Suppl. SCR 909	**Relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 821 of 2014.

From the Judgment and Order dated 17.07.2013 of the High Court of Kerala at Ernakulam in CRLA No. 1481 of 2006.

Basant R, Raghenth Basant, Adit S. Pujari, Karthik Ashok, Hardeep Singh (for Senthil Jagadeesan) for the Appellant.

Bina Madhavan for the Respondent.

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted.

2. In this Appeal we are confronted with the concurrent conviction of the Appellant under Sec n

Penal Code (IPC), although the findings of the two Courts substantially differ. The High Court has set aside his conviction under Sections 417 and 419 IPC, whereas the Additional District & Sessions Judge, Thiruvanthapuram, had sentenced the Appellant to Rigorous Imprisonment for a period of seven years and a fine of Rs.25,000/- and in default of payment thereof, to undergo Rigorous Imprisonment for three years. In the Impugned Order the High Court has reduced this sentence to Rigorous Imprisonment for a period of four years but, while maintaining the fine of Rs.25,000/-, has ordered that in default of its deposit, the Appellant would suffer Rigorous Imprisonment for the reduced period of six months. At the commencement of the impugned Judgment, the learned Judge has aptly observed that what began as a telephonic friendship strengthened into close acquaintance between the Appellant and the prosecutrix (PW2) which later blossomed into love, eventually leading them to elope. Despite arriving at this conclusion, the learned Judge has nevertheless termed PW2 as the victim, which seems to us to be an incongruous factual finding leading to a misconception and consequently a misapplication of the law.

3. So far as the facts are concerned, it is uncontroverted that at the material time PW2 was twenty years old and was studying in College for a Degree and that she appeared in and successfully wrote her last examination on 19.4.2000, the fateful day. Thereafter, when she did not return home from college, her father conducted a search which proved to be futile. Accordingly, on the next day, 20th April, 2000, he lodged the First Information Report, Exhibit P-1. It transpires that the prosecutrix (PW2) has since got married on 11th March, 2001 and at the time of her deposition had already been blessed with children. It is also not controverted that a document was registered with Sub-Registrar Office Kazhakoottam (SRO) which has been variously nomenclatured, including as a marriage registration. The Appellant's case is that he had met PW2 in the University College and after some meetings and

their getting to know each other better she had threatened to commit suicide if he did not marry her; that he immediately informed her that he was already married and had two children and that he had even given his marriage photographs to her, which she had entrusted to her friend, Fathima; that she asked him to divorce his wife; that she informed him that since her religion permitted a man to marry four times at least some documentation should be prepared to evidence their decision and compact to marry each other. It has been contended by the Appellant that sexual intercourse transpired post 19.4.2000 only and was with the free consent of both persons. The Trial Court had applied the Fourth Explanation to Section 375 and, thereafter, held the Appellant guilty, inter alia, of the commission of rape.

4. After considering the evidence of PW2 the High Court has notably concluded that there was no compulsion from the side of the Appellant at any stage, including when the prosecutrix had accompanied him on earlier occasion on a day trip to Ponmudi, when significantly no room had been booked and they had taken food in KTDC Ponmudi. PW2 has adopted the stand that the Appellant had not disclosed the factum of his being a married man and, contrary to the say of the Appellant, that he had threatened to commit suicide if she refused to marry him. She has deposed that he had told her "that after conversion marriage can be performed" but upon inquiry from the Imam he was told that his conversion was not possible just for marriage, and that conversion was possible only after a registered marriage. The prosecutrix has further testified that on the insistence of the Appellant, she had on the morning of 19th April, 2000 accompanied him to the office of the Registrar, where she had signed a paper in the Maruti Van which was driven by his driver and in which the latter's wife and child were also seated, after which she was dropped back to College where she wrote her last examination, in the event with success. After the examination, she accompanied by all these persons went to Katela, where fully appointed a[illegible]s

had been taken on rent by the Appellant; and that the next day she departed for Chavra, where the Appellant and she stayed in Room No.106 in the Mella Lodge. From there they left for Coimbatore and, thereafter, to Ooty, where they stayed for two days, i.e. 22nd and 23rd April, 2000; thereafter, they stayed in a house belonging to relatives of the Appellant in Neelagiri for three days. She has deposed that she had sex with the Appellant at all these places. It was then and there that her uncle Abdul Rasheed and his auto-rickshah driver chanced upon them when they had gone to the market to make some purchases. At that juncture her uncle Abdul Rasheed took out the photograph of the Appellant's marriage, a verbal altercation ensued and the Appellant departed in the Maruti Van. The prosecutrix has testified that "until uncle showed the photograph of A1's marriage I never knew that he is already a married person, A1 never told me that he is married. If I had an hint I would not have done all this. Thinking that I am the legally wedded wife of A1 I used to have sexual intercourse". She has testified that she told her friend and confidant, Fathima, about the Appellant speaking to her on the phone and equally importantly, that on her elopement she had informed her that she was safely staying at Katela. As already recorded, the case of the defence is that the photograph of the Appellant's marriage was subsequently entrusted by the prosecutrix to Fathima. Significantly, Fathima has not been examined by the prosecution and instead, the ill-founded contention has been articulated by learned State Counsel that she could and should have been examined by the Appellant. It is her say that although she had signed a document which was on stamp paper of Rs.50/- and had appeared before the Registrar. She was not aware of its contents. The prosecution case is that PW2, after her initial reluctance, was persuaded to immediately accompany the Appellant for the purpose of registration of marriage. It was in these circumstances that she believed that she was the legally wedded wife of the Appellant. As already noted physical sexual relations between the couple have not been denied. She has testified that had she been aware that

the accused was already married, she would not have ventured into the relationship.

5. Obviously, the statement of PW2 forms the fulcrum of the case. According to her the Appellant had introduced himself as a student of B.C.M. College, Kottayam and after they had daily telephonic conversations, they consented to meet each other in person. On 17.1.2000 she accompanied him to Ponmudi, where he proposed marriage to her and they were in each others company from 11.00 a.m. to 4.30 p.m. As already noted, the prosecutrix has, inter alia, stated that - "He told me that after conversion marriage can be performed and to know about it went to meet Imam of Palayam Mosque who told him that conversion is not possible just for marriage and therefore conversion is possible only after a registered marriage. Thus I agreed for marriage. He told me that the marriage would be registered on 19th." In our opinion this statement is indeed telltale. We cannot lose perspective of the fact that the prosecutrix is a graduate having exercised exemplary steadfastness, responsibility, resolve and discipline in appearing in and passing her last examination for graduation on the very same day when, in the morning she had appeared before the Sub-Registrar for registration of an agreement for marriage, and, later, she had proceeded and participated in her elopement.

6. Another significant feature is that PW4, the Sub-Registrar Kazhakoottam has deposed that he had registered a "marriage agreement" between the Appellant and the prosecutrix on 19.4.2000 and that the document was in the handwriting of a deed-writer named Mohana Chandran Nair (PW5). In cross-examination he has stated that he had informed the couple that the marriage would not be complete on the registration of that agreement, which in his opinion had been executed by them without any hesitation and with their free consent. So far as PW5 is concerned, we have carefully considered the statements made by him in Examination-in-Chief, none of which appears to run con n

case, yet, inexplicably he has been declared hostile. It will be apposite to recall that in Rabindra Kumar Dey vs State of Orissa 1976 (4) SCC 233, this Court has opined that - "… Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witness cannot be allowed. In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention". It is also evident to us that the cross-examination of PW5 has the effect of weakening the prosecution case. All too frequently the cross-examiner is oblivious to the danger that is fraught in asking questions the answers to which are not known or predictable and which invariably prove to be detrimental to his interests. It seems to us that details of Sasi, the social worker who was a witness to the marriage agreement were available and being a relevant witness to elucidate the state of mind of the prosecutrix, she ought to have been examined by the prosecution. To compound it for the prosecution, it is in the re-examination of PW5 that it has emerged that his opinion that document of marriage was deficient if not devoid of legal validity and efficacy was conveyed to the prosecutrix by PW5 on 18.4.2000, i.e. the day previous to the date of registration. We emphasise that the testimony of PW5 is of importance because he has stated that both the prosecutrix as well as the Appellant, as also the social

worker named Sasi, had instructed and engaged him on 18.4.2000 with regard to the drafting of the subject Agreement and that he had told the prosecutrix that the registration would not create a legal marriage.

7. PW12, namely, Chitralekha, is the wife of the accused/Appellant and her statement is also very damaging for the prosecution inasmuch as before the subject elopement, in the course of a telephone call she had informed the speaker that she was the wife of the Appellant and that the prosecutrix had subsequently in the course of that conversation disclosed her name and had told PW12 that she would talk to the Appellant directly. This witness has also been declared hostile; and she has subsequently tendered the information that she has separated from the Appellant and is living in her father's home. Nothing adverse to the stance of the Appellant has been elicited by the Public Prosecutor in her cross-examination.

8. In *Kaini Rajan vs State of Kerala* (2013) 9 SCC 113, my esteemed Brother has explained the essentials and parameters of the offence of rape in the extracted words, which renders idle any further explanation or elaboration:-

> "12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of a[illegible]f.

Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances".

9. We are fully mindful receptive, conscious and concerned of the fact that the Appellant has been found guilty and has been punished by both the Courts below for the reprehensible crime of the rape of the prosecutrix. However, we consider that the verdict manifests a misunderstanding and misapplication of the law and misreading of the facts unraveled by the examination of the witnesses. Firstly, the prosecutrix is a graduate and even otherwise is not a gullible women of feeble intellect as is evident from her conduct in completing her examination successfully even on the eventful day, i.e. 19.4.2000. In fact she has displayed mental maturity of an advanced and unusual scale. We are convinced that she was aware that a legal marriage could not be performed and, therefore, was content for the time being that an agreement for marriage be executed. Secondly, the testimony of PW4 and PW5 independently indicates that the prosecutrix had been made aware by knowledgeable and independent persons that no legally efficacious marriage had occurred between the couple. Thirdly, this state of affairs can reasonably be deduced from the fact that, possibly on the prompting of the prosecutrix, the Appellant had consulted an Imam, who both the parties were aware, had not recommended the Appellant's conversion to Islam, obviously because of his marital status and the law enunciated by this Court in this context. Palpably, had he been a bachelor at that time, there would have been no plausible reason for the Imam's reluctance to carry out his conversion. Nay, in the ordinary course, he would have been welcomed to that faith, as well as by his prospective

wife's family, making any opposition even by the latter totally improbable. For reasons recondite, the Imam has also not been examined by the prosecution. Fourthly, if he was a bachelor there would have been no impediment whastsoever for them to marry under the Special Marriage Act. Fifthly, we cannot discount the statement attributed to the prosecutrix that her faith permitted polygamy; on extrapolation it would indicate that she was aware that the Appellant was already married and nevertheless she was willing to enter into a relationship akin to marriage with the Appellant, albeit, in the expectation that he may divorce his wife. Sixthly, the prosecution should have investigated the manner in which the prosecutrix's uncle came into possession of the Appellant's marriage photograph, specially since it is his defence that he had given the photograph to the prosecutrix when she had insisted, on the threat of suicide, that they should marry each other. The Appellant has also stated that this photograph had been entrusted to Fathima, on the prosecutrix's own showing, was her confidant. Again, for reasons that are unfathomable, the prosecution has not produced these witnesses, leading to the only inference that had they been produced, the duplicity in professing ignorance of the Appellant's marital status would have been exposed. The role of the prosecution is to unravel the truth, and to bring to book the guilty, and not to sentence the innocent. But we are distressed that this important responsibility has been cast to the winds. In fact, learned counsel for the State has contended that Fathima could have been produced by the Appellant, which argument has only to be stated for it to be stoutly rejected. The Court can fairly deduce from such an argument that had Fathima been examined she would have spoken in favour of the Appellant. Seventhly, it has not been controverted by the prosecutrix that the Appellant had made all arrangements requisite and necessary for setting up a home with the prosecutrix. The present case is not one where the Appellant has prevailed on the prosecutrix to have sexual intercourse with him on the assurance that they were legally wedded; the prosecutrix was discerning and intelli

otherwise. The facts as have emerged are that the couple were infatuated with each other and wanted to live together in a relationship as close to matrimony as the circumstances would permit. Eightly, as already stated, Sasi should have been examined by the prosecution as she was a material witness and would have testified as to the state of mind of the prosecutrix. Finally, the law has been succinctly clarified in Kaini Rajan. The Court is duty bound when assessing the presence or absence of consent, to satisfy itself that both parties are ad idem on essential features; in the case in hand that the prosecutrix was lead to believe that her marriage to the Appellant had been duly and legally performed. It is not sufficient that she convinced herself of the existence of this factual matrix, without the Appellant inducing or persuading her to arrive at that conclusion. It is not possible to convict a person who did not hold out any promise or make any misstatement of facts or law or who did not present a false scenario which had the consequence of inducing the other party into the commission of an act. There may be cases where one party may, owing to his or her own hallucinations, believe in the existence of a scenario which is a mirage and in the creation of which the other party has made no contribution. If the other party is forthright or honest in endeavouring to present the correct picture, such party cannot obviously be found culpable. The following paragraph from *Deelip Singh vs State of Bihar* 2005 (1) SCC 88, is extracted:

> " 19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology".

10. We are in no manner of doubt that in the conspectus that unfolds itself in the present case, the prosecutrix was aware that the Appellant was already married but, possibly because a polygamous relationship was not anathema to her because of the faith which she adheres to, the prosecutrix was willing to start a home with the Appellant. In these premises, it cannot be concluded beyond reasonable doubt that the Appellant is culpable for the offence of rape; nay, reason relentlessly points to the commission of consensual sexual relationship, which was brought to an abrupt end by the appearance in the scene of the uncle of the prosecutrix. Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt. In our deduction there was no seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship.

11. The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realise that retribution in another form has duly visited him. It can only be hoped that his wife Chitralekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found.

12. It is in these premises that we allow the Appeal. We set aside the conviction of the Appellant and direct that he be released forthwith.

D.G.

KARNATAKA POWER TRANSMISSION CORPORATION LIMITED AND ANOTHER

v.

M/S. DEEPAK CABLES (INDIA) LTD.

(Civil Appeal No. 4424 of 2014)

APRIL 07, 2014

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

Arbitration and Conciliation Act, 1996: s.11(6) - Appointment of arbitrator - Dispute between the parties - Respondent seeking appointment of arbitrator - Resisted by appellant on the ground that the agreement did not provide for arbitration - Held: Clause 48 of the agreement provided that when disputes or differences of any kind arise between the parties relating to the performance of the works during progress of the works or after its completion or before or after the termination, abandonment or breach of the contract, it is to be referred to and settled by the engineer - There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required to be given effect to by the contractor who shall proceed with the works with due diligence - This clause did not provide any procedure to even remotely indicate that the concerned engineer was required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties - This only depict that the said clause was engrafted to avoid delay and stoppage of work and facilitate smooth carrying on of the work - The language employed in the clause did not spell out the intention of the parties to get the disputes adjudicated through arbitration - Apart from that clause 4.1 of the agreement stated that it was specifically agreed by and between the parties that all the differences or disputes arising out of the Agreement or touching the subject matter of the

Agreement would be decided by a competent Court at Bangalore - Thus, clause 48, read in conjunction with clause 4.1, clearly established that there was no arbitration clause in the agreement.

Appellant No. 1, a State Transmission utility invited tenders for establishing sub-stations. Respondent-company was successful bidder and contract was entered with it. Dispute arose and the respondent filed application under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 before the High Court for appointment of an arbitrator. The application was resisted by the appellant on the ground that clause 48 did not provide for arbitration and same cannot be construed as an arbitration clause. The High Court held that a plain reading of clause 48 would indicate that it partakes the character of an arbitration clause and, accordingly, appointed a sole arbitrator to adjudicate the matters in dispute. Hence these appeals.

Allowing the appeals, the Court

HELD: 1. Section 7 of the Arbitration and Conciliation Act, 1996 states that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. It conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/ disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the dispute. [Para 9] [779-F-H; 780-A]

2. Clause 48 is to the effect that it provides for the parties to amicably settle any disp s

arising in connection with the contract. This is the first part. The second part is that when disputes or differences of any kind arise between the parties to the contract relating to the performance of the works during progress of the works or after its completion or before or after the termination, abandonment or breach of the contract, it is to be referred to and settled by the engineer, who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required to be given effect to by the contractor who shall proceed with the works with due diligence. To understand the intention of the parties, this part of the clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the concerned engineer is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties. That apart, the decision of the engineer is only binding until the completion of the works. It only casts a burden on the contractor who is required to proceed with the works with due diligence. Besides that during the settlement of disputes and the court proceedings, both the parties are obliged to carry out the necessary obligation under the contract. The said clause has been engrafted to avoid delay and stoppage of work and for the purpose of smooth carrying on of the works. The burden is on the contractor to carry out the works with due diligence after getting the decision from the engineer until the completion of the works. Thus, the emphasis is on the performance of the contract. The language employed in the clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes. Apart

from that clause 4.1 of the agreement stated that it was specifically agreed by and between the parties that all the differences or disputes arising out of the Agreement or touching the subject matter of the Agreement would be decided by a competent Court at Bangalore. Clause 48, read in conjunction with clause 4.1, clearly establishes that there is no arbitration clause in the agreement. The High Court has fallen into grave error by considering the said clause as providing for arbitration. [Para 22, 23 and 24] [789-F-H; 790-A-G; 791-E-F]

Jagdish Chander v. Ramesh Chander and Ors. **(2007) 5 SCC 719: 2007 (5) SCR 720 - relied on.**

Smt. Rukmanibai Gupta v. Collector, Jabalpur and Ors. **(1980) 4 SCC 556;** *State of U.P. v. Tipper Chand* **(1980) 2 SCC 341;** *Dewan Chand v. State of Jammu and Kashmir* **AIR 1961 J & K 58;** *Ram Lal v. Punjab State* **AIR 1966 Punj 436 : 68 Punj LR 522 : ILR (1966) 2 Punj 428;** *State of Orissa and Anr. etc. v. Sri Damodar Das* **AIR 1996 SC 942: 1995 (6) Suppl. SCR 800;** *State of Orissa and Ors. v. Bhagyadhar Dash* **(2011) 7 SCC 406: 2011 (8) SCR 967 - Distinguished.**

M.K. Shah Engineers & Contractors v. State of M.P. **(1999) 2 SCC 594: 1999 (1) SCR 419;** *Wellington Associates Ltd. v. Kirit Mehta* **(2000) 4 SCC 272;** *Punjab State and Ors. v. Dina Nath* **(2007) 5 SCC 28: 2007 (6) SCR 536;** *Chief Conservator of Forest v. Rattan Singh* **AIR 1967 SC 166 : 1966 Supp SCR 158;** *Governor-General v. Simla Banking and Industrial Company Ltd.* **AIR 1947 Lah 215 : 226 IC 444;** *K.K. Modi v. K.N. Modi and Ors.* **(1998) 3 SCC 573: 1998 (1) SCR 601;** *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited And Ors.* **(1993) 3 SCC 137: 1993 (2) SCR 629;** *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur* **AIR 1999 SC 899: 1999 (1) SCR 181;** *Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Ltd.* **(2003) 7 SCC 418: 2003 (2) Suppl. SCR 812;** *S...*

v. Bhagyadhar Dash **(2011) 7 SCC 406: 2011 (8) SCR 967 - referred to.**

Case Law Reference:

1999 (1) SCR 419	**Referred to**	**Para 6**
(2000) 4 SCC 272	**Referred to**	**Para 6**
2007 (5) SCR 720	**Relied on**	**Para 6**
(1980) 4 SCC 556	**Distinguished**	**Para 7**
2007 (6) SCR 536	**Referred to**	**Para 7**
1966 Supp SCR 158	**Referred to**	**Para 11**
(1980) 2 SCC 341	**Distinguished**	**Para 12**
226 IC 444	**Referred to**	**Para 13**
AIR 1961 J & K 58	**Distinguished**	**Para 13**
AIR 1966 Punj 436	**Distinguished**	**Para 13**
1995 (6) Suppl. SCR 800	**Distingusihed**	**Para 14**
1998 (1) SCR 601	**Referred to**	**Para 15**
1993 (2) SCR 629	**Referred to**	**Para 15**
1999 (1) SCR 181	**Referred to**	**Para 16**
2003 (2) Suppl. SCR 812	**Referred to**	**Para 17**
2011 (8) SCR 967	**Distinguished**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4424 of 2014.

From the Judgment and Order dated 01.03.2013 of the High Court of Karnataka at Bangalore in C.M.P. No. 7 of 2013.

WITH

C.A. Nos. 4425, 4426, 4427, 4428, 4429, 4430 and 4431 of 2014.

K.V. Vishwanathan, ASG, S. Sriranga, Balaji Srinivasan, Mayank Kshirsagar, Vaishali Dixit, Abhishek Kaushik for the Appellants.

Dushyant Dave, Shyam Divan, L.M. Chidanandayya, S. Udaya Kumar Sagar, Bina Madhavan, Praseen E. Joseph, Shivendra Singh, Sinha Shrey Nikhilesh (for Lawyer's Knit & Co.) for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in all the special leave petitions.

2. The controversy involved in these appeals, preferred by special leave, being similar, they were heard together and are disposed of by a common judgment. For the sake of convenience, we shall state the facts from Civil Appeal arising out of Special Leave Petition 29011 of 2013.

3. The appellant No. 1 is a company wholly owned by the Government of Karnataka and, being a State transmission utility, is a deemed licencee in the State. It invited tenders for establishing 2x8 MVA, 66/11 Sub-stations at Tavarekere in Channagiri Taluk, Davanagere District, which included the supply materials, erection and civil works on partial turnkey basis. The respondent-company participated in the bid and it was successful in the tender and, accordingly, a letter of intent was sent to it. After taking recourse to certain procedural aspects, a contract was entered into between the appellant-company and the respondent. During the performance of the contract, the respondent raised a claim before the engineer as per clause 48 of the general conditions of the contract and called upon the engineer to settle certain disputes arising in connection with the contract. As the concerned engineer did not do anything within the prescribed period of thirty days as provided under clause 48.2, the respondent filed CMP No. 62 of 2011 under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for brevity "the Act") before the High Court of Karnataka at Bangalore for appointment of an arbitrator.

4. The said application was resisted by the present appellants on the singular ground that clause 48 does not provide for arbitration and the same, under no circumstances, could be construed as an arbitration clause. To substantiate the said submission, reliance was placed on clause 4.1 of the agreement. It was put forth that as there is no arbitration clause, no arbitrator could be appointed. The designated Judge of the Chief Justice placed reliance on the proceedings in W.P. No. 28710/09 (M/s. Subhash Projects & Marketing Limited v. Karnataka Power Transmission Corporation Limited) disposed of on 10.6.2010 wherein the appellant-company, being a State owned Corporation, had not disputed clause 48.2 as an arbitration clause and, on that foundation, opined that it was precluded from denying the same in the case under consideration. The learned designated Judge interpreted clauses 48 and 4.1 of the agreement and came to hold that a plain reading of clause 48 would indicate that it partakes the character of an arbitration clause and, accordingly, appointed a sole arbitrator to adjudicate the matters in dispute.

5. We have heard Mr. K.V. Vishvanathan, learned senior counsel appearing for the appellants, and Mr. Dushyant Dave and Mr. Shyam Divan, learned senior counsel appearing for the respondents.

6. Mr. Vishvanathan, learned senior counsel appearing for the appellants, assailing the impugned order, has submitted that clause 48 of the agreement cannot be remotely construed as an arbitration clause and hence, the designated Judge could not have invoked the power under Section 11(5) & (6) of the Act for appointment of an arbitrator. It is urged by him that an order passed in a writ petition, which was instituted in a different context, could not have been placed reliance upon for construing the said clause as an arbitration clause. It is submitted by him that in the absence of an express intention for referring the matter to an arbitrator, it cannot be so inferred from such a clause and, more so, when there is a specific

clause, i.e., clause 4 in the agreement which provides for settlement of disputes that stipulates that all the references and disputes arising out of the agreement or touching the subject-matter of the agreement shall be decided by a competent court at Bangalore. To bolster his contentions, he has commended us to the decisions rendered in *M.K. Shah Engineers & Contractors v. State of M.P.*[1], *Wellington Associates Ltd. v. Kirit Mehta*[2] and *Jagdish Chander v. Ramesh Chander and others*[3].

7. Mr. Dushyant Dave and Mr. Shyam Divan, learned senior counsel appearing for the respondents in all the appeals, in oppugnation, have submitted that when clause 48 is read as a whole, it is clear as crystal that the intention of the parties is to get the matter referred to an arbitrator and clause 4.1 only determines the place of territorial jurisdiction and has nothing to do with any stipulation for arbitration. It has been strenuously urged that clause 48 has to be interpreted on the touchstone of the language employed in Section 7 of the Act and when it is scrutinized on that anvil, there remains no trace of doubt that clause 48 has all the attributes and characteristics of an arbitration agreement. Learned senior counsel have placed reliance on *Smt. Rukmanibai Gupta v. Collector, Jabalpur and others*[4] and *Punjab State and others v. Dina Nath*[5].

8. Before we advert to the rival submissions advanced at the Bar, we think it appropriate to refer to Section 7 of the Act and what it conveys and, thereafter, refer to few authorities to understand what constitutes an arbitration clause in an agreement entered into between two parties. Section 7 of the Act reads as follows:

1. (1999) 2 SCC 594.
2. (2000) 4 SCC 272.
3. (2007) 5 SCC 719.
4. (1980) 4 SCC 556.
5. (2007) 4 SCC 28.

"7. Arbitration agreement. - (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

9. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the

dispute/disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the dispute.

10. In *Smt. Rukmanibai Gupta* (supra), while considering Clause 15 of the agreement therein, a two-Judge Bench opined that the clause spelt out an arbitration agreement between the parties. The said clause was as follows:-

"Whenever any doubt, difference or dispute shall hereafter arise touching the construction of these presents or anything herein contained or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder in the matter in difference shall be decided by the lessor whose decision shall be final."

The learned Judges, to appreciate the tenor and purport of the said clause, referred to Section 2(a) of the 1940 Act and reproduced a passage from Russell on Arbitration, 19th Edn., P. 59 which reads as follows: -

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry and hear the respective cases of the parties and decide upon evidence laid before him, then the case is one of an arbitration"

11. The Court also referred to *Chief Conservator of Forest v. Rattan Singh*[6] and ruled that:

"In the clause under discussion there is a provision for referring the disputes to the lessor and the decision of the lessor is made final. On its true construction it spells out an arbitration agreement."

6. AIR 1967 SC 166 : 1966 Supp SCR 158.

12. At this juncture, it is apposite to refer to a three-Judge Bench decision in *State of U.P. v. Tipper Chand*[7] where the Court was interpreting Clause 22 in the agreement which was under consideration so as to find out whether the stipulations therein spelt out an arbitration clause. The clause involved in the said case read as follows:-

> "Except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of such Engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the works, or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor, shall also be final, conclusive and binding on the contractor."

Interpreting the said clause, the Court opined thus:-

> "Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand, the purpose of the clause clearly appears to be to vest the Superintending Engineer with supervision of the execution of the work and administrative control over if from time to time."

13. In that context, the three-Judge Bench approved the decisions of the High Courts in *Governor-General v. Simla*

7. (1980) 2 SCC 341.

Banking and Industrial Company Ltd.[8], *Dewan Chand v. State of Jammu and Kashmir*[9] and *Ram Lal v. Punjab State*[10] wherein the clauses were different. In that context, it was opined that the High Courts had rightly interpreted the clause providing for arbitration. We think it apt to reproduce the delineation by the learned Judges:-

> "In the *Jammu and Kashmir* case the relevant clause was couched in these terms:
>
> > "For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contractor."
>
> The language of this clause is materially different from the clause in the present case and in our opinion was correctly interpreted as amounting to an arbitration agreement. In this connection the use of the words "any dispute between the contractor and the Department" are significant. The same is true of the clause in *Ram Lal* case which ran thus:
>
> > "In matter of dispute the case shall be referred to the Superintending Engineer of the Circle, whose order shall be final."
>
> We need hardly say that this clause refers not only to a dispute between the parties to the contract but also specifically mentions a reference to the Superintending Engineer and must therefore be held to have been rightly interpreted as an arbitration agreement."

14. At this stage, it is useful to refer to a three-Judge Bench decision in *State of Orissa and another etc. v. Sri Damodar Das*[11] wherein the Court posed the question whether there was an agreement for the resolution of disputes as enshrined under

8. AIR 1947 Lah 215 : 226.IC 444.
9. AIR 1961 J & K 58.
10. AIR 1966 Punj 436 : 68 Punj LR 522 : ILOR (1966) 2 Punj 428
11. AIR 1996 SC 942.

Clause 25 of the agreement. The said clause read as follows:-

> "25. Decision of Public Health Engineer to be final. - Except where otherwise specified in this contract, the decision of the Public Health Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications; drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever in any way arising out of, or relating to, the contract, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or the sooner determination thereof of the contract."

The three-Judge Bench referred to the principles stated in *Tipper Chand* (supra) and observed as follows:-

> "We are in respectful agreement with the above ratio. It is obvious that for resolution of any dispute or difference arising between two parties to a contract, the agreement must provide expressly or by necessary implication, a reference to an arbitrator named therein or otherwise of any dispute or difference and in its absence it is difficult to spell out existence of such an agreement for reference to an arbitration to resolve the dispute or difference contracted between the parties. The ratio in *Smt. Rukmanibai Gupta v. Collector* does not assist the respondent."

15. In *K.K. Modi v. K.N. Modi and others*[12], a two-Judge Bench was interpreting Clause 9 of the agreement which read as follows:-

12. (1998) 3 SCC 573.

> "Implementation will be done in consultation with the financial institutions. For all disputes, clarification etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

The court referred to a passage from Russell on Arbitration, 21st Edn., at p. 37, para 2-014 and the decisions in *Rukmanibai Gupta* (supra) and *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited And Others*[13] and came to hold that the said clause was not an arbitration clause and hence, the proceedings before the Chairman, IFCI could not have been treated as arbitration proceedings. It was so held on the following ground:-

> "Undoubtedly, in the course of correspondence exchanged by various members of Groups A and B with the Chairman, IFCI, some of the members have used the words "arbitration" in connection with clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to decide the question of valuation and the division of assets as an expert and not as an arbitrator. He has been authorised to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFCI, would not turn the decision-making process into an arbitration."

13. (1993) SCC 137.

16. In *Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd., Kanpur*[14], clauses 23 and 24 of the agreement were projected to make the foundation of an arbitration clause. That read as follows:-

> "Decision of the Executive Engineer of the UPSIC to be final on certain matters.
>
> 23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.
>
> Decision of the MD of the UPSIC on all other matters shall be final
>
> 24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specifically mentioned herein."

Interpreting the said clauses, the Court opined thus:-

> "In the present case, reading clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act."

14. AIR 1999 SC 899.

17. In *Bihar State Mineral Development Corporation and another v. Encon Builders (I) (P) Ltd.*[15], while dealing with the arbitration clause of an arbitration agreement under the Act the Court stated thus:

> "(1) There must be a present or a future difference in connection with some contemplated affair.
>
> (2) There must be the intention of the parties to settle such difference by a private tribunal.
>
> (3) The parties must agree in writing to be bound by the decision of such tribunal.
>
> (4) The parties must be ad idem".

In the said case, it has also been opined that the Act does not prescribe any form of an arbitration agreement. The term 'arbitration' is not required to be specifically mentioned in the agreement but what is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration.

18. In *Dina Nath* (supra), the clause in the agreement read as follows: -

15. (2003) 7 SCC 418.

"4. Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydel (Construction) Circle No. 1, Chandigarh for orders and his decision will be final and acceptable/binding on both parties."

The two-Judge Bench, basically relying on *Tipper Chand* (supra) which has approved the view of Jammu and Kashmir High Court in *Dewan Chand* (supra), treated the aforesaid clause as providing for arbitration because it categorically mentioned the word "dispute" which would be referred to the Superintending Engineer and further that his decision would be final and acceptable to/binding on both the parties.

19. In *Jagdish Chander* (supra), the Court, after referring to the earlier decisions, culled out certain principles with regard to the term "arbitration agreement". The said principles basically emphasize on certain core aspects, namely, (i) that though there is no specific form of an arbitration agreement, yet the intention of the parties which can be gathered from the terms of the agreement should disclose a determination and obligation to go to arbitration; (ii) non-use of the words "arbitration" and "arbitral tribunal" or "arbitrator" would not detract from a clause being interpreted as an arbitration agreement if the attributes or elements of arbitration agreement are established, i.e., (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them; and (iii) where there is specific exclusion of any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it would not be an arbitration agreement. In this context, the two-Judge Bench has given some examples and we think it apt to reproduce the same: -

"For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement."

20. In *State of Orissa and others v. Bhagyadhar Dash*[16], the Court, while discussing about the non-requirement of a particular form for constituting an arbitration agreement and ascertainment of the intention for reference to arbitration, as has been stated in *Rukmanibai Gupta* (supra), observed thus: -

"16. While we respectfully agree with the principle stated above, we have our doubts as to whether the clause considered in Rukmanibai Gupta case would be an arbitration agreement if the principles mentioned in the said decision and the tests mentioned in the subsequent decision of a larger Bench in Damodar Das are applied. Be that as it may. In fact, the larger Bench in Damodar Das clearly held that the decision in Rukmanibai Gupta was decided on the special wording of the clause considered therein: (*Damodar Das* case, SCC p. 224, para 11)

"11. … The ratio in *Rukmanibai Gupta v. Collector* does not assist the respondent. From the language therein this Court inferred, by implication, existence of a dispute or difference for arbitration."

21. Keeping in mind the principles laid down by this Court in the aforesaid authorities relating to under what circumstances a clause in an agreement can be construed as an arbitration agreement, it is presently apposite to refer to clause 48 of the agreement. The said clause reads as follows: -

"48.0 Settlement of disputes:

16. (2011) 7 SCC 406.

48.1 Any dispute(s) or difference(s) arising out of or in connection with the Contract shall, to the extent possible, be settled amicable between the parties.

48.2 If any dispute or difference of any kind whatsoever shall arise between the owner and the Contractor, arising out of the Contract for the Performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor.

48.3 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all the due diligence.

48.4 During settlement of disputes and Court proceedings, both parties shall be obliged to carry out their respective obligations under the contract."

22. On a careful reading of the said clause, it is demonstrable that it provides for the parties to amicably settle any disputes or differences arising in connection with the contract. This is the first part. The second part, as is perceptible, is that when disputes or differences of any kind arise between the parties to the contract relating to the performance of the works during progress of the works or after its completion or before or after the termination, abandonment or breach of the contract, it is to be referred to and settled by the engineer, who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required

to be given effect to by the contractor who shall proceed with the works with due diligence. To understand the intention of the parties, this part of the clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the concerned engineer is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submissions of both the parties. That apart, the decision of the engineer is only binding until the completion of the works. It only casts a burden on the contractor who is required to proceed with the works with due diligence. Besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties are obliged to carry out the necessary obligation under the contract. The said clause, as we understand, has been engrafted to avoid delay and stoppage of work and for the purpose of smooth carrying on of the works. It is interesting to note that the burden is on the contractor to carry out the works with due diligence after getting the decision from the engineer until the completion of the works. Thus, the emphasis is on the performance of the contract. The language employed in the clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes.

23. Quite apart from the above, clause 4.1 of the agreement is worthy to be noted. It is as follows: -

"4.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the Agreement or touching the subject matter of the Agreement, shall be decided by a competent Court at Bangalore."

24. Mr. Vishwanathan, learned senior counsel for the appellants, laying immense emphasis on the same, has submitted that the said clause not only provides the territorial jurisdiction by stating a competent court at Bangalore but, in essence and in effect, it stipulates tha

disputes arising out of the agreement touching the subject-matter of the agreement shall be decided by a competent court at Bangalore. Mr. Dave, learned senior counsel for the respondents, would submit that it only clothes the competent court at Bangalore the territorial jurisdiction and cannot be interpreted beyond the same. The submission of Mr. Dave, if properly appreciated, would convey that in case an award is passed by the arbitrator, all other proceedings under any of the provisions of the Act has to be instituted at the competent court at Bangalore. This construction, in our opinion, cannot be placed on the said clause. It really means that the disputes and differences are left to be adjudicated by the competent civil court. Thus, clause 48, as we have analysed, read in conjunction with clause 4.1, clearly establishes that there is no arbitration clause in the agreement. The clauses which were interpreted to be arbitration clauses, as has been held in *Ram Lal* (supra) and *Dewan Chand* (supra) which have been approved in *Tipper Chand* (supra), are differently couched. As far as *Rukmanibai Gupta* (supra) is concerned, as has been opined in *Damodar Das* (supra) and also in *Bhagyadhar Dash* (supra), it has to rest on its own facts. Clause in *Dina Nath* (supra) is differently couched, and clause 48, which we are dealing with, has no similarity with it. In fact, clause 48, even if it is stretched, cannot be regarded as an arbitration clause. The elements and attributes to constitute an arbitration clause, as has been stated in *Jagdish Chander* (supra), are absent. Therefore, the irresistible conclusion is that the High Court has fallen into grave error by considering the said clause as providing for arbitration.

25. Consequently, the appeals are allowed and the judgments and orders passed by the High Court are set aside. However, regard being had to the facts and circumstances of the case, there shall be no order as to costs.

D.G. Appeals allowed.

GOPAKUMAR B. NAIR
v.
C.B.I. & ANR.
(Criminal Appeal No. 831 of 2014)

APRIL 7, 2014

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

CODE OF CRIMINAL PROCEDURE, 1973:

s. 482 - Power of High Court to quash proceedings - Settlement of dispute between parties - Effect of - Criminal proceedings against accused-appellant for offences punishable u/s 120B IPC, s.13 (2) r/w s. 13(1)(d) of PC Act and ss. 420 and 471, IPC - Held: In the instant case, charge-sheet has been submitted and charges have been framed - Appellant has been charged u/s 13(1)(d) of PC Act, u/s 420 IPC (compoundable with leave of court) and s. 471, IPC (non -compoundable) - The offences are serious and not private in nature - Charge of conspiracy is to commit offence under PC Act - Though amounts due to bank have been paid under a private settlement, there is no acknowledgement by the bank of exoneration of accused-appellant from criminal liability - Since High Court has come to the conclusion that power u/s 482 should not be exercised to quash criminal proceedings against accused-appellant, there is no justification to interfere with the said decision - Prevention of Corruption Act, 1988 - s, 13 (2) r/w s.13(1)(d) - Penal Code, 1860 - ss. 120 B, 420 and 471.

REFERENCE TO LARGER BENCH:

Judgement - Binding effect of - Held: Reference of a case to a larger Bench necessarily has to be for a reconsideration of the principle of law on which the case has

been decided and not the merits of the decision -- The decision rendered by any Bench is final inter-parte, subject to the power of review and the curative power.

The instant appeal arose out of the order of the High Court passed in a petition filed by the appellant u/s 482 Cr.P.C., declining to quash the criminal proceedings against the appellant-accused for offences punishable u/s 120-B, IPC, and s. 13(2) read with s. 13 (1) (d) of the Prevention of Corruption Act, 1988 and ss. 420/471, IPC registered against the appellant-accused and two other persons, namely, A-1, a Branch Manager of respondent no. 2-Bank and A-3 (since deceased). After investigation, charge-sheet was submitted by respondent no. 1 CBI and charges were framed. The stand of the appellant before the High Court was that the accused-appellant had tendered all the amounts due to the Bank and an acknowledgement dated 303.2009 was issued by the Bank stating that it did not have any further claims and charges against the accused-appellant.

Dismissing the appeal, the Court

HELD: 1.1 Reference of a case to a larger Bench necessarily has to be for a reconsideration of the principle of law on which the case has been decided and not the merits of the decision. The decision rendered by any Bench is final inter-parte, subject to the power of review and the curative power. Any other view would have the effect of conferring some kind of an appellate power in a larger Bench of this Court which cannot be countenanced. However, the principle of law on which the decision is based, is open to reconsideration by a larger Bench in an appropriate case. [Para 12] [801-G; 802-A-B]

1.2 The decision in Gian Singh holding the decision rendered in Nikhil Merchant and other cases to be correct

is only an approval of the principle of law enunciated in the said decisions i.e. that a non-compoundable offence can also be quashed u/s. 482 CrPC on the ground of a settlement between the offender and the victim. Neither Nikhil Merchant nor Gian Singh can be understood to mean that in a case where charges are framed for commission of non-compoundable offences or for criminal conspiracy to commit offences under the PC Act, if the disputes between the parties are settled by payment of the amounts due, the criminal proceedings should invariably be quashed. What really follows from the decision in Gian Singh is that though quashing a non-compoundable offence u/s. 482 CrPC, following a settlement between the parties, would not amount to circumvention of the provisions of s. 320 of the Code, the exercise of the power u/s. 482 will always depend on the facts of each case. Furthermore, in the exercise of such power, the note of caution sounded in Gian Singh (para 61) must be kept in mind. [Para 13] [802-D-H]

Gian Singh vs. State of Punajb and Another **- 2012 (8) SCR 753 = 2012 (10) SCC 303;** *B. S. Joshi vs. State of Haryana* **-2003 (4) SCC 675;** *Nikhil Merchant vs. Central Bureau of Investigation and Another* **- 2008 (14) SCR 539 = (2008) 9 SCC 677 and** *Manoj Sharma vs. State* **2008 (4) SCR 1= (2008) 16 SCC 1 - relied on.**

1.3 In the instant case, the appellant has been charged with the offence of criminal conspiracy to commit the offence u/s. 13(1)(d). He is also substantively charged u/s. 420 (compoundable with the leave of the court) and s. 471 (non-compoundable). A careful consideration of the facts of the case would indicate that unlike in Nikhil Merchant, no conclusion can be reached that the substratum of the charges against the accused-appellant in the instant case is one of cheating nor are the facts similar to those in Narendra Lal Jain where the accused was charged u/s. 120-B r

only. The offences are certainly more serious; they are not private in nature. The charge of conspiracy is to commit offences under the Prevention of Corruption Act. The accused has also been charged for commission of the substantive offence u/s. 471 IPC. Though the amounts due have been paid, the same is under a private settlement between the parties unlike in Nikhil Merchant and Narendra Lal Jain where the compromise was a part of the decree of the court. There is no acknowledgement on the part of the bank of the exoneration of the criminal liability of the accused-appellant unlike the terms of compromise decree in the said two cases. [Para 14] [803-A-F]

CBI, ACB, Mumbai vs. Narendra Lal Jain & Ors. **- 2014 (3) SCALE 137- referred to.**

1.4 In the totality of the facts, the High Court has taken the view that the exclusion spelt out in Gian Singh (para 61) applies to the instant case and on that basis has come to the conclusion that the power u/s. 482 CrPC should not be exercised to quash the criminal case against the accused and, as such, there is no justification to interfere with the said decision. The order dated 25.06.2013 of the High Court, is affirmed. [Para 14] [803-F-G]

Case Law Reference:

2012 (8) SCR 753	**relied on**	**Para 6**
2008 (14) SCR 539	**relied on**	**Para 6**
2014 (3) SCALE 137	**referred to**	**Para 6**
2008 (4) SCR 1	**relied on**	**Para 11**
2003 (4) SCC 675	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 831 of 2014.

From the Judgment and order dated 25.06.2013 of the High Court of Kerala at Ernakulam in CRLMC No. 2480 of 2013.

Sidharth Luthra, ASG, H.P. Raval, P. Suresh Kumar, Abid Ali Beeran, Anando Mukherjee, Divya Anand, Sudha Gupta, Charul Sarin, Sanbha, B.V. Balram Das, Rajeev Mishra, Sanand Ramakrishnan for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. The appellant is the second accused (hereinafter referred to as 'A-2') in CC No. 48 of 2011 (RC 27(A)/2004) in the Court of the Special Judge (SPE/CBI), Thiruvananthapuram. He is aggrieved by the refusal dated 25.06.2013 of the High Court of Kerala to quash the aforesaid criminal proceeding lodged by the respondent-Central Bureau of Investigation (hereinafter for short 'CBI').

3. The allegations made against the accused-appellant in the FIR dated 30.11.2004 are to the effect that the accused-appellant alongwith one T.K. Rajeev Kumar (A-1), Branch Manager, Indian Overseas Bank, Killippalam Branch, Trivandrum and C. Sivaramakrishna Pillai (A-3) (since deceased) had entered into a criminal conspiracy to obtain undue pecuniary advantage for themselves. Specifically, it was alleged that in furtherance of the aforesaid criminal conspiracy the accused-appellant dishonestly applied for a car loan of Rs. 5 lakhs and opened a bank account bearing No. 1277 on 24.08.2002 without proper introduction. Thereafter, according to the prosecution, the accused-appellant furnished a forged agreement for purchase of a second hand Lancer Car bearing No. KL-5L-7447 showing the value thereof as Rs. 6.65 lakhs though the accused-appellant had purchased the said vehicle for Rs. 5.15 lakhs only. It is further alleged that A-1, by abusing his official position as Branch Manager, [illegible] Rs. 5 lakhs towards car loan without [illegible]

inspection. It is also alleged that A-1, who did not have the authority to do so, sanctioned education loan of Rs.4 lakhs under the Vidyajyothi Scheme to the accused-appellant for undergoing a course on Digital Film Making at SAE Technology College, Thiruvananthapuram. According to the prosecution, the accused-appellant had submitted two forged receipts of the aforesaid college showing payment of Rs. 1,60,000/- as fees which amount was duly released in his favour though he had actually paid Rs. 47,500/- to the college and had attended the course only for three days.

4. It is the further case of the prosecution that A-1, without being authorised to do so, sanctioned cash credit facility of Rs. 17 lakhs to one M/s. Focus Infotainments of which the accused-appellant is the proprietor and in this regard had obtained inflated value of the collateral security offered by the accused-appellant from deceased accused, A-3. According to the prosecution in the valuation report submitted by A-3 the value of the property offered as a collateral security by A-2 was shown at Rs.17,34,675/- though the subsequent valuation thereof by an approved valuer was for Rs.8,56,600/-. The prosecution had also alleged that after sanction of the said loan, A-1 wiped out the over draft facility of Rs. 13,94,000/- given to the accused-appellant without any authority by transferring the said amount from the cash credit account which was not only against the banking procedure but had also caused undue pecuniary advantage to the accused-appellant to the extent of Rs. 23,57,887/-. On the aforesaid facts, commission of offences under Section 120-B IPC read with Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and Sections 420/471 IPC was alleged insofar as the accused-appellant is concerned.

5. Based on the aforesaid allegations RC Case No. 27(A)/ 2004 dated 21.7.2005 was registered wherein chargesheet had been filed against the accused-appellant under the aforesaid sections of the Indian Penal Code as well as the PC Act. It is not in dispute that charges under the aforesaid

provisions of law have been framed against the accused-appellant in the court of the Special Judge (SPE/CBI), Thiruvananthapuram on 29.07.2013.

6. Shri H.P. Raval, learned Senior Counsel appearing for the accused-appellant had contended that all amounts due to the bank from the accused-appellant has been tendered in full in an out of court settlement between the parties. An acknowledgement dated 30.3.2009 has been issued on behalf of the bank to the aforesaid effect wherein it is also stated that the bank has no further claims and charges against the accused-appellant in view of the compromise reached. Placing reliance on the decisions of this Court in *Nikhil Merchant vs. Central Bureau of Investigation and Another*[1] and *Gian Singh vs. State of Punjab and Another*[2] and a recent pronouncement in *CBI, ACB, Mumbai vs. Narendra Lal Jain & Ors.*[3] Shri Raval had contended that in view of the settlement arrived at between the bank and the accused-appellant, the High Court ought to have exercised its power under Section 482 Cr.P.C. to quash the criminal proceedings against the accused-appellant. Shri Raval has taken the Court through the details of the allegations made and the charges framed to contend that the same are identical with those in *Nikhil Merchant* (supra). The charges against the accused in both the cases are identical; the same has been quashed in *Nikhil Merchant* (supra) which decision has been endorsed by a larger Bench in *Gian Singh* (supra) and also in *Narendra Lal Jain* (supra). It is, therefore, contended that the criminal proceeding against the accused-appellant is liable to be quashed and the impugned order passed by the High Court set aside.

7. On the contrary, Shri Sidharth Luthra, learned Additional Solicitor General has submitted that the decision in *Nikhil Merchant* (supra) turns on its own facts and what has been

1. (2008) 9 SCC 677.
2. (2012) 10 SCC 303.
3. 2014 (3) SCALE 137.

approved in *Gian Singh* (supra) is merely the principle of law laid down in *Nikhil Merchant* (supra), namely, that quashing a non-compoundable offence under Section 482 Cr.P.C., following the settlement between the parties, does not amount to a circumvention of the provisions of Section 320 of the Code of Criminal Procedure. Notwithstanding the above, according to Shri Luthra, whether a criminal proceeding should or should not be interdicted midway would really depend on the facts of each case. Shri Luthra has also drawn our attention to the observations made in para 61 of the judgment in *Gian Singh* (supra) wherein this Court had carved out an exception by observing that,

> "heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences."

According to Shri Luthra in view of the above and having regard to the charges framed in the present case the High Court was fully justified in declining to quash the criminal proceeding against the accused.

8. Insofar as the judgment in *Narendra Lal Jain* (supra) is concerned, Shri Luthra has pointed out that in the aforesaid case the accused was charged for the offence under Section 120B read with Section 420 of the IPC whereas in the present case the charges against the accused-appellant are under Section 120-B read with Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and Section 420/ 471 of the Indian Penal Code. It is submitted that the offences

under the Prevention of Corruption Act and Section 471 of Indian Penal Code are not compoundable.

9. We have also heard Shri P. Suresh Kumar, learned senior counsel for the respondent No.2-bank who had admitted the payment of the entire amount due from the accused-appellant under the transaction in question. Learned counsel has, however, submitted that in written acknowledgment issued by the Bank there is no mention regarding any 'settlement' of the criminal case against the accused-appellant insofar as the bank is concerned.

10. The charges framed against the accused-appellant, it may be repeated, are under Section 120-B IPC read with Section 13(2) read with Section 13(1)(d) of the PC Act and Sections 420/471 of the IPC. It is true that in *Nikhil Merchant* (supra) the charges framed against the accused were also under Sections 120-B read with Section 5(2) and 5(1) (d) of the PC Act, 1947 (Section 13(2) read with 13(1)(d) of the PC Act, 1988) and Sections 420, 467, 468, 471 of the Indian Penal Code. However, in para 28 of the judgment in *Nikhil Merchant* (supra) on a consideration of the totality of the facts and circumstances in which the charges were brought against the accused this Court had come to the following conclusion:-

> "28. The basic intention of the accused in this case appears to have been to misrepresent the financial status of the Company, M/s Neemuch Emballage Ltd., Mumbai, in order to avail of the credit facilities to an extent to which the Company was not entitled. In other words, the main intention of the Company and its officers was to cheat the Bank and induce it to part with additional amounts of credit to which the Company was not otherwise entitled."

The Court, thereafter, took into account the fact that the dispute between the parties had been settled/compromised and such compromise formed a part of the decree passed in the suit filed by the bank. After holding that the power under Section 482 Cr.P.C. to quash a crimin[illegible]t

contingent on the provisions of Section 320 of the Code of Criminal Procedure, and taking into account the conclusion recorded in para 28 of the judgment, as noticed above, the Court ultimately concluded that in the facts of the case (*Nikhil Merchant*) it would be justified to quash the criminal proceeding. In this regard, it is important to note that the Court in *Nikhil Merchant* (supra) had come to the conclusion that "the dispute involved herein has overtones of a civil dispute with certain criminal overtones."

11. The decisions in *Nikhil Merchant* (supra) as well as in some other cases namely *B.S. Joshi vs. State of Haryana*[4] and *Manoj Sharma vs. State*[5] were referred to a larger Bench in *Gian Singh* (supra) for an authoritative pronouncement as to whether in the said cases this Court had *"indirectly permitted compounding of non-compoundable offences"*. The larger Bench hearing the matter in its judgment[2] took the view that the,

> *"Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. …….. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction." [Para 57]*

Eventually, in para 61 the note of caution insofar as heinous and grave offences and offences under special laws, as already noticed, was sounded and it was held that *Nikhil Merchant* (supra), *B.S. Joshi vs. State of Haryana* (supra) and *Manoj Sharma vs. State* (supra) were correctly decided.

12. Reference of a case to a larger Bench necessarily has to be for a reconsideration of the principle of law on which the case has been decided and not the merits of the decision. The decision rendered by any Bench is final inter-parte, subject to

4. (2003) 4 SCC 675.

5. (2008) 16 SCC 1.

2. Gian Singh Vs. State of Punjab & Anr. (2012) 10 SCC 303.

the power of review and the curative power. Any other view would have the effect of conferring some kind of an appellate power in a larger Bench of this Court which cannot be countenanced. However, the principle of law on which the decision based is open to reconsideration by a larger Bench in an appropriate case. It is from the aforesaid perspective that the reference in *Gian Singh* (supra) has to be understood, namely, whether quashing of a non-compoundable offence on the basis of a compromise/settlement of the dispute between the parties would be permissible and would not amount to overreaching the provisions of Section 320 of the Code of Criminal Procedure. In fact, this is the question that was referred to the larger Bench in *Gian Singh* (supra) and not the merits of the decision in *Nikhil Merchant* (supra).

13. The decision in *Gian Singh* (supra) holding the decision rendered in *Nikhil Merchant* (supra) and other cases to be correct is only an approval of the principle of law enunciated in the said decisions i.e. that a non-compoundable offence can also be quashed under Section 482 CrPC on the ground of a settlement between the offender and the victim. It is not an affirmation, for there can be none, that the facts in *Nikhil Merchant* (supra) justified/called for the due application of the aforesaid principle of law. Also, neither *Nikhil Merchant* (supra) nor *Gian Singh* (supra) can be understood to mean that in a case where charges are framed for commission of non-compoundable offences or for criminal conspiracy to commit offences under the PC Act, if the disputes between the parties are settled by payment of the amounts due, the criminal proceedings should invariably be quashed. What really follows from the decision in *Gian Singh* (supra) is that though quashing a non-compoundable offence under Section 482 CrPC, following a settlement between the parties, would not amount to circumvention of the provisions of Section 320 of the Code the exercise of the power under Section 482 will always depend on the facts of each case. Furthermore, in the exercise of such power, the note of caution sounded in *Gian Singh* (supra) (para 61) must be kept in mind. This, in our view, is the correct ratio of the decision in *Gian Singh* (supra).

14. The aforesaid principle of law may now be applied to the facts of the present case. At the very outset a detailed narration of the charges against the accused-appellant has been made. The appellant has been charged with the offence of criminal conspiracy to commit the offence under Section 13(1)(d). He is also substantively charged under Section 420 (compoundable with the leave of the Court) and Section 471 (non-compoundable). A careful consideration of the facts of the case would indicate that unlike in *Nikhil Merchant* (supra) no conclusion can be reached that the substratum of the charges against the accused-appellant in the present case is one of cheating nor are the facts similar to those in *Narendra Lal Jain* (supra) where the accused was charged under Section 120-B read with Section 420 IPC only. The offences are certainly more serious; they are not private in nature. The charge of conspiracy is to commit offences under the Prevention of Corruption Act. The accused has also been charged for commission of the substantive offence under Section 471 IPC. Though the amounts due have been paid the same is under a private settlement between the parties unlike in *Nikhil Merchant* (supra) and *Narendra Lal Jain* (supra) where the compromise was a part of the decree of the Court. There is no acknowledgement on the part of the bank of the exoneration of the criminal liability of the accused-appellant unlike the terms of compromise decree in the aforesaid two cases. In the totality of the facts stated above, if the High Court has taken the view that the exclusion spelt out in *Gian Singh* (supra) (para 61) applies to the present case and on that basis had come to the conclusion that the power under Section 482 CrPC should not be exercised to quash the criminal case against the accused, we cannot find any justification to interfere with the said decision. The appeal filed by the accused is, therefore, dismissed and the order dated 25.06.2013 of the High Court, is affirmed.

R.P. Appeal dismissed.

MALLAMMA (DEAD) BY L.RS.
v.
NATIONAL INSURANCE CO. LTD. & ORS.
(Civil Appeal No. 1391 of 2009)

APRIL 07, 2014

[P. SATHASIVAM, CJI, S.A. BOBDE AND N.V. RAMANA, JJ.]

MOTOR VEHICLES ACT, 1988:

s. 157 - Deemed transfer of insurance policy - Death of driver of tractor in an accident - Ownership of tractor transferred during validity of insurance policy and accident took place during said period - Held: Deceased workman was in the course of employment of second respondent in whose name ownership of vehicle stood transferred and said vehicle was covered under a valid insurance policy -- High Court ought not have simply brushed aside the decision of Commissioner fastening joint liability on Insurance Company, in the light of deeming provision contained in s. 157 (1).

The instant appeal arose out of the claim-application filed before the Workmen's Compensation Commissioner by the dependants of a driver who, while in the employment of respondent no. 2, died as a result of over turn of the tractor he was driving. The Commissioner allowed the claim petition. However, the High Court held that the original owner of the tractor was one "G", and excluded the liability of respondent no.1-Insurance Company on the ground that the contention of deemed transfer of the insurance policy in favour of respondent no. 2 by virtue of s. 157 of the Motor Vehicles Act, 1988 was not urged before the Commissioner.

Allowing the appeal, the Court

HELD:

From the finding recorded by the Commissioner, it can be discerned that on the date of accident, the ownership of the tractor stood transferred to respondent no. 2. Besides, the 'Schedule of Premium' shows that an amount of Rs. 15/- has been paid as premium "for L.L. to persons employed in connection with the operation and/ or loading of vehicle (IMT 19)". Thus, this Court is of the considered view that as on the date of accident the deceased workman was in the course of employment of second respondent in whose name the ownership of the vehicle stood transferred and the said vehicle was covered under a valid insurance policy, the High Court ought not have simply brushed aside the decision of the Commissioner fastening joint liability on the Insurance Company in the light of the deeming provision contained in s. 157 (1)of the M.V. Act. The judgment passed by the High Court is set aside and that of the trial court restored. [para 14, 15 and 16] [810-C-G]

G. Govindan Vs. New India Assurance Co. Ltd. **1999 (2) SCR 476 = (1999) 3 SCC 754 - referred to.**

Case Law Reference:

1999 (2) SCR 476 referred to para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1391 of 2009.

From the Judgment and order dated 10.08.2005 of the High Court of Karnataka Bangalore in MFA No. 3842 of 2003 (WCA).

V.N. Raghupathy for the Appellants.

M.K. Dua, Kishore Rawat for the Respondents.

The Judgment of the Court was delivered by

N.V. RAMANA, J. 1. This appeal by special leave is directed against the impugned judgment and order dated 10th August, 2005 passed by the High Court of Karnataka in M.F.A. No. 3842 of 2003 whereby the High Court partly allowed the appeal preferred by the Respondent No. 1-National Insurance Company discharging it from the liability of payment of compensation to the claimants- Appellants.

2. The brief facts of the case leading to this appeal are that on 3rd April, 1997 at about 1.00 p.m., when Honniah @ Dodda Thimmaiah was returning from the field driving a tractor with the sand load on the trailor, the tractor overturned and Honnaih @ Dodda Thimmaiah died owing to the injuries sustained in the accident. Appellants herein are the claimants-legal representatives of the deceased Honniah @ Dodda Thimmaiah. The tractor involved in the accident had the registration number KA 18/717-718 and the tractor was originally registered in the name of one Gangadhara (Respondent No. 3) and the same was insured with the Respondent No. 1 while the deceased was employed as a driver with the Respondent No. 2-Jeeva Rathna Setty.

3. On 4th September, 1997, the legal representatives of the deceased, filed an application before the Commissioner for Workman's Compensation, Chickmagalur (hereinafter referred to as "the Commissioner") claiming compensation under the Workmen's Compensation Act.

4. The Commissioner while issuing notices to the respondents called for filing of objections, if any. The respondents filed objections denying their liability to pay compensation. The National Insurance Company (Respondent No. 1) deposed before the Commissioner that as per its records on the date of accident, the vehicle was no doubt under the insurance policy but in the name of Gangadhara, not in the name of Jeeva Ratna Setty, hence there is no relation of employee-employer between the deceased and Gangadhara and therefore, it has no burden of liabilit n

to the claimants.

5. After hearing parties and perusing the documents brought on record, the Commissioner came to the conclusion that the deceased was employed with Jeeva Rathna Setty, hence there is an employee-employer relationship between the deceased and the Respondent No. 1 and the deceased had died during the course of his employment. At the time of accident, the age of the deceased was determined as 25 years with a monthly earning capacity of Rs.2,000/- p.m. and thereby the Commissioner fixed compensation at Rs.2,16,910/-. As the Insurance Company did not deposit the amount, the Commissioner awarded an interest @ 12% p.a. from 3rd April 1997 till the date on which he passed the order, i.e. 14th February, 2003, which amounted to Rs.1,50,265/- and ordered that the appellants are entitled to receive a total compensation of Rs.3,67,275/- from the employer Jeeva Ratna Setty and the Insurance Company. Finally, by the Award dated 28th February, 2003, the Commissioner held that though the insurance policy was in the name of Gangadhara, the ownership of the vehicle on the date of accident was with the Jeevaratna Setty; it is proved that during the validity period of the said insurance policy, the said vehicle was transferred from Gangadhara to Jeevaratna Setty; as per Section 157(1) of the Motor Vehicles Act, 1968 whenever a vehicle is transferred from one person to another, the benefits of the insurance policy shall also be transferred to the new owner; accordingly instant policy benefits will also be automatically transferred from Gangadhara to Jeevaratna Setty. Therefore, the National Insurance Company shall be liable to pay the compensation and interest thereupon to the claimants. Accordingly, the Commissioner fixed the liability of paying compensation on the Insurance Company and Jeeva Ratna Setty individually and severally and directed them to deposit the amount within a period of 30 days from the date of the Award failing which they shall further be liable to pay interest @ 9% p.a. for the delayed period. The Commissioner, however, discharged Gangadhara (Respondent No. 3) and

Laxmana Bhovi, (Respondent No. 4) from the case.

6. Aggrieved by the said order of the learned Commissioner, the Insurance Company (Respondent No. 1) filed M.F.A. No. 3842 of 2003 before the High Court of Karnataka urging that no liability could have been fastened by the Commissioner on the Insurance Company.

7. The High Court, by the impugned order, affirmed the findings of the Commissioner that (i) the deceased workman was actually employed with Jeeva Rathna Shetty, and therefore, there is a relation of employee-employer between them; (ii) the deceased workman having died as a result of an accident arising out of and in the course of employment, hence the claimants as legal representatives of the deceased are entitled to recover compensation, (iii) there was a valid insurance policy in force on the date of accident (iv) and the original owner of the tractor was Gangadhara. However, the High Court excluded the liability of the Insurance Company on the ground that the contention of deemed transfer of the insurance policy in favour of Jeeva Rathna Setty by virtue of Section 157 of M.V. Act was not actually urged before the Commissioner.

8. Against the Judgment of the High Court relieving the Insurance Company from the liability of payment of compensation, the claimants are before this Court in this appeal.

9. We have heard learned counsel for the parties and perused the material on record.

10. Before us, learned counsel for the appellants relying upon Section 157 of the M.V. Act, contended that there is an admitted transfer of ownership of the vehicle as proved before the Commissioner. Once the ownership of the vehicle is admittedly proved to have been transferred to Jeeva Rathna Setty, the existing insurance policy in respect of the same vehicle will also be deemed to have b e

new owner and the policy will not lapse even if the intimation as required under Section 103 of the M.V. Act is not given to the insurer, hence the impugned order passed by the High Court is contrary to law. In support of this contention, learned counsel for the appellant has relied upon a judgment of this Court in *G. Govindan Vs. New India Assurance Co. Ltd.* (1999) 3 SCC 754.

11. Learned counsel has also brought to our notice a relevant portion from the 'Schedule of Premium' of the insurance policy, a copy of which is available on record as Annexure P-1., which reads thus:

B.	LIABILITY TO PUBLIC	Rs. 120-00
	RISK Liability to Trailor	Rs. 87-00
Add:	for L.L. to persons employed in Connection with the operation and/ or loading of vehicle (IMT 19)	Rs. 15-00
Add:	for increased third party property damage limits. Section II-I(ii) upto Rs. Unltd. IMT 70	Rs. 75-00
	TOTAL PREMIUM (A +B)	Rs. 1318-00

12. On the other hand, learned counsel for the National Insurance Company, mainly contended that unless it is proved by evidence that the vehicle has been transferred in the name of Jeeva Rathna Setty, the deeming provision of Section 157 of the M.V. Act would not be applicable. In the absence of such evidence on record the High Court has rightly absolved the Insurance Company from the liability and the order passed by the High Court does not require any interference from this Court.

13. The counsel for the Insurance Company of course contended that as per their records, on the date of accident, the vehicle was registered in the name of Gangadhara. Hence in the absence of a valid proof that the ownership of the vehicle

has been transferred in the name of Jeeva Ratna Setty, the benefits of insurance policy cannot be given to Jeeva Ratna Setty. However, the said contention is contrary to record. A specific finding by the Commissioner to this effect in his order dated 28th February, 2003 reads thus:

> "The 4th respondent had stated that on the date of the accident, this vehicle was in the name of Sh. Gangadhara. But the applicants have proved the said statement as false through documents and on the date of the accident, the vehicle was in the name of the Respondent No.1."

14. In view of the above finding, it can be discerned that on the date of accident, the ownership of the tractor stood transferred from Gangadhara to Jeeva Ratna Setty. In addition to that, a perusal of the 'Schedule of Premium' extracted above shows that an amount of Rs.15-00 has been paid as premium "for L.L. to persons employed in connection with the operation and/or loading of vehicle (IMT 19)".

15. In view of the above discussion we are of the considered view that as on the date of accident, the deceased workman was in the course of employment of Jeeva Rathna Setty in whose name the ownership of the vehicle stood transferred and the said vehicle was covered under a valid insurance policy, the High Court ought not have simply brushed aside the decision of the Commissioner fastening joint liability on the Insurance Company in the light of the deeming provision contained in Section 157 (1) of the M.V. Act.

16. For the foregoing reasons, we allow this appeal, set aside the impugned judgment passed by the High Court and restore the judgment of the trial Court.

17. There shall, however, be no order as to costs.

R.P. Appeal allowed.

NAGAR PALIKA PARISHAD MIHONA AND ANR.
v.
RAMNATH AND ANR.
(Civil Appeal No. 4454 of 2014)

APRIL 9, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND V. GOPALA GOWDA, JJ.]

MADHYA PRADESH MUNICIPALITIES ACT, 1961:

s. 319 - Bar of suit in absence of notice - Suit for declaration of title and permanent injunction - No notice u/s 319 issued by plaintiff to Nagar Palika Parishad - Held: In view of bar of suit for declaration of title in absence of notice u/s 319, the suit was not maintainable -- Courts below wrongly held that the suit was for perpetual injunction - Plaintiff having claimed title, the suit cannot be termed to be suit for perpetual injunction alone - Judgments of all the three courts below, set aside - It will be open to Nagar Palika Parishad to proceed in accordance with law.

The instant appeal arose out of the order of the High Court dismissing the second appeal filed by the appellant- Nagar Palika Parishad against the judgment and decree of the trial court and the first appellate court decreeing the suit for declaration and permanent injunction filed by respondent no. 1 against the appellant-defendant Nagar Palika Parishad. The stand of the appellant -Parishad was that respondent no. 1 had encroached upon the suit land which was a public road and did not comply with the notices issued to him in this regard.

It was submitted by the appellant that before the High Court it had specifically raised one of the substantial

questions of law as to whether the suit filed by respondent no. l-plaintiff was maintainable for non-compliance of statutory requirement of notice as contemplated by s. 319 of the Madhya Pradesh Municipalities Act, 1961.

Allowing the appeal, the Court

HELD: 1.1 Respondent No.1-plaintiff filed the suit for declaration of title and permanent injunction. In view of bar of suit for declaration of title in absence of notice u/s 319 of the Madhya Pradesh Municipalities Act, 1961, the suit was not maintainable. The courts below wrongly held that the suit was perpetual injunction. Respondent No.1 having claimed title, the suit cannot be termed to be suit for perpetual injunction alone. The High Court also has overlooked the valuable interest and right of public at large, to use the suit land which is a part of public street. [Para 8-10] [815-D-E; 816-D-F]

1.2 Respondent No.1- plaintiff cannot derive advantage of sub s. (3) of s. 319 which stipulates non-application of s. 319 when the suit was instituted u/s 54 of the Specific Relief Act, 1877 (old provision) equivalent to s. 38 of the Specific Relief Act, 1963. Further, in absence of challenge to the notice of eviction issued by the appellant, it was not open to the trial court to decide the title merely because permanent injunction coupled with declaration of title was also sought for. The impugned judgment passed by the High Court in second appeal as also the judgment and decree passed by the first appellate court and the trial court are set aside. It will be open to the appellant to proceed in accordance with law. [Para 9-11] [815-E-F; 816-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4454 of 2014.

From the Judgment and Order dated 11.04.2012 of the High Court of M.P. at Gwalior in SA No. 568 of 2009.

S.K. Dubey, Sumit Kumar Sharma, Niraj Sharma for the Appellants.

D.S. Parmar, Susheel Tomar, Ankit R., Abha R. Sharma for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted.

2. This appeal has been preferred by the appellants-Nagar Palika Parishad, Mihona (hereinafter referred to as "Nagar Palika") against the judgment dated 11th April, 2012 passed by the High Court of Madhya Pradesh Bench at Gwalior in Second Appeal No.568 of 2009. By the impugned judgment the High Court dismissed the Second Appeal and affirmed the judgments passed by the first appellate court and the trial court.

3. The case of the appellant-Nagar Palika is that on finding that respondent No.1 - plaintiff has made encroachment on a public road, namely, Khitoli Road, a notice under Section 187 of the M.P. Municipalities Act, 1961 (hereinafter referred o as "Act, 1961") dated 26th November, 1982 was issued to respondent No.1-plaintiff calling upon him to remove the encroachment from Khitoli Road at Mihona, District Bhind, M.P. (hereinafter referred to as "suit land"). As respondent No.1 - plaintiff refused to comply with the aforesaid notice and also failed to show any title over the encroached land, another notice was issued on 23rd December, 1982, intimating respondent No.1-plaintiff that if the encroachment is not removed by him it shall be removed by the appellant, in exercise of power conferred under Section 109 read with Section 223 of the Act, 1961.

4. Instead of complying with the aforesaid notices, respondent No.1 - plaintiff filed Civil Suit No.79/90 in the Court

of 1st Civil Judge, Class-I, Lahar, District Bhind for declaration of his title and permanent injunction for restraining the appellants from interfering in his possession over the suit land contending that the suit land was his ancestral property. The aforesaid suit was contested by the appellant by filing written statement contending, inter alia, that the suit land is a public road which the appellants intend to make a Pakka (Road) in consonance with the public policy and public interest due to which the action for removal of encroachment has been taken and that the suit was not maintainable for want of notice under Section 319 of the Act, 1961.

5. The trial court on hearing the parties by its judgment and decree dated 20th August, 2008 decreed the suit in favour of respondent No.1-plaintiff. The trial court held that no notice under Section 319 of the Act, 1961 is required to be issued before filing a suit for permanent injunction. The aforesaid judgment was upheld by the first appellate court by the judgment and decree dated 31st August, 2009 in C.A. No. 20/09.

6. The second appeal preferred by the appellant was dismissed by the High Court though the appellant raised one of the following substantial questions of law:

• Whether the suit filed by respondent No.1 - plaintiff was maintainable for non-compliance of statutory requirement of notice as contemplated by Section 319 of the Act, 1961.

7. Section 319 of the Act, 1961 bars suits in absence of notice and reads as follows:

"Section 319-Bar of suit in absence of notice.-(1) No suit shall be instituted against any Council or any Councilor, officer or servant thereof or any person acting under the direction of any such Council, Councilor, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff a[illegible]e

claims, has been, in the case of a Council delivered or left at its office, and, in the case of any such member, officer, servant or person as aforesaid, delivered to him or left at his office or usual place of abode; and the plaint shall contain a statement that such notice has been delivered or left.

(2)Every suit shall be dismissed unless it is instituted within eight months from the date of the accrual of the alleged cause of action.

(3)Nothing in this section shall be deemed to apply to any suit instituted under Section 54 of the Specific Relief Act, 1877 (I of 1877)."

8. Respondent No.1-plaintiff filed the suit for declaration of title and permanent injunction. In view of bar of suit for declaration of title in absence of notice under Section 319 the suit was not maintainable. The Courts below wrongly held that the suit was perpetual injunction though the respondent No.1-plaintiff filed the suit for declaration of title and for permanent injunction.

9. Respondent No.1-plaintiff cannot derive advantage of sub Section (3) of Section 319 which stipulates non-application of the Section 319 when the suit was instituted under Section 54 of the Specific Relief Act, 1877 (old provision) equivalent to Section 38 of the Specific Relief Act, 1963 and reads as follows:

"Section 38.Perpetual injunction when granted.- (1)Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2)When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter-II.

(3)When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely:

(a)where the defendant is trustee of the property for the plaintiff;

(b)where there exists no standard for ascertaining the actual damage caused, or likely to be causes, by the invasion;

(c)where the invasion in such , that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings."

The benefit aforesaid cannot derive by Respondent No.1-plaintiff as the suit was filed for declaration of title coupled with permanent injunction. Respondent No.1 having claimed title, the suit cannot be termed to be suit for perpetual injunction alone.

10. Along with the trial court and the appellate court, the High Court also failed to appreciate the aforesaid fact and also overlooked the valuable interest and right of public at large, to use the suit land which is a part of public street. Further, in absence of challenge to the notice of eviction issued by the appellant, it was not open to the trial court to decide the title merely because permanent injunction coupled with declaration of title was also sought for.

11. In view of our finding, we set aside the impugned judgment dated 11th April, 2012 passed by the High Court in second appeal as also the judgment and decree passed by the first appellate court and the trial court. It will be open to the appellant to proceed in accordance with law. The appeal is allowed with aforesaid observations.

R.P. .

MURALIDHAR @ GIDDA & ANR.
v.
STATE OF KARNATAKA
(Criminal Appeal No. 551 of 2011 etc.)

APRIL 09, 2014.

[R.M. LODHA AND SHIVA KIRTI SINGH, JJ.]

EVIDENCE:

Dying declaration - Evidentiary value of -- Trial of accused for offences punishable u/ss. 302, r/w s. 149 and s. 148 IPC - Witnesses turned hostile - Prosecution case based on dying declaration - Acquittal by trial court - Conviction by High Court - Held: If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, this by itself creates suspicion about credibility of such statement and prosecution has to clear the same to the satisfaction of court - In the instant case, dying declaration was not recorded in actual words of victim, but was recorded by witness on the dictation of PSI - Further, there was overwriting on the time of recording of statement as also insertion of two names in different ink - On facts, trial court rightly did not consider it safe to rely upon dying declaration and rightly acquitted the accused - High Court without considering the principles of dealing with an appeal against acquittal erred in upsetting the judgment of acquittal - Judgment of High Court set aside -Penal Code, 1860 -- ss. 302, r/w s. 149 and s. 148 IPC.

APPEAL:

Appeal against acquittal - Principles of hearing an appeal against acquittal - Culled out.

The five appellants (A1 to A4 and A6) along with A5 were prosecuted for commission of offences punishable

u/ss. 302, 307, 144, 148 read with 149, IPC, on the basis of the statement made by the victim that while he was sitting in front of a shop, the six accused attacked him and PW4. The victim died subsequently and his statement became the dying declaration. The three eye - witnesses, namely, PW4, PW5 and PW15 turned hostile. The trial court held that the dying declaration did not inspire confidence and acquitted the accused. However, the High Court maintained the acquittal of A5, but convicted accused- appellant A1 to A4 and A6 u/s 302 r/w s.149 and s. 148 IPC on the basis of the dying declaration alone, and sentenced them to imprisonment for life.

Allowing the appeal, the Court

HELD: 1.1 Sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, this by itself creates suspicion about credibility of such statement and the prosecution has to clear the same to the satisfaction of the court. In the instant case, the trial court on an over-all consideration of the evidence of PW-25, PW-30 and PW-36 coupled with the facts that the dying declaration was recorded by PW30 as dictated by PW36 (PSI) and was not in actual words of maker, and that there was over-writing about the time at which the statement was recorded and also insertion of two names by different ink, did not consider it safe to rely upon the dying declaration and acquitted the accused for want of any other evidence. In the circumstances, it cannot be said that the view taken by the trial court on the basis of evidence on record was not a possible view. The accused were entitled to the benefit of doubt which was rightly given to them by the trial court. [Para 19] [830-D-G]

1.2 This Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following:

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions, but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court. [Para 12] [828-A-F]

Surajpal Singh v. State **1952 SCR 193 = AIR 1952 SC 52;** *Tulsiram Kanu v. State* **AIR 1954 SC 1;** *Madan Mohan Singh v. State of U.P.* **AIR 1954 SC 637;** *Atley v. State of U.P.* **AIR 1955 SC 807;** *Aher Raja Khima v. State of Saurashtra* **1955 SCR 1285 = AIR 1956 SC 217;** *Balbir Singh v. State of Punjab* **AIR 1957 SC 216;** *Madan Mohan Singh v. State of U.P.* **AIR 1954 SC 637;** *Atley v. State of U.P.* **AIR 1955 SC 807;** *M.G. Agarwal v. State of Maharashtra* **1963 SCR 405 = AIR 1963 SC 200;** *Noor Khan v. State of Rajasthan* **1964 SCR 521 = AIR 1964 SC 286;** *Khedu Mohton v. State of Bihar* **1971 (1) SCR 839 = (1970) 2 SCC 450;** *Shivaji Sahabrao Bobade v. State of Maharashtra* **1974 (1) SCR 489 = (1973) 2 SCC 793;** *Lekha Yadav v. State of Bihar* **(1973) 2 SCC 424;** *Khem Karan v. State of U.P.* **1974 (3) SCR 863 = (1974) 4 SCC 603;** *Bishan Singh v. State of Punjab* **(1974) 3 SCC 288;** *Umedbhai Jadavbhai v. State of Gujarat* **1978 (2) SCR 471= (1978) 1 SCC 228;** *K. Gopal Reddy v. State of A.P.* **1979 (2) SCR 265 = (1979) 1 SCC 355;** *Tota Singh v. State of Punjab* **1987 (2) SCR 747 =(1987) 2 SCC 529;** *Ram Kumar v. State of Haryana* **1994 (4) Suppl. SCR 335 = 1995 Supp (1) SCC 248;** *Madan Lal v. State of J&K* **1997(3) Suppl. SCR 337 = (1997) 7 SCC 677;** *Sambasivan v. State of Kerala* **1998 (3) SCR 280 = (1998) 5 SCC 412 ;** *Bhagwan Singh v. State of M.P.* **(2002) 4 SCC 85;** *Harijana Thirupala v. Public Prosecutor, High Court of A.P.* **2002 (1) Suppl. SCR 379 = (2002) 6 SCC 470;** *C. Antony v. K. G. Raghavan Nair* **(2003)1 SCC 1;** *State of Karnataka v. K. Gopalakrishna* **(2005) 9 SCC 291;** *State of Goa v. Sanjay Thakran* **2007 (3) SCR 507 = (2007) 3 SCC 755;** *Chandrappa v. State of Karnataka* **2007 (2) SCR 630 = (2007) 4 SCC 415;** *Ghurey Lal v. State of U.P.* **2008 (11) SCR 499 = (2008) 10 SCC 450 - relied on.**

Sheo Swarup v. King Emperor **AIR 1934 Privy Council 227 - referred to.**

1.3 In the instant case, the High Court on consideration of the same evidence ...w

and interfered with the judgment of acquittal without properly keeping in mind that the presumption of innocence in favour of the accused has been strengthened by their acquittal from the trial court and the view taken by the trial court as to the credibility of Ext.P-22 and the evidence of PW-25, PW-30 and PW-36 was a possible view. The High Court while upsetting the judgment of acquittal has not kept in view the well established principles in hearing the appeal from the judgment of acquittal. Accordingly, the judgment of the High Court is set aside and that of the Court of Session, restored. [Para 20-21] [830-G-H; 831-A-C]

Case Law Reference:

AIR 1934 Privy Council 227	**referred to**	**para 10**
1952 SCR 193	**relied on**	**para 12**
AIR 1954 SC 1	**relied on**	**para 12**
AIR 1954 SC 637	**relied on**	**para 12**
AIR 1955 SC 807	**relied on**	**para 12**
1955 SCR 1285	**relied on**	**para 12**
AIR 1957 SC 216	**relied on**	**para 12**
1963 SCR 405	**relied on**	**para 12**
1964 SCR 521	**relied on**	**para 12**
1971 (1) SCR 839	**relied on**	**para 12**
1974 (1) SCR 489	**relied on**	**para 12**
1974 (3) SCR 863	**relied on**	**para 12**
(1974) 3 SCC 288	**relied on**	**para 12**
1978 (2) SCR 471	**relied on**	**para 12**
1979 (2) SCR 265	**relied on**	**para 12**

1987 (2) SCR 747	**relied on**	**para 12**
1994 (4) Suppl. SCR 335	**relied on**	**para 12**
1997 (3) Suppl. SCR 337	**relied on**	**para 12**
1998 (3) SCR 280	**relied on**	**para 12**
(2002) 4 SCC 85	**relied on**	**para 12**
2002 (1) Suppl. SCR 379	**relied on**	**para 12**
(2003) 1 SCC 1	**relied on**	**para 12**
(2005) 9 SCC 291	**relied on**	**para 12**
2007 (3) SCR 507	**relied on**	**para 12**
2007 (2) SCR 630	**relied on**	**para 12**
2008 (11) SCR 499	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 551 of 2011.

From the Judgment and Order dated 21.10.2010 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 656 of 2005.

WITH

Criminal Appeal Nos. 791 and 1081 of 2011.

Sanjay R. Hegde, H. Chandra Shekhar, V.K. Biju, S. Nithin, K.M.D. Muhilan, A.V. Manavalan for the Appellants.

V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. These three criminal appeals arise from the common judgment and, therefore, they were heard together and are being disposed of by the common judgment.

2. The statement (Ex.P-22) recorded by the police on 17.08.2002 between 9.55 P.M. and 10.20 P.M. at K.R. Hospital, Mandya triggered the prosecution of the appellants and one Swamy. Ex.P-22 is in Kannada, which in English translation reads:

> "The statement of Pradeep son of Swamygowda, 28 years, Vakkaligaru by community, agriculturist residing at Majigepura village, Srirangapatna Taluk. Today at about 8.30 p.m. night, I was sitting in front of shaving shop by the side of shop of Javaregowda on K.R.S. - Majigepura Road along with Vyramudi, Prakash and Umesh. At that time Naga, S/o Ammayamma, Jagga S/o Sentu Kumar's sister, Gunda, Gidda, S/o Fishari Nanjaiah, Swamy, Manju and Hotte Ashoka and others who were having old enmity assaulted me by means of chopper, long on my hand, head, neck and on other parts of the body with an intention to kill me and they have assaulted Umesh who was with me. Vyramudi said do not kill us and went away. Prakash ran away. Please take action against those who have attempted to kill me."

3. After registration of the First Information Report (Exhibit P-5) on the basis of the above statement made by Pradeep which has become dying declaration in view of his death, the investigation commenced. In the course of investigation, 37 witnesses were examined. The investigating officer, on completion of investigation, submitted challan against Naga @ Bagaraju (A-1), Jaga @ Santhosh Kumar (A-2), S. Sathish @ Gunda (A-3), Muralidhar @ Gidda (A-4), Swamy @ Koshi (A-5) and Manju (A-6).

4. The concerned Magistrate then committed the accused to the court of Sessions for trial. The Court of Sessions Judge, Fast Track Court-I, Mandya conducted the trial against A-1 to A-6 for the offences punishable under Sections 302, 307, 144, 148 read with Section 149 of the Indian Penal Code, 1860 (for

short, "IPC"). The prosecution examined 37 witnesses of which PW-4 (Umesha), PW-5 (Prakash) and PW-15 (Vyramudi) were produced as eye-witnesses. Exhibit P-22 is recorded by PW-30 (Rajashekar) on the oration of PW-36 (Kodandaram, PSI) in the presence of PW-25 (Dr. Balakrishna).

5. The three eye-witnesses PW-4, PW-5 and PW-15 have turned hostile to the case of prosecution and have not supported the prosecution version at all. In the circumstances, the only evidence that has become significant is the dying declaration (Ex.P-22). The trial court by its judgment dated 28.09.2004 on consideration of the entire oral and documentary evidence reached the conclusion that prosecution had failed to prove the offence against the accused persons and, accordingly, acquitted them.

6. The State of Karnataka preferred an appeal before the Karnataka High Court against the judgment of the Fast Track Court-I, Mandya acquitting the accused. The High Court on hearing the public prosecutor and the counsel for the accused vide its judgment dated 21.10.2010 maintained the acquittal of A5 (Swamy) but convicted A1 to A4 and A6 for the offences under Section 302 read with Section 149 IPC and sentenced them to undergo imprisonment for life with fine and defaulting sentence. The High Court has also convicted them for the offence under Section 148 IPC and they were sentenced to suffer rigorous imprisonment for one year. Both sentences have been ordered to run concurrently. It is from this judgment that these appeals, by special leave, have arisen.

7. The High Court has convicted the appellants on the basis of dying declaration alone, as in its view the dying declaration is credible and genuine. In this regard, the reasoning of the High Court is broadly reflected in paragraphs 16 and 17 which reads as follows:

> "16. Having heard both sides and carefully gone through the evidence of the witnesses and c e

evidence we find that Ex. P22 which is the dying declaration of the deceased has been recorded naturally and truthfully. PW25 - Doctor has categorically stated that the injured was in a position to speak and give statement and further he has signed Ex.P.22. Under these circumstances, it could be gathered that PW25 - the Medical Officer was not only a person present when Ex. P.22 was recorded, but also asserted that the patient was in a position to give such statement. However, on a careful scrutiny of Ex.P.22, it is seen that the name of Swamy - Accused No.5 has been added subsequently and there is no initial of any officer by the side of the name of Swamy and the colour of the ink differs from the other handwriting. In view of the foregoing discussions we hold that the dying declaration of deceased Pradeep - Ex. P.22 is genuine and has been recorded by PW30 - Rajshekhar in the presence of PW25 - Dr. Balakrishan when the deceased was in fit condition to give statement and hence, a conviction can be based on the said dying declaration.

17. So far as the capacity of the deceased to narrate the incident regarding the cause of his injuries is concerned, on perusal of Ex. P.3 the accident register it is clear that Ex.P.3 was brought into existence at 9.30 p.m. and in Ex.P3 it is mentioned that the assault was by six persons and the names of all the six persons are mentioned therein without any over writing. The over writing pertains only to the presence of Vyramudi and it is the contention of the learned counsel for the accused that over the name of Vyramudi name of Pradeep is written. In Ex.P.23 - requisition letter it is seen that signature of Vyramudi is separately taken by the doctor as brought by him and, therefore, the presence of either Vyramudi or Pradeep in the hospital at the time when the deceased was brought to the hospital cannot be disputed at all."

8. The trial Court, however, held that it was not safe to act

on the dying declaration (Ex.P-22). The trial court on consideration of Ex.P-22 and the evidence of PW-25, PW-36 and PW-30 concluded that the time of recording Ex. P-22 did not inspire confidence and the credibility of Exhibit P-22 had not been established to the satisfaction of the court and conviction cannot be based on Exhibit P-22 and the deposition of PW-36, PW-25 and PW-30.

9. The only question that arises for our consideration in these appeals is, whether the High Court was justified in upsetting the view of the trial court on re-appreciation of the evidence of PW-25, PW-30 and PW-36 and Exhibit P-22.

10. Lord Russell in *Sheo Swarup*[1], highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said, "… the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." The opinion of the Lord Russell has been followed over the years.

11. As early as in 1952, this Court in *Surajpal Singh*[2] while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Criminal Procedure Code observed, "…….the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be

1. Sheo Swarup v. King Emperor (AIR 1935 Privy Ciouncil 227].
2. Surajpal Singh v. State; [AIR 1952 SC 52].

reversed only for very substantial and compelling reasons."

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in *Tulsiram Kanu*[3], *Madan Mohan Singh*[4], *Atley* [5], *Aher Raja Khima*[6], *Balbir Singh*[7], *M.G. Agarwal*[8], *Noor Khan*[9], *Khedu Mohton*[10], *Shivaji Sahabrao Bobade*[11], *Lekha Yadav*[12], *Khem Karan*[13], *Bishan Singh*[14], *Umedbhai Jadavbhai*[15], *K. Gopal Reddy*[16], *Tota Singh*[17], *Ram Kumar*[18], *Madan Lal*[19], *Sambasivan*[20], *Bhagwan Singh*[21], *Harijana Thirupala*[22], *C. Antony*[23], *K. Gopalakrishna*[24], *Sanjay Thakran*[25] and *Chandrappa*[26]. It is

3. Tulsiram Kanu v. State; [AIR 1954 SC 1].
4. Madan Mohan Singh v. State of U.P.; [AIR 1954 SC 637].
5. Atley v. State of U.P.; [AIR 1955 SC 807].
6. Aher Raja Khima v. State of Saurashtra; [AIR 1956 SC 217].
7. Balbir Singh v. State of Punjab; [AIR 1957 SC 216].
8. M.G. Agarwal v. State of Maharashtra; [AIR 1963 SC 200].
9. Noor Khan v. State of Rajasthan; [AIR 1964 SC 286].
10. Khedu Mohton v. State of Bihar; [(1970) 2 SCC 450].
11. Shivaji Sahabrao Bobade v. State of Maharashtra; [(1973) 2 SCC 793].
12. Lekha Yadav v. State of Bihar; [(1973) 2 SCC 424].
13. Khem Karan v. State of U.P.; [(1974) 4 SCC 603].
14. Bishan Singh v. State of Punjab; [(1974) 3 SCC 288].
15. Umedbhai Jadavbhai v. State of Gujarat; [(1978) 1 SCC 228].
16. K. Gopal Reddy v. State of A.P. ; [(1979) 1 SCC 355].
17. Tota Singh v. State of Punjab [(1987) 2 SCC 529].
18. Ram Kumar v. State of Haryana; [1995 Supp (1) SCC 248].
19. Madan Lal v. State of J&K; [(1997) 7 SCC 677].
20. Sambasivan v. State of Kerala; [(1998) 5 SCC 412].
21. Bhagwan Singh v. State of M.P.; [(2002) 4 SCC 85].
22. Harijana Thirupala v. Public Prosecutor, High Court of A.P.; [(2002) 6 SCC 470].
23. C. Antony v. K. G. Raghavan Nair; [(2003) 1 SCC 1].
24. State of Karnataka v. K. Gopalakrishna; [(2005) 9 SCC 291].
25. State of Goa v. Sanjay Thakran; [(2007) 3 SCC 755].
26. Chandrappa v. State of Karnataka; [(2007) 4 SCC 415].

not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

13. In *Ghurey Lal*[27], the Court has culled out the principles relating to the appeals from a judgment of acquittal which are in line with what we have observed above.

14. Now, we shall examine whether or not the impugned judgment whereby the High Court interfered with the judgment of acquittal is justified.

27. Ghurey Lal v. State of U.P.; [(2008) 10 SCC 4

15. Of the 37 witnesses examined by the prosecution, PW-4, PW-5 and PW-15 are the eye-witnesses but they have turned hostile to the case of prosecution. The first medical examination of the deceased Pradeep and so also the injured Umesha was done by PW1 (Dr. Latha) at about 9.30 P.M. on 17.08.2002. She has not certified that Pradeep was in fit state to make any statement. PW-25 (Dr. Balakrishna) at the relevant time was Assistant Professor of Surgery at K.R. Hospital where deceased Pradeep was taken immediately after the incident. At about 9.40 p.m. on 17.08.2002, PW-36 (Kodandaram, PSI) gave a memo to PW-25 stating that one patient (Pradeep) was admitted in the hospital and requested him to verify as to whether the patient was in a position to give statement. In his cross-examination, PW-25 has stated that at 9.35 P.M., he saw the patient (Pradeep) when he was kept in operation theatre of casualty for emergency treatment. He has also deposed that a group of doctors was providing treatment to him. His deposition does not establish that Pradeep was under his treatment. The recording of Pradeep's statement by a constable (PW-30) as dictated by PW-36 (PSI) in this situation raises many questions. The trial court found this absurd. It is the prosecution version that PW-30 has recorded Ex.P-22 as dictated by PW-36 (PSI). Thus, Ex.P-22 is not in actual words of the maker. The trial court in this background carefully considered the evidence of PW-25, PW-30 and PW-36 along with Ex.P-22. The trial court has noted that PW-25 failed to confirm in his testimony that he was treating deceased Pradeep when he was brought to the hospital. Moreover, PW-25 admitted over-writing with regard to the time written on Ex.P-22. The trial court also observed that though there was lot of bleeding injuries found on the person of Pradeep, PW-25 did not say anything about the quantity of loss of blood.

16. Dealing with the testimony of PW-30, the trial court has observed that in his cross-examination, he has admitted that he did not record the statement in the words of the maker (Pradeep) but wrote the statement as dictated by PW-36.

Moreover, PW-30 in his cross-examination had admitted that at the time Pradeep was attended to by the doctors, he was not inside.

17. Then, in respect of Ex.P-22, the trial court observed that the names of accused Gunda (A-3) and Swamy (A-5) appear to have been inserted in different ink later on.

18. On a very elaborate consideration of the entire evidence, the trial court was of the view that Ex.P-22 did not inspire confidence and the credibility of Ex.P-22 has not been established to the satisfaction of the court. Accordingly, the trial court held that conviction of the accused persons cannot be based on Ex.P-22 and the deposition of PW-36, PW-25 and PW-30.

19. The sanctity is attached to a dying declaration because it comes from the mouth of a dying person. If the dying declaration is recorded not directly from the actual words of the maker but as dictated by somebody else, in our opinion, this by itself creates a lot of suspicion about credibility of such statement and the prosecution has to clear the same to the satisfaction of the court. The trial court on over-all consideration of the evidence of PW-25, PW-30 and PW-36 coupled with the fact that there was over-writing about the time at which the statement was recorded and also insertion of two names by different ink did not consider it safe to rely upon the dying declaration and acquitted the accused for want of any other evidence. In the circumstances, in our view, it cannot be said that the view taken by the trial court on the basis of evidence on record was not a possible view. The accused were entitled to the benefit of doubt which was rightly given to them by the trial court.

20. The High Court on consideration of the same evidence took a different view and interfered with the judgment of acquittal without properly keeping in mind that the presumption of innocence in favour of the accused h d

by their acquittal from the trial court and the view taken by the trial court as to the credibility of Ex.P-22 and the evidence of PW-25, PW-30 and PW-36 was a possible view. The High Court while upsetting the judgment of acquittal has not kept in view the well established principles in hearing the appeal from the judgment of acquittal.

21. Accordingly, the appeals are allowed. The impugned judgment is set aside. The judgment of the court of Sessions Judge, Fast Track Court-I at Mandya dated 28.09.2004 is restored. The appellants shall be set at liberty forthwith, if not required in any other case.

R.P. Appeal allowed.

MADHUKAR

v.

STATE OF MAHARASHTRA AND ORS.

(Civil Appeal No. 4470 of 2014)

APRIL 11, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

Maharashtra Civil Services (Pension) Rules, 1982: rr.46(4), 48(3) - Pension - Fixation of - Qualifying period - Calculation of - As per the Resolution dated 11.3.1992 issued by Government of Maharashtra, pension scheme shall also be made applicable to teaching and non-teaching employees in non-agricultural universities and non-government colleges affiliated to it from 1.10.1982 - Para 3 of Resolution dated 11.3.1992 states that the benefit of previous service by condoning break in service can be granted only if there is compliance of conditions contained in r.48(1) of Rules, 1982 - As per r.48(3) in the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption services to be treated as qualifying service - In the instant case, appellant resigned from the Government service on 18.07.1960 and joined the post of Lecturer in Hislop College on the same day i.e. 18.07.1960 - He retired from the Hislop College on 24.05.1983 i.e. after 1.10.1982 - Therefore, the appellant is entitled to the benefits in terms of Resolution dated 11.3.1992 - Higher authorities recommended to add the earlier period of service for determination of pensionary benefit - In view of the provisions of r.48 r/w Government Resolution dated 11.3.1992, the appellant is entitled for counting the service earlier rendered between 21.06.1950 to 17.07.1960 for

determination of pension - Government Resolution No.NGC 1284/106150/994/84)/VS-4 dated 11.3.1992.

Service law: Pension - Held: Cause of action for grant of pension arises every month.

The appellant worked in various departments for the period 21.6.1950 to 18.7.1960. During the period 11.12.1958 to 17.7.1960 he was posted as Social Education organiser when he tendered resignation from the service. After its acceptance, on 18.7.1960, he joined Hislop College as lecturer in absence of any refusal of letter of resignation. The Maharashtra Civil Services (Pension) Rules, 1982 were not applicable to the teaching and non-teaching employees of the colleges. On 24.5.1983, the appellant retired from service as Assistant Professor from Hislop College. In between 1983 and 1986 pension of the appellant was finalized but the service of the appellant from 21.6.1950 to 18.7.1960 was not counted. The Government of Maharashtra by Government Resolution No.NGC 1284/106150/994/84)/VS-4 dated 11.3.1992 decided to count past government service for computation of pension in respect of all employees retiring on or after 1.10.1982. In view of such Resolution, though the appellant was entitled to get his past services counted for fixation of pension, the same were not considered. On 30.11.2005, respondent No.4, the Administrative Officer, Higher Education recommended the appellant's claim for refixation of pension to the respondent No.5, Senior Accounts Officer. Respondent No.5 in turn rejected the said recommendation. On a representation made by the appellant, the Joint Director by his letter dated 30.12.2005 requested respondent No.2, the Director, Higher and Technical Education, Pune to take into consideration the services rendered by the appellant between 21.6.1950 and 18.7.1960 for computation of pension in view of Government

Resolution dated 11.03.1992. In spite of such recommendation made by the Joint Director, no action was taken. The appellant then preferred the writ petition before the High Court which was dismissed. Hence the instant appeal.

Allowing the appeal, the court

Held: 1. In the case in hand, the appellant has claimed fixation of pension by counting the earlier period of service in the light of Government Resolution dated 11.3.1992. No such claim was made under the Maharashtra Civil Services (Pension) Rules, 1982. The Government of Maharashtra, from its Education and Employment Department issued Resolution dated 11.3.1992. Referring to its earlier Resolution No. NGC 1283/(865) vs-4 dated 21.7.1983 it was informed that pension scheme shall also be made applicable to teaching and non-teaching employees in non-agricultural universities and non-government colleges affiliated to it from 1.10.1982. For calculation of qualifying service under the said Resolution, the services rendered in grant-in-aid non-government colleges/higher secondary schools/ secondary schools are also to be taken into account. In case, the employee working on the post of Lecturer/ Professor in the colleges affiliated to it has accepted the appointment on the post of Lecturer/Professor in Government service, in that event, his service on the post of Lecturer/Professor in non-agricultural Universities and non-government colleges affiliated to the Universities are to be counted for determination of pension under Government Resolution No. SCT-1584/ (1567) Admn.-2 dated 17.10.1986. [Paras 7, 8] [839-B-F]

2. From the bare reading of Resolution dated 11.3.1992, it is clear that the Resolution is applicable to the employees retiring on or after 1.10.1982. Admittedly, the appellant retired from the [illegible]n

24.05.1983 i.e. after 1.10.1982; therefore the appellant is entitled to the benefits in terms of Resolution dated 11.3.1992. Rule 46 of the Rules, 1982 relates to forfeiture of service on resignation. Under Rule 46(1) "resignation from a service or a post entails forfeiture of past services". Sub rule (4) of Rule 46 deals with the cases where the resignation shall not entail forfeiture of past services. But the said Rule 46 is not applicable to the appellant as he neither claimed the benefit of pension under the said Rules nor he was paid pension in terms of the said Rules. As per paragraph 3 of Resolution dated 11.03.1992, the benefit of previous service by condoning break in service can be granted only if there is compliance of conditions contained in Rule 48(1) of the Rules, 1982. As per Rule 48(3) in the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption services to be treated as qualifying service. [Paras 9 to 12] [840-D-G; 841-G]

3. In the case of the appellant, there is notional break in service. He resigned from the Government service on 18.07.1960 and joined the post of Lecturer in Hislop College, Nagpur on the same day i.e. 18.07.1960. Further, Higher authorities have recommended to add the earlier period of service for determination of pensionary benefit. In absence of a specific direction to the contrary in the service record, the interruption between two spells of service rendered by the appellant under the Government shall be treated as automatically condoned; the earlier service rendered by appellant is to be counted towards qualifying service. In view of the provisions of Rule 48 read with Government Resolution dated 11.3.1992, the appellant is entitled for counting the service earlier rendered between 21.06.1950 to 17.07.1960 for

determination of pension. The High Court wrongly held that the appellant is not entitled to get the benefits of his past services in view of Rule 46(1) of the Rules, 1982, which is not applicable in the case of the appellant. The High Court also erred in rejecting the claim on the ground of delay and failed to notice that the cause of action for grant of pension arises every month. In the present case what we find is that the appellant made representation at an appropriate stage and such request was accepted by respondent No.4, the Administrative Officer, Higher Education, Nagpur who recommended respondent No.5, the Senior Accounts Officer, Accountant General-II, Maharashtra to count the period and to take into consideration the fact that the appellant has rendered more than 33 years of service. Even the Joint Director by his letter dated 30.12.5005 recommended to respondent No.2, Director, Higher and Technical Education, Pune to count the period from 21.06.1950 to 18.07.1960. Thereby, the appellant also explained the delay in moving the High Court. [paras 13, 14] [841-H; 842-A-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4470 of 2014.

From the Judgment and Order dated 23.04.2012 of the Division Bench of the High Court of Judicature at Bombay, Nagpur Bench in WP No. 4736 of 2011.

Sudheer Voditel, Rameshwar Prasad Goyal for the Appellant.

Dr. Rajeev B. Masodkar, Aniruddha P. Mayee for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted.

2. This appeal has been preferred by the appellant against the judgment and order dated 23.04.2012 passed by the Division Bench of High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Writ Petition No. 4736 of 2011. By the impugned judgment and order, the High Court refused to grant pension to the appellant and dismissed the writ petition. Apart from the ground of delay, the High Court dismissed the case on merit on the ground that the resignation in the previous service was not tendered by appellant with prior permission.

3. The appellant was appointed on 21.6.1950 in the Food Department at Dongargaon in District of Durg; the then 'Madhya Prant Warhad State' and worked till 20.12.1954. Thereafter, he was appointed as Assistant Master, Upper Division in Normal School at Kondagaon, District Jagdalpur where he functioned between 22.12.1954 and 19.8.1956. Since his posting on 20.8.1956 he worked as Assistant Direct Inspector of School, Nagpur where he continued upto 9.10.1956. Thereafter, he was posted as Superintendant, Chokhamela Hostel, Nagpur from 10.10.1956 to 26.06.1957. Between 29.06.1957 and 30.04.1958 he underwent B.T. Training at Akola held by Education Department. Thereafter, the appellant was posted as Superintendent, Government Chokhamela Hostel, Nagpur on 1.5.1958 where he continued up to 10.12.1958. He was posted as Social Education Organiser at Mauda, District Nagpur between 11.12.1958 to 17.7.1960 when he tendered a resignation from the service. The resignation was accepted on 18.07.1960 by the Block Development Officer and it was forwarded to the Deputy Director of Education. After its acceptance, on 18.07.1960, he joined Hislop College, Nagpur as Lecturer in absence of any refusal of letter of resignation .

4. The Maharashtra Civil Services (Pension) Rules, 1982 (hereinafter referred to as, "the Rules, 1982") were not applicable to the teaching and non-teaching employees of the colleges. On 24.5.1983, the appellant retired from service as

Assistant Professor (Marathi) from Hislop College, Nagpur. In between 1983 and 1986 pension of the appellant was finalized but the service of the appellant from 21.6.1950 to 18.7.1960 was not counted. The Government of Maharashtra by Government Resolution No.NGC 1284/106150/ 994/84)/VS-4 dated 11.3.1992 decided to count past government service for computation of pension in respect of all employees retiring on or after 1.10.1982. In view of such Resolution, though the appellant was entitled to get his past services counted for fixation of pension, the same were not considered. Being aggrieved, the appellant made representations followed by reminder dated 10.2.2000. On 30.11.2005, respondent No.4, the Administrative Officer, Higher Education, Nagpur Division, Nagpur recommended the appellant's claim for refixation of pension to the respondent No.5, Senior Accounts Officer, Accountant General-II, Nagpur, Maharashtra. Respondent No.5 in turn rejected the said recommendation. On a representation made by the appellant, the Joint Director by his letter dated 30.12.2005 requested respondent No.2, the Director, Higher and Technical Education, Pune to take into consideration the services rendered by the appellant between 21.6.1950 and 18.7.1960 for computation of pension in view of Government Resolution dated 11.03.1992. In spite of such recommendation made by the Joint Director, no action was taken. The appellant then preferred the writ petition before the High Court which was dismissed by the impugned judgment and order dated 23.04.2012.

5. Learned counsel for the appellant placed reliance on Rule 48(3) of the Rules, 1982 and submitted that an interruption between two spells one rendered under the Government and other under the College should be treated as automatically condoned. Further, according to him, the appellant is entitled for counting the earlier period from 21.06.1950 to 18.07.1960 for re-fixation of pension in terms of Government Resolution dated 11.3.1992.

6. On the other hand, according to respondents as per Rule 46(1) of the Rules, 1982 the service of the appellant prior to 19.07.1960 were liable to be forfeited; as resignation entails forfeiture of past service.

7. In the case in hand, the appellant has claimed fixation of pension by counting the earlier period of service in the light of Government Resolution dated 11.3.1992. No such claim has been made under Rules, 1982.

8. The Government of Maharashtra, from its Education and Employment Department issued Resolution dated 11.3.1992. Referring to its earlier Resolution No. NGC 1283/(865) vs-4 dated 21.7.1983 it was infomred that pension scheme shall also be made applicable to teaching and non-teaching employees in non-agricultural universities and non-government colleges affiliated to it from 1.10.1982. For calculation of qualifying service under the said Resolution, the services rendered in grant-in-aid non-government colleges/higher secondary schools/secondary schools are also to be taken into account. In case, the employee working on the post of Lecturer/ Professor in the colleges affiliated to it has accepted the appointment on the post of Lecturer/Professor in Government service, in that event, his service on the post of Lecturer/ Professor in non-agricultural Universities and non-government colleges affiliated to the Universities are to be counted for determination of pension under Government Resolution No. SCT-1584/(1567) Admn.-2 dated 17.10.1986.

Considering the above aspects, the Government by resolution dated 11.3.1992 decided as follows:

> "3). Now the government issues the Order that, the previous services of teaching/non-teaching employees retiring from non-agricultural universities and grant-in-aid non-government affiliated colleges rendered on any of post in government service, to which the Government Pension Scheme is applicable, may be taken into account for the purpose of pension. Moreover, previous services of employees retiring from government posts to which the Government Pension Scheme is applicable, rendered in on teaching/non-teaching posts in non-agricultural universities and grant-in-aid non-government colleges affiliated to it, may be taken into account for the purpose of pension. This Order will be applicable to the employees retiring on and after 1.10.1982. However, the benefit of previous service by condoning break in service will be granted only if there is compliance of Conditions contained in Rule 48(1) of Maharashtra Civil Services (Pension) Rules."

From the bare reading of the Resolution dated 11.3.1992, it is clear that the Resolution is applicable to the employees retiring on or after 1.10.1982.

9. Admittedly, the appellant retired from the Hislop College on 24.05.1983 i.e. after 1.10.1982; therefore, the appellant is entitled to the benefits in terms of Resolution dated 11.3.1992.

10. Rule 46 of the Rules, 1982 relates to forfeiture of service on resignation. Under Rule 46(1) "resignation from a service or a post entails forfeiture of past services". Sub rule (4) of Rule 46 deals with the cases where the resignation shall not entail forfeiture of past services. But the said Rule 46 is not applicable to the appellant as he neither claimed the benefit of pension under the said Rules nor he was paid pension in terms of the said Rules.

11. As per paragraph 3 of Resolution dated 11.03.1992 the benefit of previous service by condoning break in service can be granted only if there is compliance of conditions contained in Rule 48(1) of the Rules, 1982, which reads as follows:-

> **"48. Condonation of interruption in service.-**(1)The appointing authority may, by order,

in the service of a Government servant:

Provided that-

(a) the interruptions have been caused by reasons beyond the control of the Government servant;

(b) the total service pensionary benefit in respect of which will be lost, is not less than five years duration, excluding one or two interruptions, if any; and

(c) the interruption including two or more interruptions, if any, does not exceed one year.

(2) The period of interruption condoned under sub-rule (1) shall not count as qualifying service.

(3) In the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.

(4) Nothing in sub-rule (3) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(5) The period of interruption referred to in sub-rule (3) shall not count as qualifying service."

12. As per Rule 48 (3) in the absence of a specific indication to the contrary in the service record, an interruption between two spells of civil service rendered by a Government servant under Government, shall be treated as automatically condoned and the pre-interruption services to be treated as qualifying service.

13. In the case of the appellant, there is notional break in service. He resigned from the Government service on

18.07.1960 and joined the post of Lecturer in Hislop College, Nagpur on the same day i.e. 18.07.1960. Further, higher authorities have recommended to add the earlier period of service for determination of pensionary benefit. Being so, in absence of a specific direction to the contrary in the service record, the interruption between two spells of service rendered by the appellant under the Government shall be treated as automatically condoned; the earlier service rendered by appellant is to be counted towards qualifying service.

14. In view of the provisions of Rule 48 read with Government Resolution dated 11.3.1992, we hold that the appellant is entitled for counting the service earlier rendered between 21.06.1950 to 17.07.1960 for determination of pension. The High Court failed to notice the relevant provisions and wrongly held that the appellant is not entitled to get the benefits of his past services in view of Rule 46(1) of the Rules, 1982, which is not applicable in the case of the appellant. The High Court also erred in rejecting the claim on the ground of delay and failed to notice that the cause of action for grant of pension arises every month. In the present case what we find is that the appellant made representation at an appropriate stage and such request was accepted by respondent No.4, the Administrative Officer, Higher Education, Nagpur who recommended respondent No.5, the Senior Accounts Officer, Accountant General-II, Maharashtra to count the period and to take into consideration the fact that the appellant has rendered more than 33 years of service. Even the Joint Director by his letter dated 30.12.2005 recommended to respondent No.2, Director, Higher and Technical Education, Pune to count the period from 21.06.1950 to 18.07.1960. Thereby, the appellant also explained the delay in moving the High Court.

15. For the reasons aforesaid, we set aside the impugned judgment and order dated 23.04.2012 passed by the Division Bench of High Court of Judicature at Bombay, Nagpur Bench, Nagpur and direct the respondents t[illegible]f

service rendered by the appellant from 21.06.1950 to 18.07.1960 for the purpose of computation of pension and pay the consequential benefits including arrears of pension within three months from the date of this judgment. On failure, the respondents shall be liable to pay interest @ of 8% from the date of filing of the writ petition till the amount is paid.

16. The appeal is allowed with aforesaid observations and directions. No costs.

D.G. Appeal allowed.

SHAMIM BANO
v.
ASRAF KHAN
(Criminal Appeal No. 820 of 2014)

APRIL 16, 2014

[DIPAK MISRA AND VIKRAMAJIT SEN, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.125 - Claim of maintenance by a Muslim woman, who during the pendency of application was divorced - Held: Application u/s 125 was prior to date of divorce and hearing of application continued - Husband contested the same without raising the plea of consent - Even if an application u/s 3 of Muslim Women (Protection of Rights on Divorce) Act for grant of maintenance was filed, parameters of s.125 CrPC would have been made applicable, as Magistrate still retains the power of granting maintenance to a divorced Muslim wife u/s 125 CrPC - Besides, when a marriage breaks up, the wife suffers -- It is law's duty to recompense and primary obligation is that of husband - Matter remitted to Magistrate for re-adjudication of controversy in question keeping in view the principles stated in the judgment - Muslim Women (Protection of Rights on Divorce) Act, 1986 - ss. 3 and 4.

In the instant appeal filed by a Muslim wife who was divorced during the pendency of her application u/s 125 CrPC, the questions for consideration before the Court were: (i) whether the appellant's application for grant of maintenance u/s 125 of the Code of Criminal Procedure, 1973 was to be restricted to the date of divorce and, because of filing of an application u/s. 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain the application u/s. 125

of the Code; and whether regard being had to the fact situation, the consent u/s. 5 of the Act was an imperative to maintain the application.

Allowing the appeal, the Court

HELD: 1.1 In Khatoon Nisa*, this Court has held that even an application has been filed under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in s. 125 of the Code. Thus, the emphasis is on the retention of the power by the Magistrate u/s 125 of the Code and the effect of ultimate consequence. [para 13] [855-C-D, F]

Khatoon Nisa v. State of U.P. and Ors.* **2002 (6) SCALE 165 - relied on.

Shabana Bano vs. Imran Khan **2009 (16) SCR 190 = 2010 (1) SCC 666 - referred to.**

1.2 In the instant case, the High Court has erred in holding that as the appellant had already taken recourse to s. 3 of the Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance u/s. 125 of the Code would only be maintainable till she was divorced. It may be noted that during the pendency of her application u/s. 125 of the Code, the divorce took place. The wife preferred an application u/s. 3 of the Act for grant of mahr and return of articles. The Magistrate directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the iddat period by the Magistrate as the petition was different, which was not filed for grant

of maintenance. That apart, the authoritative interpretation in Danial Latifi was not available. [Para 15] [856-B-E]

Danial Latifi and another v. Union of India **2001 (3) Suppl. SCR 419 = 2001 (7) SCC 740 - referred to.**

1.3 In any case, it would be travesty of justice if the appellant would be made remediless. Her application u/s. 125 of the Code was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application u/s. 3 of the Act for grant of maintenance was filed, the parameters of s. 125 of the Code would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued. Another aspect which has to be kept in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. It is the law's duty to recompense, and the primary obligation is that of the husband. The entitlement and the necessitous provisions have to be made in accordance with the parameters of law. [Para 15-16] [856-F-H; 857-A-B]

Mohd. Ahmed Khan v. Shah Bano Begum and others **1985 (3) SCR 844 = 1985 (2) SCC 556 - referred to.**

1.4 In the circumstances, regard being had to the dictum in Khatoon Nisa's case, seeking of option would not make any difference. The High Court is not correct in opining that when the appellant-wife filed application u/s. 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance u/s. 125 of the Code to a divorced Muslim woman and the proceeding was continuing withou d

the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable. [Para 17] [857-B-D]

1.5 In the circumstances, it would be appropriate that the matter should be heard and dealt with by the Magistrate so that parties can lead further evidence. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration. It would be open to the appellant-wife to file a fresh application for grant of interim maintenance, if so advised. The impugned orders are set aside and the matter is remitted to the Magistrate for re-adjudication of the controversy in question keeping in view the principles stated in the judgment. [Para 18-19] [857-F-H]

Case Law Reference:

2001 (3) Suppl. SCR 419	**referred to**	**para 9**
1985 (3) SCR 844	**referred to**	**para 8**
2002 (6) SCALE 165	**relied on**	**para 12**
2009 (16) SCR 190	**referred to**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 820 of 2014.

From the Judgment and Order dated 01.03.2012 in MCRC No. 188/2005 of the High Court of Chhattisgarh at Bilaspur.

Fakhruddin, Raj Kishor Choudhary, Neeru Sharma, Surya Kamal Mishra (for T. Mahipal) for the Appellant.

Kaustubh Anshuraj, Vikrant Singh Bais for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The appellant, Shamim Bano, and the respondent, Asraf Khan, were married on 17.11.1993 according to the Muslim Shariyat law. As the appellant was meted with cruelty and torture by the husband and his family members regarding demand of dowry, she was compelled to lodge a report at the Mahila Thana, Durg, on 6.9.1994, on the basis of which a criminal case under Section 498-A read with Section 34 IPC was initiated and, eventually, it was tried by the learned Magistrate at Rajnandgaon who acquitted the accused persons of the said charges.

3. Be it noted, during the pendency of the criminal case under Section 498-A/34 IPC before the trial court, the appellant filed an application under Section 125 of the Code of Criminal Procedure (for short "the Code") in the Court of Judicial Magistrate First Class, Durg for grant of maintenance on the ground of desertion and cruelty. While the application for grant of maintenance was pending, divorce between the appellant and the respondent took place on 5.5.1997. At that juncture, the appellant filed Criminal Case No. 56 of 1997 under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for brevity "the Act") before the learned Judicial Magistrate First Class, Durg. The learned Magistrate, who was hearing the application preferred under Section 125 of the Code, dismissed the same on 14.7.1999 on the ground that the appellant had not been able to prove cruelty and had been living separately and hence, she was not entitled to get the benefit of maintenance. The learned Magistrate, while dealing with the application preferred under Section 3 of the Act, allowed the application directing the husband and others to pay a sum of Rs.11,786/- towards mahr, return of goods and ornaments and a sum of Rs.1,750/- towards maintenance during the Iddat period.

4. Being grieved by the order not granting maintenance, the appellant filed Criminal Revision No. 275 of 1999 and the revisional court concurred with the vi[illegible]e

learned Magistrate and upheld the order of dismissal. The aforesaid situation constrained the appellant to invoke the jurisdiction of the High Court under Section 482 of the code in Misc. Crl. Case No. 188 of 2005. Before the High Court a preliminary objection was raised on behalf of the respondent-husband that the petition under Section 125 of the Code was not maintainable by a divorced woman without complying with the provisions contained in Section 5 of the Act. It was further put forth that initial action under Section 125 of the Code by the appellant-wife was tenable but the same deserved to be thrown overboard after she had filed an application under Section 3 of the Act for return of gifts and properties, for payment of mahr and also for grant of maintenance during the 'Iddat' period. It was also urged that the wife was only entitled to maintenance during the Iddat period and the same having been granted in the application, which was filed after the divorce, grant of any maintenance did not arise in exercise of power under Section 125 of the Code. Quite apart from the above, both the parties also had advanced certain contentions with regard to obtaining factual score.

5. The High Court, after referring to certain authorities, came to hold that a Muslim woman is entitled to claim maintenance under Section 125 of the Code even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 of the Code in the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would be preferred to be governed by the provisions of the Code; that the applicability of Sections 125 to 128 of the Code would depend upon exercise of statutory option available to parties under Section 5 of the Act and as the appellant-wife had taken recourse to the provisions contained in the Act, it was to

be concluded that she was to be governed by the provisions of the Act; that the claim of the appellant under Section 125 of the Code until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the Act to be governed by Section 125 of the Code, was to be governed by the provisions contained in the Act; that as the application under Section 3 of the Act having already been dealt with by the learned Magistrate and allowed and affirmed by the High Court under Section 482 of the Code, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 of the Code; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding upto the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction.

6. We have heard Mr. Fakhruddin, learned senior counsel appearing for the appellant, and Mr. Kaustubh Anshuraj, learned counsel appearing for the respondent.

7. The two seminal issues that emanate for consideration are, first, whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain the application under Section 125 of the Code; and second, whether regard being had to the present fact situation, as observed by the High Court, the consent under Section 5 of the Act was an imperative to maintain the application.

8. To appreciate the central controversy, it is necessary to

sit in a time machine for apt recapitulation. In *Mohd. Ahmed Khan v. Shah Bano Begum and others*[1], entertaining an application under Section 125 of the Code, the learned Magistrate had granted monthly maintenance for a particular sum which was enhanced by the High Court in exercise of revisional jurisdiction. The core issue before the Constitution Bench was whether a Muslim divorced woman was entitled to grant of maintenance under Section 125 of the Code. Answering the said issue, after referring to number of texts and principles of Mohammedan Law, the larger Bench opined that taking the language of the statute, as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 of the Code and that mahr is not such a quantum which can ipso facto absolve the husband of the liability under the Code, and would not bring him under Section 127(3)(b) of the Code.

9. After the aforesaid decision was rendered, the Parliament enacted the Act. The constitutional validity of the said Act was assailed in *Danial Latifi and another v. Union of India*[2] wherein the Constitution bench referred to the Statement of Objects and Reasons of the Act, took note of the true position of the ratio laid down in Shah Bano's case and after adverting to many a facet upheld the constitutional validity of the Act. While interpreting Sections 3 and 4 of the Act, the Court came to hold that the intention of the Parliament is that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. Thereafter, the Court proceeded to state thus: -

> "In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include

1. (1985) 2 SCC 556.
2. (2001) 7 SCC 740.

> provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."

10. In the said case the Constitution Bench observed that in actuality the Act has codified the rationale contained in *Shah Bano's* case. While interpreting Section 3 of the Act, it was observed that the said provision provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties and further indicates that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The Court further observed that the emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period", and if the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to havi[illegible]r

and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act. Thereafter the larger Bench opined thus:-

> "30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.
>
> 31. Even under the Act, the parties agree that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional."

11. Eventually the larger Bench concluded that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well and such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3 of the Act; that liability of a Muslim husband to his divorced wife arising under Section 3 of the Act to pay maintenance is not confined

to the iddat period; and that a divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents and if any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

12. At this Juncture, it is profitable to refer to another Constitution Bench decision in *Khatoon Nisa v. State of U.P. and Ors.,*[3] wherein question arose whether a Magistrate is entitled to invoke his jurisdiction under Section 125 of the Code to grant maintenance in favour of a divorced Muslim woman. Dealing with the said issue the Court ruled that subsequent to the enactment of the Act as it was considered that the jurisdiction of the Magistrate under Section 125 of the Code can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with. The Court noticed that in the said case the Magistrate had returned a finding that there having been no divorce in the eye of law, he had the jurisdiction to grant maintenance under Section 125 of the Code. The said finding of the magistrate had been upheld by the High Court. The Constitution Bench, in that context, ruled thus:

> "The validity of the provisions of the Act was for consideration before the constitution bench in the case of *Danial Latifi and Anr. v. Union of India.* In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr.P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and

3. 2002 (6) SCALE 165.

considerations are the same as those in Section 125 Cr.P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr.P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in *Danial Latifi's* case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr.P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman."

13. The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

14. Slightly recently, in *Shabana Bano v. Imran Khan*[4], a two-Judge Bench, placing reliance on *Danial Latifi* (supra), has ruled that: -

"The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only."

4. (2010) 1 SCC 666.

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoon Nisa* (supra).

15. Coming to the case at hand, it is found that the High Court has held that as the appellant had already taken recourse to Section 3 of the Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced. It may be noted here that during the pendency of her application under Section 125 of the Code the divorce took place. The wife preferred an application under Section 3 of the Act for grant of mahr and return of articles. The learned Magistrate, as is seen, directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the Iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the Iddat period by the learned Magistrate as the petition was different. We are disposed to think so as the said application, which has been brought on record, was not filed for grant of maintenance. That apart, the authoritative interpretation in *Danial Latifi* (supra) was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 of the Code was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the Act for grant of maintenance was filed, the parameters of Section 125 of the Code would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued.

16. Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in cer[illegible]e

requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband. Needless to emphasise, the entitlement and the necessitous provisions have to be made in accordance with the parameters of law.

17. Under these circumstances, regard being had to the dictum in *Khatoon Nisa's* case, seeking of option would not make any difference. The High Court is not correct in opining that when the appellant-wife filed application under Section 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable.

18. It is noticed that the High Court has been principally guided by the issue of maintainability and affirmed the findings. Ordinarily, we would have thought of remanding the matter to the High Court for reconsideration from all spectrums but we think it appropriate that the matter should be heard and dealt with by the Magistrate so that parties can lead further evidence. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration, as has been stated in the aforestated authorities for grant of maintenance. It would be open to the appellant-wife to file a fresh application for grant of interim maintenance, if so advised. Be it clarified, we have not expressed anything on the merits of the case.

19. In the result, the appeal is allowed and the impugned orders are set aside and the matter is remitted to the learned Magistrate for re-adjudication of the controversy in question keeping in view the principles stated hereinabove.

R.P. Appeal allowed.

ISWARLAL MOHANLAL THAKKAR
v.
PASCHIM GUJARAT VIJ COMPANY LTD. & ANR.
(Civil Appeal No. 4558 of 2014)

APRIL 16, 2014

[GYAN SUDHA MISHRA AND V. GOPALA GOWDA, JJ.]

Service law: Service records - Date of birth - Application for change of date of birth on the basis of birth certificate issued by Municipal Corporation - Respondent-Employer rejected application and relied upon the School Leaving Certificate and thereby retired the employee - Labour court set aside the said order holding that employer ought to have not relied on the School Leaving Certificate since as per certificate issued by school to the brother of the appellant, the difference between appellant and his brother was only 5 months and that was improbable and impossible - Writ petition u/Art.227 - High Court set aside the order of labour court - On appeal, held: Respondent-board ought not to have relied upon the School Leaving Certificate and instead, the birth certificate issued by the Municipal Corporation should have been relied upon - High Court wrongly held that the appellant was estopped from raising the issue of his date of birth since he had signed the records in 1978 but raised this issue only in 1987 - This is also clear from the circular issued by respondent in 1987 to the effect that those employees who wished to change their date of birth in the records may do so by furnishing the necessary birth certificate and further, they can do it before they become 50 years of age - The appellant had not attained 50 years of age at the time he raised the issue of mistake of his date of birth - High Court did not apply its mind in setting aside the award of the labour court in exercise of its power of judicial review and superintendence - Therefore, impugned judgment and order of the High Court

set aside and the award of the labour court restored - Constitution of India, 1950 - Article 227.

Constitution of India, 1950: Article 227 - Scope of - Held: High Court cannot exercise its power u/Article 227 as an appellate court or re-appreciate evidence and record its findings on the contentious points - Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court - Service law.

Evidence Act, 1872: s.35 - Birth certificate issued by the Municipal Corporation - Evidentiary value of - Held: Birth certificate issued by the municipal corporation is a conclusive proof of age, the same being an entry in the public record as per s.35 of the Indian Evidence Act, 1872 - Service law.

The appellant was the employee of the erstwhile Bhavnagar Electricity Company Ltd. which was taken over by the respondent-board and the appellant was appointed afresh as per the agreement in 1978. The appellant gave an application in the year 1987 to change his birth date from 27.6.1937 to 27.6.1940 but he was orally informed of the rejection of his request. The Executive Engineer of the respondent-board addressed a letter to the appellant directing him to produce a school leaving certificate or Municipal Birth certificate as proof and stated that in the absence of production of the required documents, the date of birth recorded in the service book would be final. The appellant's elder brother filed a criminal application wherein it was prayed that the Registrar of Birth and Date Records be directed to enter the date of birth of the appellant as 27.6.1940 on its record and a birth certificate be issued. The Court of the JMFC vide order dated 22.05.1987 directed the Bhavnagar Municipal Corporation (BMC) to issue a birth certificate to the appellant.

The birth certificate was issued by the Bhavnagar Municipal Corporation (BMC) wherein his date of birth was shown as 27.06.1940. The appellant forwarded the birth certificate issued by the BMC to the respondent on 25.5.1987 and sent a reminder on 11.6.1987 to make corrections in the service record with regard to his date of birth. He was informed by the Executive Engineer of the respondent-board that he has to produce his original school leaving certificate or SSC pass certificate in order to effect corrections in the service records. The Electricity Board by its circular dated 28.5.1989 informed all the employees that for the purpose of deciding date of birth and making corrections for the same, only School Leaving Certificate of SSC or HSC may be taken into account. The appellant filed a civil suit for declaration regarding his date of birth which was dismissed. The appeal was also rejected. The respondent-board on 27.6.1997, on the basis of the date of birth in its records, terminated the services of the appellant and the appellant raised an industrial dispute. The Labour Court allowed the reference after conducting an enquiry and passed an award dated 31.7.2001 holding that the termination of the services of the appellant prematurely on the basis of his incorrect date of birth was wrong and further directed the respondent to pay full salary, all admissible ancillary benefits from the date he was wrongfully and prematurely terminated from service till the date of his actual retirement and further, also ordered that a sum of Rs.1,500/- be paid as costs. The respondent filed a petition under Articles 226 and 227 before the High Court which was allowed. The instant appeal was filed challenging the order of the High Court.

The questions would arose for consideration in the instant appeal were: In the event that there is a dispute in the date of birth between the birth certificate issued by the competent authority and the scho[illegible]e,

which document will prevail; whether the High Court was correct in passing an order setting aside the judgment and Award of the Labour Court?

Allowing the appeal, the Court

HELD: 1. The Labour court while passing its award and judgment examined all the evidence on record and held that as per Ex.36 which is the certificate of birth given by the school for the brother of the appellant, wherein his date of birth is written as 27/1/1937 and therefore, it is impossible that the appellant's date of birth would be 27/6/1937 as the difference would be only 5 months and so it is clear that when both the brothers joined the school, the Director/Principal had inadvertently written date of birth which revealed from Court's order and hence, the date of birth in the school record for the appellant was corrected to 27/6/1940 as per the court's order. The Labour Court further went on to observe that before the court order, as and when the applicant got the chance, he gave an application to the respondent organisation by letter dated 18.4.1987 requesting them to correct his date of birth as per documents enclosed - the statement of the Bhavnagar Electricity Company Ltd, his Identity card and copy of the LIC policy, all of which showed his date of birth as 27.6.1940, and to record the entry in the service records. The respondent did not accept the same and the appellant then got a court order dated 22.05.1987 which directed the entry of date of birth of the appellant as 27.6.1940 to be passed in the Birth & Deaths Register but in spite of this order, the respondent did not accept such judicial/court evidence or the government documents. They neither cared to inform the appellant that they did not accept the documents nor did they give him any opportunity to defend his application and retired him arbitrarily by taking an ex-parte decision which is illegal and against the principles of natural

justice. The Labour Court then went on to observe that in the case of other employees, the dates of birth were corrected on the basis of affidavits but in the case of the appellant, in spite of producing a court order and other documents, they were not accepted by the respondent and thus, this action of the respondent, retiring the applicant from service was illegal and unconstitutional and against the principles of natural justice. Thereby the reference of the appellant was accepted and the respondent was ordered to pay the appellant full salary along with all admissible ancillary benefits from the date he was retired till the date of his actual retirement as per his date of birth, and Rs.1,500/- towards costs of the matter. [Para 8] [869-G-H; 870-A-H]

2. The judgment and award of the labour court well-reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the instant case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the award of the labour court was based on sound and cogent reasoning, which has served the ends of justice. [Para 9] [871-A-D]

Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil **(2010) 8 SCC329: 2010 (8) SCR 83** *y.*

Punjab State Warehousing Corporation **(2010) 3 SCC 192: 2010 (1) SCR 591;** *Heinz India Pvt. Ltd. & Anr. v. State of UP & Ors.* **(2012) 5 SCC443: 2012 (3) SCR 898 - relied on.**

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

3. The High Court has committed a grave error by setting aside the findings recorded on the points of dispute in the award of the labour court. A grave miscarriage of justice has been committed against the appellant as the respondent should have accepted the birth certificate as a conclusive proof of age, the same being an entry in the public record as per Section 35 of the Indian Evidence Act, 1872 and the birth certificate mentioned the appellant's date of birth as 27.6.1940, which is the documentary evidence. Therefore, there was no reason to deny him the benefit of the same, instead the respondent-board prematurely terminated the services of the appellant by taking his date of birth as 27.6.1937 which is contrary to the facts and evidence on record. This date of birth is highly improbable as well as impossible as the appellant's elder brother was born on 27.1.1937 as per the School Leaving Certificate, and there cannot be a mere 5 months difference between the birth of his elder brother and himself. Therefore, it is apparent that the School Leaving Certificate cannot be relied upon by the respondent-board and instead, the birth certificate issued by the BMC which is the documentary evidence should have been relied upon by the respondent. Further, the date of birth is mentioned as 27.6.1940 in the LIC insurance policy on the basis of which the premium was paid by the respondent to the Life Insurance Corporation on behalf of the appellant. Therefore, it is only just and proper that the respondent should have relied on the birth certificate issued by the BMC on the face of all these

discrepancies as the same was issued on the order of the JMFC. The High Court has wrongly held that the appellant was estopped from raising the issue of his date of birth as he had signed the records in 1978 but he raised this issue only in 1987. The reason for this is clear that the respondent came out with a circular in 1987 that those employees who wished to change their date of birth in the records may do so by furnishing the necessary birth certificate and further, they can do it before they become 50 years of age. The appellant had not attained 50 years of age at the time he raised the contention regarding mistake in his date of birth. The High Court has not applied its mind in setting aside the judgment and award of the labour court in exercise of its power of judicial review and superintendence as it is patently clear that the labour court has not committed any error of jurisdiction or passed a judgment without sufficient evidence. The impugned judgement and order of the High Court deserves to be set aside and the award and judgment of the labour court be restored. [Para 10] [873-C-H; 874-A-D]

4. The impugned judgment and order of the High Court is set aside and the award of the Labour Court is restored since the services of the appellant were prematurely superannuated taking his date of birth as 27.06.1937 instead of 27.06.1940, and therefore, he is entitled to full back wages and other consequential monetary benefits from the date of termination till the date of his correct superannuation considering his date of birth as 27.06.1940. The back wages shall be calculated on the basis of revised pay scale and the same must be paid by way of demand draft to the appellant within six weeks from the date of receipt of the copy of this order, failing which the respondent shall pay interest @ 12% per annum on the amount due, towards back wages and other consequential monetary bene[illegible]f

the Award of the Labour Court till the date of payment. [Para 11] [874-E-H]

Case Law Reference:

2010 (8) SCR 836	**Relied on**	**Para 8**
2010 (1) SCR 591	**Relied on**	**Para 10**
2012 (3) SCR 898	**Relied on**	**Para 10**
(1999) 1 All ER 481	**Referred to**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4558 of 2014.

From the Judgment and Order dated 19.04.2011 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 4168 of 2002.

Pravin H. Parekh, Galau C. Sharma, Vishal Prasad, Ritika Sethi, Kshatrashal Raj, Himanjali Gautam, Parekh & Co. for the Appellant.

Hemantika Wahi for the Respondents.

The Judgment of the Court was delivered by

V.GOPALA GOWDA, J. 1. Leave granted.

2. This appeal is filed by the appellant against the final judgment and order dated 19.04.2011, passed by the High Court of Gujarat at Ahmedabad in Special Civil Application No. 4168 of 2002, whereby the High Court allowed the petition filed by the respondent under Articles 226 and 227 of the Constitution of India, praying for issuance of an appropriate writ or direction for quashing and setting aside the judgment and award dated 31.7.2001 passed by the Labour Court, Bhavnagar in Reference(LCB) No.225 of 1998.

3. Brief facts of the case are stated hereunder:

The appellant was the employee of the erstwhile

Bhavnagar Electricity Company Ltd. which was taken over by the respondent-board and the appellant was appointed afresh as per the agreement in 1978. The appellant gave an application in the year 1987 to change his birth date from 27.6.1937 to 27.6.1940 but he was orally informed of the rejection of his request. The Executive Engineer of the respondent-board addressed a letter to the appellant directing him to produce a school leaving certificate or Municipal Birth certificate as proof and stated that in the absence of production of the required documents, the date of birth recorded in the service book shall be final. The appellant's elder brother filed a criminal application no.227 of 1987 wherein it was prayed that the Registrar of Birth and Date Records, Bhavnagar be directed to enter the date of birth of the appellant as 27.6.1940 on its record and a birth certificate be issued. The Court of the JMFC vide order dated 22.05.1987 directed the Bhavnagar Municipal Corporation(BMC) to issue a birth certificate to the appellant. Pursuant to this order a birth certificate was issued by the BMC, the Xerox copy of which is marked as Ex.52, wherein his date of birth was shown as 27.6.1940. The appellant forwarded the birth certificate issued by the BMC to the respondent on 25.5.1987 and sent a reminder on 11.6.1987 to make corrections in the service record with regard to his date of birth. He was informed by the Executive Engineer of the respondent-board that he has to produce his original school leaving certificate or SSC pass certificate in order to effect corrections in the service records. The Electricity Board vide its circular dated 28.5.1989 informed all the employees that for the purpose of deciding date of birth and making corrections for the same, only School Leaving Certificate of SSC or HSC may be taken into account.

4. As his date of birth was not corrected, the appellant filed a civil suit in the year 1997 for declaration regarding his date of birth and prayed for interim relief, but the same was rejected. He then filed a civil misc. appeal No.124 of 1997 before the District Court, Bhavnagar, against the [illegible]t,

but this also came to be rejected. The respondent-board, on 27.6.1997, pursuant to the date of birth in its records, terminated the services of the appellant and the appellant raised an industrial dispute before the Conciliation Officer which was referred by the State Government for adjudication to Labour Court, Bhavnagar vide reference(LCB) no.225 of 1998. The Labour Court has allowed the reference after conducting an enquiry and passed an Award dated 31.7.2001 holding that the termination of the services of the appellant prematurely on the basis of his incorrect date of birth was wrong and further directed the respondent to pay full salary, all admissible ancillary benefits from the date he was wrongfully and prematurely terminated from service till the date of his actual retirement and further, also ordered that a sum of Rs.1,500/- be paid as costs. The respondent filed a petition under Articles 226 and 227, being special civil application no.4168 of 2002 before the High Court of Gujarat at Ahmedabad. The same was allowed and the award passed by the Labour Court in Reference(LCB) No.225 of 1998 was set aside. Aggrieved by the same, the appellant has filed the present civil appeal urging various facts and legal contentions in support of his case.

5. Mr. P.H. Parekh, the learned senior counsel for the appellant has argued that the appellant came to know about his wrongly mentioned date of birth in his service record of the respondent in the year 1987 only. Prior to that, he had no knowledge about the incorrect recording of his date of birth and so he immediately made representation to the respondent for its correction which was not acceded and therefore, he had raised the industrial dispute and the Labour Court had recorded its finding in the Award after adjudication of the dispute and held that there was no delay on the part of the appellant in approaching his employer and the Conciliation Officer to correct his date of birth as he had approached it within reasonable time. It is contended by him that the appellant's submission with respect to his date of birth is based on documentary evidence i.e the birth certificate issued by the

BMC, the Xerox copy of which is Ex.52 herein. Further, the LIC Policy, Ex.42 for which the premium was paid by the respondent on behalf of the appellant to the Life Insurance Corporation and the same was deducted from his monthly salary, mentions his date of birth as 27.6.1940. There was an apparent mistake in his school records and it is submitted that the appellant approached the authorities for rectification of the same on the basis of the birth certificate issued by BMC and the school authorities rectified it. The learned senior counsel submitted that the birth certificate issued by the BMC is a legally binding document and that the appellant was prematurely, arbitrarily and illegally superannuated from his services, without notice, even though the respondent was aware of the appellant's real date of birth as the same was reflected in records namely : Identity Card issued by the Bhavnagar Electricity Co., the Birth Certificate issued by the BMC, the Certificate of birth date issued by the principal of the appellant's school, statement of employees and their relevant details handed over by the Bhavnagar Electricity Co. to the respondent at the time of takeover, confidential reports maintained by the respondent in its records and lastly the LIC Policy by which premium was paid. It was further contended that the High Court erred in not appreciating that the respondent, by permitting other employees to correct their date of birth by merely producing an affidavit has discriminated against the appellant by refusing to correct the date of birth even on production of an affidavit and a birth certificate issued by the BMC pursuant to an order of the JMFC court and other such documents furnished to it for correction that also formed part of the respondent's own record of its employees which proved the date of birth of the appellant to be 27.6.1940 and not 27.6.1937.

6. On the other hand, Ms. Hemantika Wahi, the learned counsel for the respondent submits that the respondent-board had taken over the erstwhile Bhavnagar Electricity Co. in the year 1978 and whatever service record was available with the erstwhile company was transferred to

and as per the said record, birth date of the appellant was 27.6.1937. It is submitted that the appellant signed all the documents with open eyes and it was open for him to raise the issue of the alleged wrong date of birth in the year 1978 but he did not take any steps towards that till the year 1987. It was further contended that the confidential reports was signed by him every year and there also his birth date was indicated as 27.6.1937 and the service book of the appellant also reflects the same and all this evidence has estopped him from contending any birth date other than 27.6.1937. The learned counsel has raised the point that the Labour Court merely on the basis of conjectures and surmises and without assigning any detailed justification or reasons has accepted the birth certificate issued by the BMC to the appellant with the date of birth as 27.6.1940 and is thus ex-facie illegal and, therefore, the findings and reasons recorded by it is rightly set aside by the High Court in exercise of its power of judicial review.

7. We have heard the rival legal contentions urged on behalf of both the parties. The following questions would arise for our consideration:

i. In the event that there is a dispute in the date of birth between the birth certificate issued by the competent authority and the school leaving certificate, which document will prevail?

ii. Whether the High Court was correct in passing an order setting aside the judgment and Award of the Labour Court?

iii. What Award?

8. We will first examine the award and judgment of the Labour Court. The Labour court while passing its award and judgment has given cogent reasons for the same. The labour court examined all the evidence on record and held that as per Ex.36 which is the certificate of birth given by the school for the brother of the appellant, Batuklal Mohanlal Thakker wherein his

date of birth is written as 27/1/1937 and therefore, it is impossible that the appellant's date of birth would be 27/6/1937 as the difference would be only 5 months and so it is clear that when both the brothers joined the school, the Director/Principal had inadvertently written date of birth which revealed from Court's order and hence, the date of birth in the school record for the appellant was corrected to 27/6/1940 as per the court's order. The Labour Court further went on to observe that before the court order, as and when the applicant got the chance, he gave an application to the respondent organisation vide letter dated 18.4.1987 requesting them to correct his date of birth as per documents enclosed - the statement of the Bhavnagar Electricity Company Ltd, his Identity card and copy of the LIC policy, all of which showed his date of birth as 27.6.1940, and to record the entry in the service records. The respondent did not accept the same and the appellant then got a court order dated 22.05.1987 which directed the entry of date of birth of the appellant as 27.6.1940 to be passed in the Birth & Deaths Register but in spite of this order, the respondent did not accept such judicial/court evidence or the government documents. They neither cared to inform the appellant that they did not accept the documents nor did they give him any opportunity to defend his application and retired him arbitrarily by taking an ex-parte decision which is illegal and against the principles of natural justice. The Labour Court then went on to observe that in the case of other employees, the dates of birth were corrected on the basis of affidavits but in the case of the appellant, in spite of producing a court order and other documents, they were not accepted by the respondent and thus, this action of the respondent, retiring the applicant from service was illegal and unconstitutional and against the principles of natural justice. Thereby the reference of the appellant was accepted and the respondent was ordered to pay the appellant full salary along with all admissible ancillary benefits from the date he was retired till the date of his actual retirement as per his date of birth, and Rs.1,500/- towards costs of the matter.

9. We find the judgment and award of the labour court well-reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the Award of the labour court was based on sound and cogent reasoning, which has served the ends of justice.

It is relevant to mention that in the case of *Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil*[1], with regard to the limitations of the High Court to exercise its jurisdiction under Article 227, it was held in para 49 that-

> "The power of interference under Art.227 is to be kept to a minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court."

It was also held that-

> "High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Art.227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it."

Thus it is clear, that the High Court has to exercise its power under Article 227 of the Constitution judiciously and to further the ends of justice.

In the case of *Harjinder Singh v. Punjab State Warehousing Corporation*[2], this Court held that,

> "20……In view of the above discussion, we hold that the learned Single Judge of the High Court committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,582 by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the Regulation."

10. The power of judicial review of the High Court has to be alluded to here to decide whether or not the High Court has erred in setting aside the judgment and order of the labour court. In the case of *Heinz India Pvt. Ltd. & Anr. v. State of UP & Ors.*[3], this Court referred to the position held on the power of judicial review in the case of *Reid v. Secretary of State for Scotland*[4], wherein it is stated that :-

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence,

to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

Therefore, in view of the above judgments we have to hold that the High Court has committed a grave error by setting aside the findings recorded on the points of dispute in the Award of the labour court. A grave miscarriage of justice has been committed against the appellant as the respondent should have accepted the birth certificate as a conclusive proof of age, the same being an entry in the public record as per Section 35 of the Indian Evidence Act, 1872 and the birth certificate mentioned the appellant's date of birth as 27.6.1940, which is the documentary evidence. Therefore, there was no reason to deny him the benefit of the same, instead the respondent-board prematurely terminated the services of the appellant by taking his date of birth as 27.6.1937 which is contrary to the facts and evidence on record. This date of birth is highly improbable as well as impossible as the appellant's elder brother was born on 27.1.1937 as per the School Leaving Certificate, and there cannot be a mere 5 months difference between the birth of his elder brother and himself. Therefore, it is apparent that the School Leaving Certificate cannot be relied upon by the respondent-board and instead, the birth certificate issued by the BMC which is the documentary evidence should have been relied upon by the respondent. Further, the date of birth is mentioned as 27.6.1940 in the LIC insurance policy on the basis of which the premium was paid by the respondent to the Life Insurance Corporation on behalf of the appellant. Therefore, it is only just and proper that the respondent should have relied

on the birth certificate issued by the BMC on the face of all these discrepancies as the same was issued on the order of the JMFC. The High Court has wrongly held that the appellant was estopped from raising the issue of his date of birth as he had signed the records in 1978 but he raised this issue only in 1987. The reason for this is clear that the respondent came out with a circular in 1987 that those employees who wished to change their date of birth in the records may do so by furnishing the necessary birth certificate and further, they can do it before they become 50 years of age. The appellant had not attained 50 years of age at the time he raised the contention regarding mistake in his date of birth. The High Court has not applied its mind in setting aside the judgment and award of the labour court in exercise of its power of judicial review and superintendence as it is patently clear that the labour court has not committed any error of jurisdiction or passed a judgment without sufficient evidence. The impugned judgement and order of the High Court deserves to be set aside and the award and judgment of the labour court be restored.

11. In view of the aforesaid reasons, we allow the appeal, set aside the impugned judgment and order of the High Court and restore the award of the Labour Court, since the services of the appellant were prematurely superannuated taking his date of birth as 27.06.1937 instead of 27.06.1940, and therefore, he is entitled to full back wages and other consequential monetary benefits from the date of termination till the date of his correct superannuation considering his date of birth as 27.06.1940. The back wages shall be calculated on the basis of revised pay scale and the same must be paid by way of demand draft to the appellant within six weeks from the date of receipt of the copy of this order, failing which the respondent shall pay interest @ 12% per annum on the amount due, towards back wages and other consequential monetary benefits, from the date of the Award of the Labour Court till the date of payment.

D.G.