NATIONAL COMMISSION OF WOMEN
v.
STATE OF DELHI & ANR.
(Special Leave Petition (Criminal) No. 2506 of 2009)

JULY 23, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860:

s. 376 – A girl of 21 years subjected to sexual intercourse with the false promise of marriage – The girl committed suicide – Trial court convicting the accused u/s 306 with 10 years RI and u/s 376 with life imprisonment – Acquittal by High Court as regards offence punishable u/s 306 and reduction of sentence u/s 376 to the period already undergone viz. about 5 years and six months – Special leave petition filed by National Commission for Women challenging reduction of sentence u/s 376 – HELD: Sub-s.(1) of s.376 provides for imposition of a sentence of upto ten years or life but the proviso says that the court may for adequate and special reasons, impose a lesser sentence – The discretion exercised by a court, particularly a superior court, should not be lightly interfered with – Several factors had been taken into account by the High Court while imposing a lesser sentence and it would be improper for Supreme Court to interfere with the High Court's discretion on the quantum of sentence except in extraordinary circumstances – There is no such circumstance – Sentence/Sentencing – Constitution of India, 1950 – Article 136 – Code of Criminal Procedure, 1973 – s.377.

***CODE OF CRIMINAL PROCEDURE, 1973**:*

s.377 – Appeal against sentence on the ground of its inadequacy – National Commission for Women filing SLP

before Supreme Court challenging the judgment of High Court by which it reduced the sentence u/s 376 IPC from life imprisonment to the period already undergone viz. 5 years and six months – HELD: Section 377 specifically provides that it is the State Government or the Central Government which can issue a direction to the Public Prosecutor to present an appeal before the Court of Session or the High Court on the ground of inadequacy of the sentence – This section does not in any manner authorise an appeal to the Supreme Court – Therefore, the Commission was not entitled to maintain an appeal in the Supreme Court against the order of the High Court – Penal Code, 1860 – s.376 – Constitution of India, 1950 – Article 136.

Constitution of India, 1950:

Article 136 – Permission to file special leave petition – Revocation of – National Commission for Women filing special leave petition with permission to file the SLP – Challenging judgment of High Court reducing the sentence of life imprisonment u/s 376 IPC awarded by trial court to the period already undergone which was about five years and six months – HELD: An appeal is the creature of a Statute and cannot lie under any inherent power – Supreme Court does undoubtedly grant leave to appeal under the discretionary power conferred under Article 136, at the behest of the State or an affected private individual but to permit anybody or an organization pro-bono publico to file an appeal would cause utter confusion in criminal justice system – While an appeal by a private individual can be entertained but it should be done sparingly and after due vigilance and, particularly, in a case where the remedy has been shut out for the victims due to malafides on the part of the State functionaries or due to inability of the victims to approach the Court – In the instant case, neither the State which is the complainant nor the heirs of the deceased have chosen to file a petition in the High Court – As this responsibility has been taken up by the

Commission at its own volition, this is clearly not permissible in the light of the judgments of this Court – Accordingly, Special Leave Petition is dismissed as not maintainable – Permission to file Special Leave Petition granted by the Court's order dated 2.4.2009 is, accordingly, revoked – Party – Penal Code, 1860 – s.376 – Code of Criminal Procedure, 1973 – s.377 – Administration of criminal justice.

Pritam Singh vs. State **AIR (37) 1950 SC 169;** *P.S.R. Sadhanantham vs. Arunachalam* **1980 (2) SCR 873 = 1980 (3) SCC 141 – relied on.**

Case Law Reference:

AIR (37) 1950 SC 169	**relied on**	**para 8**
1980 (2) SCR 873	**relied on**	**para 8**

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 2506 of 2009.

From the Judgment & Order dated 9.2.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No. 389 of 2008.

Priya Hingorani and Aman Hingorani (for Hingorani & Associates) for the Appellant.

Mohan Parasaran, ASG, Vivek Narayan Sharma, D.K. Thakur and Anil Katiyar for the Respondents.

The following order of the Court was delivered

O R D E R

1. This Special Leave Petition has been filed by the National Commission for Women (hereinafter called the 'Commission') statedly under the inherent powers of this Court challenging the order of the High Court dated 9 th February, 2009, whereby the respondent No.2 has been acquitted for the offence under Section 306 of the Indian Penal Code and while maintaining his conviction under Section 376 of the Indian Penal Code, the sentence has been reduced to that already undergone, which is said to be about five years and six months.

2. The facts are as under:

3.1 Sunita then aged 21 years, committed suicide by consuming aluminium phosphide tablets on 14th April, 2003. A suicide note Ex. P.4 (G) found near her body was proved to be written in her hand. In the suicide note, she pointed out that she had taken tuitions from the accused, Amit, at her residence in Rajgarh Colony and during that period had developed a deep friendship with him leading to physical relations as well. He also held out a promise of marriage but later backed off and when she remonstrated with him and reminded him of his promise he threatened to expose and defame her in case she insisted on meeting him. She stated in the suicide note that the accused continued to have sexual relations with her but also compelled her to have sexual relations with others as well. Frustrated and feeling exploited, Sunita thus committed suicide.

2.2 The learned Additional Sessions Judge, Karkardooma Courts, Delhi, by his judgment dated 21st April, 2008, relying primarily on the dying declaration which was the suicide note, convicted the accused under Section 306 of the IPC and sentenced him to rigorous imprisonment for 10 years with a fine of Rs.5,000/- and in default of payment of fine, to undergo rigorous imprisonment for six months in addition, and to imprisonment for life under Section 376 of the IPC and a fine of Rs.5000/- and in default, to undergo rigorous imprisonment for six months; both the sentences to run concurrently.

2.3 An appeal was thereafter taken by the accused to the High Court. The High Court vide the impugned judgment held that a case under Section 306 was not made out and the accused was entitled to acquittal under that provision but on the question of the offence under Section 376 observed as under:

> "We note that Sunita was aged 21 years and the appellant was aged 20 years when they indulged in a promiscuous relationship.

At the age of 21, Sunita was matured enough to understand the moral worth of her acts. She was conscious that by having repeated sex with the appellant she could become pregnant and hence the appellant had told her to take Mala-D tablets.

There is some participative act committed by Sunita. It is not a case where the appellant forced herself on Sunita. There is no evidence that the appellant compelled Sunita to have sex with the other person. We note that the Sunita has only written that the appellant was compelling her to have sex with a third person. She has not written that she was actually made to have sex with a third person.

Considering the totality of the circumstances and noting that the appellant has suffered incarceration for five years and six months and would be entitled to remissions on account of his good conduct in jail; noting further that the appellant has redeemed himself in jail evidenced by the fact that he took his civil services examinations and qualified for being appointed to the Indian Administrative Services; we are of the opinion that the custodial sentence already suffered by the appellant would meet the ends of justice as a requisite punishment."

2.4 An order reducing the term of imprisonment for life to that already undergone was, accordingly, made.

3. The present Special Leave Petition has been filed by the National Commission for Women and the only plea raised is that the reasons given by the High Court for reducing the sentence awarded under Section 376 of the IPC were not acceptable as a helpless girl had been cruelly exploited and cheated by the accused. This matter came up for motion hearing before a Bench of this Court and permission to file ˇthe Special Leave Petition was granted and notice was issued on 2nd April 2009. Respondent No.1, that is the State of Delhi, has filed a counter affidavit, in effect supporting the

case of the Commission although it has been conveyed to us by the learned Additional Solicitor General that the State does not propose to file an application for leave to appeal against the impugned judgment. The accused has also been served by publication but has not chosen to appear in response thereto.

4. Ms. Priya Hingorani, the learned counsel for the petitioner, has forcefully argued that notwithstanding the fact that the State had not filed an appeal in the present matter an appeal at the instance of the Commission was maintainable under the inherent powers of this Court more particularly, as leave to file the Special Leave Petition had already been granted by order dated 2nd April, 2009. It has, accordingly, being submitted that it was not now open to this Court to retract on the earlier order and revoke the permission and to doubt the very maintainability of the Special Leave Petition. On merits, it has been submitted that the discretion exercised by the High Court while reducing the sentence for the offence under Section 376 of the IPC was not called for and merely because the accused had, in the meanwhile, cleared the Indian Administrative Services Examination was not a relevant consideration. We are unable to accept the plea raised by the learned counsel.

5. Chapter XXIX of the Code of Criminal Procedure deals with "Appeal"(s). Section 372 specifically provides that no appeal shall lie from a judgment or order of a Criminal Court except as provided by the Code or by any other law which authorizes an appeal. The proviso inserted by Section 372 (Act 5 of 2009) w.e.f. 31st December, 2009, gives a limited right to the victim to file an appeal in the High Court against any order of a Criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence. An appeal would thus be maintainable only under Section 377 to

the High Court as it is effectively challenging the quantum of sentence. Section 377 is reproduced below:

> "377. *Appeal by the State Government against sentence:*(1) Save as otherwise provided in sub- section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy—
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> (a) to the Court of session, if the sentence is passed by the Magistrate; and
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> (b) to the High Court, if the sentence is passed by any other Court.
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> (2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than the Code, [the Central Government may also direct] the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy—
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> (a) to the Court of session, if the sentence is passed by the Magistrate; and
>
> (b) to the High Court, if the sentence is passed by any other Court.
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> (3) When an appeal has been filed against the sentence on the ground of the inadequacy the Court of Session, or, as the case may be, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence."

6. This Section specifically provides that it is the State Government or the Central Government which can issue a direction to the Public Prosecutor to present an appeal before the Court of Session or the High Court on the ground of inadequacy of the sentence. This Section does not in any manner authorize an appeal to the Supreme Court. We are, therefore, unable to comprehend as to how the Commission was entitled to maintain an appeal in the Supreme Court against the order of the High Court. An appeal is a creature of a Statute and cannot lie under any inherent power. This Court does undoubtedly grant leave to the appeal under the discretionary power conferred under Article 136 of the Constitution of India at the behest of the State or an affected private individual but to permit anybody or an organization *pro-bono publico* to file an appeal would be a dangerous doctrine and would cause utter confusion in the criminal justice system. We are ,therefore, of the opinion that the Special Leave Petition itself was not maintainable.

7. In *Pritam Singh v. State* AIR (37) 1950 SC 169 , this Court while dealing with a criminal matter (after the grant of leave under Article 136 of the Constitution) considered scope and ambit of this Article and observed:

> "9. On a careful examination of Article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases on1y, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article. By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income-tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases. The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant special leave to appeal only in those

cases where special circumstances are shown to exist.....It is sufficient for our purpose to say that though we are not bound to follow them too rigidly since the reasons, constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with us, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of this Court in granting special leave. Generally speaking, this Court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

8. In *P.S.R. Sadhanantham v. Arunachalm And Another* (1980) 3 SCC 141, this Court was dealing with the locus standi of a private person, in this case a victim's brother, who was neither a complainant nor a first informant in the criminal case but had filed a petition under Article 136 of the Constitution of India. This Court observed that the strictest vigilance was required to be maintained to prevent the abuse of the process of the Court, more particularly, in criminal matters, and ordinarily a private party other than the complainant, should not be permitted to file an appeal under Article 136, though the broad scope of the Article postulated an exception in suitable cases. It was spelt out as under:-

"7. Specificity being essential to legality, let us if the broad spectrum spread out of Article 136 fills the bill from the point of view of "procedure established by law". In express terms, Article 136 does not confer a right of appeal on a party as such but it confers a wide discretionary power on the Supreme Court to interfere in suitable cases. The discretionary dimension is considerable but that relates to the power of the court. The question is whether it spells by implication, a fair procedure as contemplated by Article 21. In our view, it does. Article 136 is a special jurisdiction. It

is residuary power; it is extraordinary in its amplitude, its limit, when it chases injustice, is the sky itself. This Court functionally fulfils itself by reaching out to injustice wherever it is and this power is largely derived in the common run of cases from Article 136. Is it merely a power in the court to be exercised in any manner it fancies? Is there no procedural limitation in the manner of exercise and the occasion for exercise? Is there no duty to act fairly while hearing a case under Article 136, either in the matter of grant of leave or, after such grant, in the final disposal of the appeal? We have hardly any doubt that there is a procedure necessarily implicit in the power vested in the summit court. It must be remembered that Article 136 confers jurisdiction on the highest court. The founding fathers unarguably intended in the very terms of Article 136 that it shall be exercised by the highest judges of th land with scrupulous adherence to judicial principles well established by precedents in our jurisprudence. Judicial discretion is canalised authority, not arbitrary eccentricity."

The Court then examined the implications of completely shutting out a private party from filing a petition under Article 136 on the locus standi and observed thus:

"Having said this, we must emphasise that we are living in times when many societal pollutants create new problems of unredressed grievance when the State becomes the sole repository for initiation o criminal action. Sometimes, pachydermic indifference of bureaucratic officials, at other times politicisation of higher functionaries may result in refusal to take a case to this Court under Article 136 even though the justice of lis may well justify it. While "the criminal law should not be used as a weapon in personal vendettas between private individuals", as Lord Shawcross once wrote, in the absence of an independent prosecution authority easily accessible to every citizen, a wider connotation of the expression 'standing' is necessary for Article 136 to further its mission."

9. A reading of the aforesaid excerpts from the two judgments would reveal that while an appeal by a private individual can be entertained but it should be done sparingly and after due vigilance and particularly in a case where the remedy has been shut out for the victims due to malafides on the part of the state functionaries or due to inability of the victims to approach the Court. In the present matter, we find that neither the State which is the complainant nor the heirs of the deceased have chosen to file a petition in the High Court. As this responsibility has been taken up by the Commission at its own volition this is clearly not permissible in the light of the aforesaid judgments.

10. Ms. Priya Hingorani's submission with regard to the reasons which weighed with the Court while reducing the sentence must now be dealt with. Sub-section (1) of 376 of the IPC provides for the imposition of a sentence of upto ten years or life but the proviso says that the Court may for adequate and special reasons, impose a lesser sentence. We are of the opinion that the discretion exercised by a Court, particularly a superior court, should not be lightly interfered with. We have quoted from the judgment of the High Court hereinabove and find that several factors had been taken into account while imposing a lesser sentence and it would be improper for us to interfere in the High Court's discretion on the quantum of sentence except in extraordinary circumstances. We do not see any such circumstance. We, accordingly, dismiss the Special Leave Petition as not maintainable. The permission to file the Special Leave Petition granted vide this Court's order dated 2nd April, 2009, is, accordingly, revoked.

R.P. SLP dismissed.

MYLADIMMAL SURENDRAN & ORS.
v.
STATE OF KERALA
(Criminal Appeal No. 839 of 2006)

SEPTEMBER 01, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 – ss. 302, 143, 147, 148 and 341 – Death of victim due to political rivalry – Incident witnessed by wife and others – Conviction and sentence u/ss. 302, 143, 147, 148 and 341 by Session Court – Order of conviction upheld by High Court – Death sentence reduced to imprisonment for life – Interference with – Held: Not called for – Consistent eye-witness account of three witnesses-wife, PW2 and PW 3, together with the evidence of witnesses for the period immediately after the incident – Dying declaration corroborates eye-witness account given by wife, PW2 and PW3 – Nature of injuries consistent with the weapons used by assailants – No delay in lodging FIR and in sending the copy of FIR to Magistrate – Evidence of wife could not be discarded on the basis that she was an interested witness and of PW 2 and PW 3 that they were chance/partisan witnesses – Non-holding of test identification parade did not cause any prejudice to accused – All accused identified in court – Thus, there is no reason to disturb the concurrent conclusions reached by trial court and High Court – Evidence – Witnesses – Interested witness/chance witness/partisan witnesses – Identification – Test identification parade – Delay in lodging FIR.

Many political murders and other crimes took place in 'K' district of Kerala. 'MV', an activist of the Communist Party of India (Marxist) was murdered. Thereafter, 'PC'- leader of BJP, received death threats, thinking to be the

brain behind the murder of 'MV'. 'PC' was then provided police security. On the fateful day, accused persons-A1 to A5, armed with deadly weapons, hacked 'PC' to death in broad day light, in front of his wife-PW 1. The father of the deceased-CW1 also witnessed the incident. Accused-A2 absconded. The Court of Session convicted the appellants-accused persons A1, A3 to A5 for the offences punishable under Sections 143, 147, 148, 341 and 302 IPC. They were sentenced to death for the offence under Section 302 IPC. For offences under Sections 143, 147, 148, 341 they were sentenced to undergo rigorous imprisonment for different periods, varying from two months to three years. The High Court upheld the order of conviction but converted death sentence to imprisonment for life. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 Given the seriousness of the allegations made as also the imposition of the death penalty by the trial court, the High Court correctly considered the entire evidence with great care and caution. The High Court took cautionary approach because this was one of the many political murders and crimes which had been committed in 'K' district during the relevant time. The deceased was a BJP leader and the accused were workers of the Marxist Party. It came in evidence before the trial court that the deceased was a candidate of the BJP in the General Election for the 'P' Assembly Constituency. Even though he got only 10,000 votes, he was threatened that he would be killed. Consequently, the police aid post was established about 150 meters near the house of 'PC'. The added reason for danger to the life of the deceased was that he was suspected to be a mastermind behind the murder of a Marxist Party activist called 'MV'. Demands were made by the Marxist Party, as

well as the public in general, for the deceased to be arrayed as an accused in the said murder. The High Court also noticed that the danger to the life of the deceased became stronger when the LDF Government came to power. The house of the deceased was situated in a disturbed area. [Para 11] [930-A-E]

1.2 The High Court examined the entire evidence and concurred with the conclusions reached by the trial court. There is no reason to differ with the conclusions which seem to flow naturally from the evidence on record. [Para 12] [930-F-G]

1.3 The wife was an eye-witness to the murderous assault, which resulted in the death of her husband. The wife-PW1 categorically stated that the accused persons attacked her husband at the stated time and place; and that two of the accused persons hacked her husband with a billhook. However, she was not aware of the names of the accused persons at that time. The names were given to her by CW1, three days after the incident. During her deposition in court, she clearly stated that she could identify the assailants. She actually identified them in the court. When questioned in court, she categorically stated that her husband tried to turn the motorcycle round on the road, but it fell down; that she ran to the house through the very same route where her husband and the assailants also followed; and that the persons who injured her husband, were the persons she identified in the court. [Para13 and 14] [930-H; 931-G-H; 932-A-B]

1.4 The High Court rightly concluded that the evidence of PW1 was consistent with the evidence given by PW2 and PW3. PW2 stated that he saw the deceased being hacked with a billhook with a curved beak. He specifically named the accused 'S'. Upon being brutally wounded, the deceased fell down. The witness also

stated that, thereafter, all the five accused attacked the deceased with their respective weapons. He recognized four of the persons present in the court. He also stated that he knew the names of each of them and could point out each person by name; that the name of the absconding assailant is 'P'; and that A3 was armed with an axe and the others with billhook with pointed beak/ curved beak. He identified the weapons of offence. The evidence of PW2 was reiterated by PW3. The High Court also noticed that PW4-neighbour also reached the scene of the assault. He stated that the deceased in reply to a question of the policemen stated while groaning with pain, that 'S and others' were the assailants. He confirmed that the deceased was facing assassination threats after the murder of 'MV' at place 'C'. He deposed that he had seen in the newspaper that Marxist people had gone on Satyagraha in their office demanding inclusion of the deceased as an accused in the 'MV' murder case. The High Court also noticed the evidence of PW7, who was posted in the police picket near the house of the deceased. He stated that they had gone to the scene of the crime when they were informed by some workmen that somebody had been stabbed. When they reached the place of incident, they saw the deceased was lying covered with blood in the lap of his father CW1. PW 7 stated that on being asked the names of the assailants, the victim gave the name which he was unable to understand. However, he stated that the victim was conscious at that time. With the consistent eye-witness account of three witnesses together with the evidence of the witnesses for the period immediately after the incident, it would be well-nigh impossible to disturb the concurrent conclusions reached by the trial court and the High Court. [Paras 15, 16, 17, 18, 19 and 20] [932-C; H-933-A-C, H; 934-A, C-E; 935-A-D]

1.5 The father of the deceased, author of the first information statement passed away before the trial. In the first information statement which was converted into a FIR, he categorically stated that on hearing the screams of the daughter-in-law, he ran back towards the place where he had met his son and daughter-in-law. He saw that the motorcycle had been abandoned in the road. His son was running towards the house and was being chased by five to eight persons. They were hacking his son with weapons like sword. When he yelled for help, the accused 'S' hacked forcefully on the back of the deceased with a sword like weapon in his hand and ran away. The High Court correctly observed that the statement could not be considered as a substantive piece of evidence. [Para 21] [935-E-G; 936-A-B]

1.6 The High Court accepted that the dying declaration might not be sufficient for conviction of the accused. However, it could be considered for corroboration of the evidence of other witnesses. PW2 and PW3 categorically stated that the deceased even though badly injured had stated that the assailants were 'S' and others. The High Court was also cautious to ensure that the injured was in a fit state to make the dying declaration. Therefore, it examined the evidence of the doctor who clearly stated that even after being brutally injured, the deceased could have talked for another 20 minutes. PW10, the doctor, who conducted the post-mortem stated that the cause of death was due to bleeding and irreversible shock neural and vascular. He also stated that Injury Nos. 1, 4, 6, 7, 10, 15, 16, 17 and 21 could be caused by MO1 or a weapon similar to MO1. Injury No. 12 could be caused by a sharp-edged weapon like an axe. The doctor stated that after sustaining injury No.12 ,the victim must have received neural shock for sometime and, thereafter, he would have been able to talk

and drink, approximately for another 20 minutes. The doctor also opined after looking at the injuries that the same were caused by persons trained in killing. [Paras 22, 24 and 25] [936-C-D; 939-C-E]

1.7 The High Court rightly observed that there was no unexplained delay in lodging the FIR and in sending the copy of the same to the Magistrate. In any event, no prejudice was caused to the accused persons. [Para 26] [940-C-D]

1.8 The evidence given by the wife of the deceased was unimpeachable. It could not be discarded, on the basis that she was an interested witness. If such a wide proposition was to be accepted the evidence of all the witnesses who were relatives of a victim of a violent crime would be rendered unacceptable. Merely because PW1 happens to be the wife of the deceased would not justify her being branded as an interested witness. The evidence of the wife is followed by the consistent evidence given by PW2 and PW3 which was further corroborated by the dying declaration made by the injured within minutes of being assaulted. In such circumstances, it cannot be accepted that the evidence of the eye-witnesses ought to be disbelieved. [Para 27] [940-E-G]

1.9 The evidence of PW 2 and PW 3 could not be brushed aside on the ground that they were chance as well as partisan witnesses. The deceased was LIC agent. PW2 wanted to take a loan from LIC for construction of his house. Therefore, he went to meet the deceased at his house. He was accompanied by his friend PW3. Both of them left the house of the deceased in the circumstances narrated and clearly witnessed the second assault on the deceased. Merely because PW2 and PW3 were sympathizers of BJP, their evidence could not be brushed aside. At best, their evidence has to be

carefully scrutinized. On, a careful scrutiny of the evidence, the trial court and the High Court rightly concluded that the evidence of PW2 and PW3 could not be discarded. [Paras 28, 30 and 31] [940-H; 941-D-E; 942-C-D]

State of Rajasthan vs. Smt. Kalki and Anr. **(1981) 2 SCC 752;** *Sachchey Lal Tiwari vs. State of U.P.* **(2004) 11 SCC 410 – relied on.**

1.10 No test identification parade was held. The wife and the other eye-witnesses, PW 2 and 3, were asked to identify the accused for the first time in the court, some eight and a half years after the incident. The widow had witnessed the brutal murder of her husband, right in front of her eyes in broad day light. In such circumstances, it would be difficult, if not impossible, for her to forget the faces of the assailants. They would be imprinted on her psyche for ever. She had come face to face with the assailants. She would have no reason whatsoever to falsely implicate the appellants. In court, she categorically deposed and identified each of the assailants. She was absolutely truthful and straight forward. A1 lives very near to the house of the deceased. In such circumstances, she could have easily stated that she had known A1 earlier. There are no embellishments seen in her evidence throughout. The High Court rightly rejected that non-holding of the test identification parade caused any prejudice to the accused. The evidence of PW1 is fully supported/corroborated by the evidence of PW2 and PW3 on the point of second assault. They identified all the accused in court. Their identification was further strengthened by the fact that all the accused were known to the two witnesses earlier. Therefore, they were identified by name in court. [Para 34] [943-G-H; 944-A-D]

Ramanbhai Naranbhai Patel vs. State of Gujarat **(2000)**

1 SCC 358 – relied on.

1.11 Upon a due consideration of the entire facts and circumstances of the case, the judgment of the High Court does not call for any interference. [Para 35]

Case Law Reference:

(1981) 2 SCC 752	**Relied on.**	**Para 29**
(2004) 11 SCC 410	**Relied on.**	**Para 30**
(2000) 1 SCC 358	**Relied on.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 839 of 2006.

From the Judgment & Order dated 16.11.2005 of the High Court of Kerala at Ernakulam in Crl. Appeal No. 159 of 2005.

WITH

Criminal Appeal No.840 of 2006.

C.K. Sasi for the Appellants.

R. Sathish, S. Geetha for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These appeals have been filed against the common judgment passed by the High Court of Kerala, at Ernakulam in Criminal Appeal Nos. 214 and 159 of 2005 filed by the accused/appellant no.1 and accused/appellant no.3 to accused /appellant no.5 respectively whereby the High Court was pleased to confirm the conviction of the accused/appellants under Sections 143, 147, 148, 341, 302 read with 149 IPC, but partly allowed their appeals to the extent that the sentence of death imposed upon by the Sessions Court was converted to imprisonment for life.

2. Both the trial court and the High Court have concluded that the deceased was killed due to political vendetta. The conclusions reached by the two Courts do not seem to be without basis. The High Court has noticed that there were many political murders and other crimes in Kannur district of Kerala at the time when Sri Panniyannur Chandran was murdered. He was murdered to avenge the murder of an activist of the Communist Party of India (Marxist), Mamman Vasu within the limits of Checkli Police Station. At that time, the deceased, Sri Panniyannur Chandran was the Secretary of the District Committee of BJP. Following the murder of Mamman Vasu, death threats were often received by the deceased. He was thought to be the brain behind the murder of the CPM activist. It was said that such threats were made even in the Peace Committee Meetings that followed the killing of Mamman Vasu. The State Special Branch officials being satisfied about the possible threat to the life of deceased had conveyed the information to the local police station of the area in which the deceased resided. Consequently, a Police Picket was set up near the house of the deceased to provide security. Tragically, it appears that in spite of all the security measures, the assailants had their way. He was murdered on 25.5.1996 in broad day light, in front of his wife. He was literally hacked to death, by trained killers.

3. We may now notice the facts.

4. On 25.5.1996, between 2:30 and 3:00 p.m. Sri Panniyannur Chandran accompanied by his wife, Arundhuti (hereinafter referred to as PW1) went to the Thalassery Railway Station riding a motor bike to see off his brother-in-law to Madras. On their return, they met the father of the deceased, who told them that he was going to the ration shop to buy rice. On their way back, when they had almost reached home, they found that the road had been blocked by Arayakkamdy Sukumaran @ Suku (hereinafter referred to as A1), Thayyullathil Thazhekuniyil Pavithran @ Pavi (hereinafter referred to as A2), Myladimmal Surendran (hereinafter referred

to as A3), Kaithayullaparambath Preman (hereinafter referred to as A4) and Kunhiparambath Purushothaman @ Purushu (hereinafter referred to as A5). They were all armed with deadly weapons. Though the deceased attempted to avoid them, he was unable to do so, as the engine of the motor cycle went dead. The wife jumped off the motorcycle just before it fell. She ran away. Then from a distance she saw that A1 assaulted the deceased with a billhook which injured his left hand. The deceased started running towards his house hotly chased by the accused armed with deadly weapons. The wife ran to the place where they had met CW1. But hearing her screams, CW1 was already coming towards the trouble spot. On meeting CW1, she informed him about the incident. She then ran to the house of her husband thinking that the deceased must have reached home. Finding that her husband was not in the house, she again ran back, with the sister of the deceased, to the place of assault. She found the deceased lying with his head on the lap of his father. According to the wife, the incident occurred at about 4:45 p.m. At that time, she did not know the names of the accused. She was told the names by CW1 after three days.

5. The Policemen on picket duty reached the spot and took Panniyannur Chandran to the general hospital where he breathed his last at 5:50 p.m. The father of the deceased reported the incident which was recorded by the C.I. of Police, Thalassery. The investigation was carried on for sometime by the local Police but eventually for efficient investigation the case was transferred to the Crime Branch. PW17, a Detective Inspector of the Crime Branch conducted the investigation from that point onwards. In the mean time A1 to A5 surrendered before the Addl. C.J.M, Thalassery and were remanded to custody. After investigation, PW17 submitted final report against A1 to A5 in the court of Addl. CJM, Thalassery for offences under Sections 143, 147, 148, 341 and 302 read with 149 IPC. At that stage A2 absconded. Therefore the case against A2 was split up and the case against A1, A3 to A5 was committed to the Court of Sessions, Thalassery. Since the

accused pleaded not guilty they were duly put on trial.

6. By order dated 12.11.2004, the Sessions Court convicted the appellants herein for the offences punishable under Sections 143, 147, 148, 341 and 302 IPC. For the offences punishable under the aforesaid Sections (except Section 302 IPC) they were sentenced to undergo rigorous imprisonment for different periods, varying from two months to three years. They were, however, sentenced to death for the offence under Section 302, IPC.

7. Challenging the aforesaid judgment, A1 filed Criminal Appeal No. 214 of 2005 and A3 to A5 filed Criminal Appeal No. 159 of 2005 before the High Court of Kerala at Ernakulam. The High Court vide order dated 16.11.2005 confirmed the conviction of the accused under Section 302 read with 149 IPC but the sentence of death was converted to imprisonment for life. Aggrieved by the said judgment, A1 filed Crl. Appeal No. 840 of 2006 and A3 to A5 filed Crl. Appeal No. 839 of 2006 before this Court.

8. We have heard Mr. Surinder Singh, learned Senior Advocate for the appellants and Mr. R. Satish on behalf of the respondent State.

9. After taking us through the relevant materials relied on by the prosecution, Mr. Surinder Singh learned Senior Advocate raised the following contentions:

(i) Ext P1, the First information Statement was given by the father of the deceased (CW1), who died one year before trial. The FIS has been wrongly used as a substantial piece of evidence to corroborate the evidence given by the prosecution witnesses. In the First Information Statement, he had stated that the incident occurred while his son was returning from the Railway Station together with his

wife (PW1) after seeing off his brother in law. He had further stated that earlier at about 3 p.m., three persons had come to his house and enquired about whereabouts of the deceased. He had told them that his son had gone to the railway station and would be coming back by about 4:30 p.m. He had told them to wait for his son in the house. He then left for the Ration Shop to buy rice. On his way to the Ration Shop, he had met his son returning on his motorcycle with his wife. On enquiry from his son, he had told him that he was going to buy rice from the Ration Shop. Soon thereafter, he heard the cries of his daughter-in-law. He rushed back to the place where he had met his son. There he saw Arayakkamdy Sukumaran @ Suku and others assaulting the deceased with deadly weapons. He stated that the assault on his son was due to political rivalry.

(ii) The FIR is not the correct version of the assault and the death of the victim. The FIS is the earliest version of the incident. The prosecution cannot thereafter give a different version. In the FIS the name of the main culprit is given as "Suku of Arayakkamdy House". The name of the first accused in the trial is Suku (short for Sukumaran).

(iii) The FIR was not sent to the Magistrate forthwith, as is evident from the seal of the court of Magistrate, which is dated 29th May. Surprisingly, the Magistrate has initialed the FIR on 26.5.1996.

(iv) It is then submitted that even if the delay in recording the FIR is not fatal, the High Court

ought to have scrutinized the evidence meticulously.

(v) The recovery of the MOS itself was not acceptable under Section 27 of the Evidence Act.

(vi) The dying declaration that "Suku and others" had committed the crime is unreliable. With so many injuries, it is impossible that the victim would give a coherent answer to any question. In fact, PW7 at the Police Picket stated that the name uttered by the victim was not clear to him.

(vii) The learned senior counsel submitted that there was suspicion regarding the identity of the accused as no test identification parade was conducted. PW1 identified the accused in court after eight years and three months. Since PW1 did not know the accused it would be unsafe to rely upon her identification of the accused.

(viii) The learned senior counsel then attacked the evidence of PW2 and PW3. According to the learned senior counsel, there is no explanation, why their statements were recorded 3 or 4 days after the incident. Both the witnesses being BJP sympathizers were planted by the prosecution.

(ix) Another submission made by the learned senior counsel was that if the identify of the accused was known, their names would have been mentioned at the Police Picket.

10. On the other hand Mr. R. Satish, learned counsel for the State of Kerala, submitted that:

(i) The trial court and the High Court have convicted the accused on the basis of the eye-witness account of three witnesses. PW1 is the wife of the deceased. She had no reason to falsely implicate anyone.

(ii) The evidence given by the wife is consistent with the evidence of PW2 and PW3, who witnessed the second phase of the murderous assault.

(iii) The presence of PW2 and PW3 cannot be doubted on the ground that they are chance witnesses or that they are partisan witnesses.

(iv) The nature of injuries caused are consistent with the weapons used, by the assailants.

(v) Medical evidence confirms the ocular evidence.

(vi) The dying declaration also adds further corroboration to the eye-witness account given by PW1, PW2 and PW3.

(vii) Non holding of the test identification parade would not weaken the eye-witness account of PW1, PW2 and PW3. All of them have identified the accused in court.

(viii) There is no delay in recording the FIR. There is also no delay in sending a copy of the FIR to the Judicial Magistrate, Ist Class.

(ix) Both the courts have given concurrent findings, therefore, no case is made out for interference by this Court.

11. We have considered the submissions made by the learned counsel. Given the seriousness of the allegations made as also the imposition of the death penalty by the trial court, the High Court, in our opinion, correctly considered the entire evidence with great care and caution. The other reason which impelled the High Court to take this cautionary approach was that this was one of the many political murders and crimes which had been committed in Kannur District during the relevant time. It was noticed that the deceased was a BJP leader and the accused were workers of the Marxist Party. It had come in evidence before the trial court that the deceased had been a candidate of the BJP in the General Election for the Peringalam Assembly Constituency. Even though he had got only 10,000 votes, he had been threatened that he would be killed. Consequently, the police aid post had been established about 150 meters near his house. The added reason for danger to the life of the deceased was that he was suspected to be a mastermind behind the murder of a Marxist Party activist called Mamman Vasu. Demands had been made by the Marxist Party, as well as the public in general, for the deceased to be arrayed as an accused in the aforesaid murder. The High Court also noticed that the danger to the life of the deceased became stronger when the LDF Government came to power. To make it even worst, the house of the deceased was situated in a disturbed area.

12. The High Court thereafter examined the entire evidence threadbare and concurred with the conclusions reached by the trial court. We see no reason to doubt, let alone differ with, the conclusions which seem to flow naturally from the evidence on record. Although the conviction of the accused persons was confirmed, the High Court converted the death sentence to imprisonment for life.

13. At the outset, we may notice that this is one of those rare cases where the wife is an eye-witness to the murderous assault, which resulted in the death of her husband. She

appeared in the Court as PW1. In her evidence, she has clearly stated that on 25.5.1996 she and her husband had gone to the local railway station to see off her brother on the train to Madras. They had set off from the house between 2.30 p.m. to 3 p.m. on her husband's motorcycle. They left the railway station after 3.45 p.m. On the way back home, they bought some apples from fruit stall and put them in a box attached to the motor bike. When they reached near the house they met CW1 father of the deceased. On being asked by her husband, CW1 told them that he was going to the Ration Shop to buy some rice. Whilst they were on their way home, they saw five persons standing in the middle of the road at the curve. On being obstructed, her husband tried to go round them. Tragically, however, the engine of the motorcycle somehow got switched off. She immediately jumped off the motorcycle, which in any event fell down. She then saw one of the accused persons hack her husband with a billhook. Her husband tried to block the blow by raising his left arm which in the process got injured. She started screaming. While running away from the scene, she saw her husband also running towards the house, hotly pursued by the five assailants, waving their deadly weapons. She ran to locate CW1, who was already rushing towards the trouble spot, having heard her shrieks. She then witnessed the second assailant Purushu (A5) hack her husband with the billhook. She ran to the house of the deceased taking the canal road, thinking that he would have reached home by then. However, finding that her husband had not reached, she again rushed back to the scene of the incident, along with the sister of the deceased. It was at that time she saw her husband lying on the ground with his head on the lap of his father CW1. He had injuries all over his body and he was drenched in blood.

14. In her evidence, she had categorically stated that the accused persons had attacked her husband at the stated time and place. She, however, stated that she was not aware of the names of the accused persons at that time. The names were given to her by CW1 three days after the incident. During her

deposition in court, she clearly stated that she can identify the assailants. She actually identified them in court. When questioned in court, she categorically stated that her husband tried to turn the motorcycle round on the road, but it fell down. She also stated that she ran to the house through the very same route where her husband and the assailants had also followed. She very clearly stated in court that the persons, that injured her husband, were the persons she identified in Court.

15. The High Court has also rightly concluded that the evidence of PW1 is consistent with the evidence given by PW2 and PW3. According to these witnesses, on 25.9.1996, PW2 accompanied by his friend PW3 had come to the house of the deceased. He had promised to help PW2 to get the loan. On reaching the house of the deceased at about 4.30 p.m. they met CW1. He informed them that his son (the deceased) had gone to the railway station to see off his brother-in-law. He also told them that the deceased was to come back home shortly, so they could wait in the house for him. CW1 also told them that he was going to Ration Shop to buy some rice. After about 4-5 minutes, they left the house, after informing the sister of the deceased that they will meet him on the way. When they had moved about a 100 meters away from the house they heard the shrieks of a woman. They started running towards the direction from where the shrieks were coming. At that time, they also heard the shouts of some men asking them to come fast. When they were about 50 meters away, they saw the deceased being chased by the five accused. They were holding the weapons in their hands. When they reached about 30 meters away, they saw one of the accused persons attacking (hacking) the deceased on the left side of the back. By that time, they were standing about 10 meters away from the deceased and the assailants.

16. PW2 had categorically stated that he saw the deceased being hacked with a billhook with a curved beak. He specifically named the accused Sukumaran. Upon being

brutally wounded, the deceased fell down. The witness also stated that thereafter all the five accused attacked the deceased with their respective weapons. He recognized four of the persons present in court. He also stated that he knew the names of each of them and he can point out each person by name. The witness then actually pointed out the accused by name. This witness further goes on to state that the name of the absconding assailant is 'Pavithran'. He stated that A3 was armed with an axe and the others with billhook with pointed beak/curved beak. He identified the weapons of offence. According to this witness, the body of the deceased was badly cut up. By the time, the father of the victim, CW1 reached the spot, the five assailants had fled away. They carried their weapons with them. It was only after that an explosion was heard from the Southern side of the place of incident. CW1 took the head of the victim in his lap who was continuously asking for water. By that time, two police men came running to the spot. One of them wiped out the blood from the face of the victim. He asked the victim 'who did this to you'? The victim answered 'Suku and others'. At the same time, a neighbouring woman gave some water to the police men who then dripped the same into the victim's mouth. The neighbour also gave them some more clothes which were used for dressing the wounds of the victim. This witness, thereafter, helped the police and other persons to put the victim into the jeep who was then taken to the hospital. The witness categorically stated that the accused were known to him earlier as they were regular visitors at the arrack shop where he worked. He stated that A1 was a Mason, A2 Pavithran who is absconding was a carpenter, A3 was a bus cleaner, A4 was a coconut tree climber, A5 was a concrete worker. The witness even stated that he had given the names to the police at the time when the statement was recorded. Subsequently, when the statement was again recorded, he again gave the names. This witness was cross-examined at length but his evidence could not be shaken.

17. The aforesaid evidence of PW2 has been reiterated

by PW3. He also claimed to know all the accused. He also stated that he is prepared to identify the accused by naming them in court. He also actually identified the accused in court. An effort was made to attack the character of this witness. It was sought to be projected that he was a BJP sympathizer. The aforesaid suggestion was stoutly denied by the witness. He, however, admitted that after he had become a prosecution witness in this case, a false case had been registered against him which is pending. In the aforesaid case, false allegations of burning the CPI (M) office had been made.

18. In addition to the aforesaid witness, the High Court noticed that PW4, the neighbour, had also reached the scene of the assault. This witness also stated that the deceased in reply to a question of the policemen stated while groaning with pain, that 'Suku and others' were the assailants. This witness also accompanied the victim to the hospital in the jeep. He confirmed that the deceased was facing assassination threats after the murder of Mamman Vasu at Checkli. He further deposed that he had seen in the newspaper that Marxist people had gone on Satyagraha in their office at Checkli demanding inclusion of the deceased as an accused in the Mamman Vasu murder case. The witness further stated that in a public meeting he had heard that they will assassinate the deceased. The relevant part of the deposition which has been reproduced by the High Court in its judgment is as under :-

> "I saw in the news paper, a report of hunger strike by Marxist party people in Checkli asking to make Chandrettan as an accused in Mamman Murder Case. Like wise I am told that there was speech in public meeting of CPI(M) that Chandrettan would be killed."

In his cross-examination, he stated that he is a BJP candidate and deceased was Kannur District Secretary of BJP. He also stated that he had told the doctor that he had seen the deceased lying on the road with injuries all over his body.

19. The High Court took notice of the evidence of another important witness PW7, who was posted in the Police Picket near the house of the deceased. He stated that they had gone to the scene of the crime when they were informed by some workmen that somebody had been stabbed. When they reached the place of incident, they saw the deceased was lying covered with blood in the lap of his father CW1. This witness stated that he had asked the victim, the names of the assailants. In reply the victim had given the name which he was not able to understand. He, however, stated that the victim was conscious at that time.

20. With the aforesaid consistent eye-witness account of three witnesses together with the evidence of the witnesses for the period immediately after the incident, in our opinion, it would be well-nigh impossible to disturb the concurrent conclusions reached by the trial court and the High Court.

21. In this case, unfortunately, the author of the first information statement passed away before the trial. He was none other than the unfortunate father of the victim. In the first information statement which has been converted into a FIR, he has categorically stated that on hearing the screams of the daughter-in-law, he ran back towards the place where he had met his son and daughter-in-law. He saw that the motorcycle has been abandoned in the road. His son was running towards the house and he was being chased by five to eight persons. They were hacking his son with weapons like sword. When he yelled for help, the accused Arayakkamdy Sukumaran @ Suku hacked forcefully on the back of the deceased with a sword like weapon in his hand and ran away. After narrating the entire sequence as to how the victim was brought to the hospital he had stated that : -

> "Chandran is the District Secretary of BJP. Sugu and others are communists. Politically they are inimical to Chandran. They hacked Chandran to death out of this political animosity. Necessary action may be taken in this respect. The place of occurrence is within the limits of the Panoor Police station."

The High Court, in our opinion, correctly observed that the statement could not be considered as a substantive piece of evidence.

22. The High Court also accepted that the dying declaration in this case may not be sufficient for conviction of the accused. It can, however, be considered for corroboration of the evidence of other witnesses. It has been noticed earlier that PW2 and PW3 had categorically stated that the deceased even though badly injured had stated that the assailants were Suku and others. The High Court was also cautious to ensure that the injured was in a fit state to make the dying declaration. It, therefore, examined the evidence of the doctor who had clearly stated that even after being brutally injured, the deceased could have talked for another 20 minutes.

23. The evidence given by the doctor who conducted the post mortem PW10, was noticed by the High Court minutely. The post mortem certificate Ex.PW7 indicated the following injuries on the deceased :-

1. 4 c.m. x 2 c.m. gaping linear wound on upper scalp (R) side incised.
2. Transverse linear incised wound on top of scalp 8c.m. x 3 c.m. from (L) top parietal region to past the midline of the middle of the scalp cutting the bone.
3. A slashed (RY) eyebrow hanging over the eye with a piece of underlying bone, 7 c.m.
4. ® side of the nose is cut open and hanging (flesh) incise 'U' shaped inverted.
5. (L) car is transversely slashed from the tragus and

through the middle of the pinna into two, 7 c.m. incised wound gracing occiput bone and mastoid.

6. 13 c.m. x 6 c.m. transverse incised wound on the neck at the level of the (L) ear lobe gracing on the mastoid.

7. On the back, (L) side below neck, gaping 7 c.m. x 5 c.m. transverse wound and its tail extends superficially, 8 c.m. more laterally and downward (in L Shape).

8. A linear incised wound 4 c.m. x 3 cm. just below this wound.

9. 4 c.m. x 3 c.m. incised transverse wound 12 c.m. below the neck.

10. 2.5 c.m. long incised wound on skin over (L) shoulder blade.

11. Four linear slashed incised wounds on the back of head with marks on the skull from above downwards (from R to L 10 cm x 3 cm, 8 cm x 2.5 cm, 4.5 cm x 2.5 cm and 7 cm x 6 cm.

12. 11 c.m. long x 8 c.m. deep transverse incised cut on the back of neck at the level of the 5th cervical spine and cutting it and the spinal cord.

13. 12 c.m. long transversely oblique incised wound cutting open the posterolateral left thigh and knee joint 7 c.m. deep exposing the femoral condyle and cutting it.

14. 15 c.m. oblique gaping incised wound on (L) lateral thigh middle, cutting part of the muscles and 4 c.m. deep.

15. 9 c.m. linear cut exposing the (L) shoulder 5 c.m.

deep and cutting the (L) humeral head incising and exposing it.

16. Superficial transverse 5 c.m. long wound on back of (L) upper forearm (incised).

17. 6 c.m. long incised slash separating the ulnar metacarpals of the (L) hand from the wrist 3.5 c.m. deep and oblique.

18. Superficial incised 2.5 c.m. transverse wound over the (L) wrist over the radial styloid.

19. The right cubical fossa is slashed open 7 c.m. oblique incised and 4 c.m. deep.

20. 6 c.m. long through and through cut of ® wrist on its back with opening of skin 2.5 cm. on he ventral aspect in the corresponding oblique direction.

21. Oblique wound 6 c.m. incised exposing the M.C.P. tendons of ® little ring and middle fingers on the back of the ® palm, transverse.

22. Linear contusions dark and in two number 68 c.m. each in length on ® shoulder and transverse dark linear contusion on ® arm 6 c.m. long and 4 c.m.long linear contusion ® mid-forearm back.

23. Minor contusion, abrasions three in number on (L) shoulder, two transverse and one linear.

24. Dark patches (L) flank abdomen (contusion) and on (L) knee, (L) le, ® shin, ® knee and ® Side abdomen.

25. Skull is cut from midline to (L) parietal regions transversely reaching the dura, but without bleeding or injury to the brain.

26. Another 4 cuts on (L) occiput obliquely and over (L) mastoid.

27. Abdomen contains partially digested food materials.

28. Internal viscera pale, intact, including brain matter, liver, lungs, stomach, spleen, viscera and heart."

24. The doctor PW10 had stated that the cause of death was due to bleeding and irreversible shock neural and vascular. He had also stated that Injury Nos. 1, 4, 6, 7, 10, 15, 16, 17 and 21 can be caused by weapon like MO1. Injury Nos. 2, 3, 5, 8 and 9 can be caused by MO1 or a weapon similar to MO1. Injury Nos. 11, 13, 14, 18, 19 and 20 can be caused by MO2. Injury No.12 can be caused by a sharp-edged weapon like and an axe.

25. On specifically being asked, he had stated that it would be possible for the injured to speak even after sustaining the injuries mentioned above. The doctor had stated that after sustaining injury No.12 the victim must have received neural shock for sometime, say for about 5 minutes, and thereafter he would have been able to talk and drink, approximately for another 20 minutes. The doctor also opined after looking at the injuries that the same were caused by persons trained in killing.

26. The High Court also rejected the submissions with regard to the delay in the registration of the FIR or with regard to the delay in transmission of the same to the Magistrate. It was noticed by the High Court that the Judicial Magistrate, Ist Class had initially received the FIR at 11.30 a.m. on 26.5.1996. The incident occurred around 4.45 p.m. on 25.5.1996. The injured was brought to the Government Hospital at 5.40 p.m. The FIS of the father of the deceased was recorded at 7 p.m. It reached Panoor Police Station at 9 p.m. Thereafter, the FIR was registered. It reached the residence of the Judicial Magistrate, Ist Class at 11.30 a.m. on 26.5.1996. The High

Court notices the submission on behalf of the accused that the seal of the court on the FIR was affixed on 29.5.1996. It was, however, observed that the genuineness of the signature of the Magistrate on 26.5.1996 was not questioned by the accused at any time. This apart, it was noticed that the investigating officer was not questioned regarding the authenticity of the signature of the Judicial Magistrate, Ist Class. It was also noticed that 28th was a holiday, being Muharam, therefore, the seal being affixed on 29.5.1996 would not be extraordinary. The High Court also found that in case the recording of the FIR was actually delayed, as suggested by the accused, it would not be necessary to name only one accused person therein. If the FIR was fabricated then all the accused could have been incorporated. In our opinion, it was rightly observed by the High Court that there was no unexplained delay in lodging the FIR and in sending the copy of the same to the Magistrate. In any event, no prejudice has been caused to the accused persons.

27. In our opinion, the evidence given by the wife of the deceased in this case was unimpeachable. It could not be discarded, as stated by the learned senior counsel on the basis that she was an interested witness. If such a wide proposition was to be accepted the evidence of all the witnesses who were relatives of a victim of a violent crime would be rendered unacceptable. Merely because PW1 happens to be the wife of the deceased would not justify her being branded as an interested witnesses. The evidence of the wife is followed by the consistent evidence given by PW2 and PW3. This is further corroborated by the dying declaration made by the injured within minutes of being assaulted. In such circumstances, it would be difficult to accept the submissions of the learned senior counsel that the evidence of the eye-witnesses ought to be disbelieved.

28. In our opinion, the High Court rightly rejected the submission, which was also reiterated before us, that the evidence of PW2 and PW3 should be rejected on the ground that they were chance as well as the partisan witnesses.

29. We may at this stage notice the observations made by this Court in the case of *State of Rajasthan Vs. Smt. Kalki and Another* [(1981) 2 SCC 752] which is as under:-

> "True, it is she is the wife of the deceased, but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested' in the instant case PW1 had no interest in protecting the real culprit, and falsely implicating the respondents."

30. In our opinion, the aforesaid observations are fully applicable to the evidence of the PW1 in this case. Similarly, the evidence of PW2 and PW3 cannot be brushed aside as chance witnesses. It has come in evidence that the deceased was the LIC agent. PW2 wanted to take a loan from the LIC for construction of his house. He, therefore, went to meet the deceased at his house. He was accompanied by his friend PW3. Both of them left the house of the deceased in the circumstances narrated above and clearly witnessed the second assault on the deceased. This Court had occasion to disapprove the attitude of casually branding material witnesses to crimes of violence as chance witnesses in the case of *Sachchey Lal Tiwari Vs. State of U.P.* [(2004) 11 SCC 410]. It was observed as follows:-

> "Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passerby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is

> borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence."

31. In our opinion, these observations of this court are of tremendous relevance given the cultural ethos of this country. For the same reasons, we are unable to accept the submission of the learned senior counsel that the evidence of the PW3 ought to be rejected on the ground that they are partisan witnesses. Merely because PW2 and PW3 are sympathizers of BJP, their evidence cannot be brushed aside. At best, their evidence has to be carefully scrutinized. On such careful scrutiny of the evidence the trial court and the High Court have clearly and in our opinion rightly concluded that the evidence of these witnesses could not be discarded.

32. Now, this brings us to the most important submission made by the learned senior counsel. Mr. Surinder Singh, submitted that since no test identification parade was held, prior to the witnesses deposing in court, the identity of the accused has not been established. Learned counsel has submitted that it is in fact a case of a blind murder. The deceased was a political activist; he had political enemies. The prosecution has unnecessarily dragged in the names of the accused appellants. Learned senior counsel had also pointed out the numerous weaknesses in the investigation of the case. He submitted that the benefit of doubt clearly had to be extended to the accused in the peculiar circumstances of this case. We have carefully examined the aforesaid submissions.

33. Earlier, this Court had the occasion to consider similar submissions in the case of *Ramanbhai Naranbhai Patel Vs. State of Gujarat,* (2000) 1 SCC 358. In that case also, the murder of the husband had been committed in front of the wife.

Justice S.B. Majmudar speaking for the Court observed as follows:

> "……there is direct eyewitness account deposed to by the witness Dhirubhai Mohanbhai (brother of the deceased), witness Dhirubhai Premjibhai, PW 5, the tenant residing in the locality and Dilipbhai, the younger brother of the deceased. These witnesses have clearly deposed that they knew the accused. In fact, Dilipbhai was the person who was involved in the incident of the previous day wherein Accused 1 and his accomplices had a quarrel with him and his supporters. That part of the evidence of these eyewitnesses had remained well sustained on record. *So far as witness Niruben was concerned, she is the wife of the deceased Ramanbhai Mohanbhai. The accused mounted an assault on her husband in her bedroom and even though she might not be knowing the accused earlier, the faces of the accused mounting such an assault and which caused fatal injuries to her husband can easily be treated to have been imprinted in her mind and when she could identify these accused in the Court even in the absence of an identification parade, it could not be said that her deposition was unnatural or she was trying to falsely rope in the present accused by shielding the real assaulters of her husband."* (Emphasis supplied)

In our opinion these observations would be fully applicable to the situation in this case.

34. Undoubtedly, no test identification parade was held in this case. It is also not disputed that the wife and the other eye-witnesses PW 2 and 3 were asked to identify the accused for the first time in the court, some eight and a half years after the incident. We have noticed in detail the manner in which the widow in this case witnessed the brutal murder of her husband, right in front of her eyes in broad day light. In such circumstances, it would be difficult, if not impossible, for her to forget the faces of the assailants. They would be imprinted on

her psyche for ever. She had come face to face with the assailants. The murder was committed in broad day light. She would have no reason whatsoever to falsely implicate the appellants. In court, she had categorically deposed and identified each of the assailants. She has been absolutely truthful and straight forward. It has come in evidence that the accused (A1) lives very near to the house of the deceased. In such circumstances she could easily have said that she had known A1 earlier. There are no embellishments seen in her evidence throughout. The High Court, in our opinion, rightly rejected the submission that non holding of the test identification parade has caused any prejudice to the accused. The evidence of PW1 is fully supported/corroborated by the evidence of PW2 and PW3 on the point of second assault. Further more they have identified all the accused in court. Their identification is further strengthened by the fact that all the accused were known to the two witnesses earlier. Therefore, they were identified by name in court.

35. Upon a due consideration of the entire facts and circumstances of this case, we are of the considered opinion that the judgment of the High Court does not call for any interference. The appeals are dismissed.

N.J. Appeals dismissed.

RAMESH GOBINDRAM (DEAD) THROUGH LRS.
v.
SUGRA HUMAYUN MIRZA WAKF
(Civil Appeal No. 1182 of 2006)

SEPTEMBER 1, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Wakf Act, 1995 – s. 6(5), 7, 83 and 85 – Wakf Tribunal – Jurisdiction of – To decide eviction suit in respect of wakf property – Held: The Act does not provide that the Wakf Tribunal should decide the dispute regarding eviction of tenant in possession of wakf property – Therefore, Eviction suit is maintainable before civil court and not before Wakf Tribunal.

Jurisdiction – Jurisdiction of civil court vis-à-vis Wakf Tribunal constituted under Wakf Act – Determination of – Discussed.

Respondent filed suits seeking eviction of the appellant-tenant, who was occupying a wakf property. Wakf Tribunal holding that it had the jurisdiction to decide the issue, decreed the eviction suits. In revision petitions, the High Court affirmed the decree.

In the instant appeals, the question for consideration was whether the Wakf Tribunal constituted u/s. 83 of the Wakf Act, 1995 was competent to entertain and adjudicate upon disputes regarding eviction of the appellants who were occupying the wakf property.

Allowing the appeals, the Court

HELD: 1. The well-settled rule is that the civil courts have the jurisdiction to try all suits of civil nature except those entertainment whereof is expressly or impliedly barred. The jurisdiction of civil courts to try suits of civil

nature is very expansive. Any statute which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a civil court. Any such exception cannot be readily inferred by the courts. The court would lean in favour of a construction that would uphold the retention of jurisdiction of the civil courts and shift the onus of proof to the party that asserts that civil court's jurisdiction is ousted. Even in cases where the statute accords finality to the orders passed by the tribunals, the court will have to see whether the tribunal has the power to grant the reliefs which the civil courts would normally grant in suits filed before them. If the answer is in negative exclusion of the civil courts jurisdiction would not be ordinarily inferred. [Paras 5 and 6] [954-H; 955-A-D]

Rajasthan SRTC v. Bal Mukund Bairwa (2), **(2009) 4 SCC 299;** *Pabbojan Tea Co. Ltd. v. Dy. Commr* **(1968) 1 SCR 260;** *Ramesh Chand Ardawatiya v. Anil Panjwani* AIR 2003 SC 2508; *Dhulabhai v. State of M.P.* **(1968) 3 SCR 662;** *Mafatlal Industries Ltd. v. Union of India* **(1997) 5 SCC 536;** *State of A.P. v. Manjeti Laxmi Kantha Rao* **(2000) 3 SCC 689**; *Dhruv Green Field Ltd. v. Hukam Singh and Ors.* **(2002) 6 SCC 416;** *Dwarka Prasad Agarwal v. Ramesh Chandra Agarwala* **AIR 2003 SC 2696;** *State of Tamil Nadu v. RamalingaSamigal Madam* **AIR 1986 SC 794 – relied on.**

2. In the instant case, the respondent-Wakf Board who claims exclusion of jurisdiction of civil court has not discharged the onus that lay upon it. From a conjoint reading of the provisions of Sections 6 and 7 of the Wakf Act, 1995, it is clear that the jurisdiction to determine whether or not a property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf, rests entirely with the tribunal and no suit or other proceeding can be instituted or commenced in a civil court in relation to any such question after the commencement of the Act. Under

Section 6 r/w Section 7, the institution of the civil court is barred only in regard to questions that are specifically enumerated therein. The bar is not complete so as to extend to other questions that may arise in relation to the wakf property. [Paras 8 and 12] [956-A-B; 959-F-H; 960-A]

Board of Muslim Wakfs Rajasthan v. Radha Kishan and Ors. **(1979) 2SCC 468;** *Punjab Wakf Board v. Gram Panchayat alias Gram Sabha* **(2000) 2 SCC 121 – relied on.**

3. A plain reading of s. 85 would show that the civil court's jurisdiction is excluded only in cases where the matter in dispute is required under the Act to be determined by the tribunal. The words "which is required by or under this Act to be determined by tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the civil court. Whenever a question arises whether "any dispute, question or other matter" relating to "any wakf or wakf property or other matter" falls within the jurisdiction of a civil court, the answer would depend upon whether any such dispute, question or other matter is required under the Act to be determined by the tribunal constituted under the Act. If the answer be in the affirmative, the jurisdiction of the civil court would be excluded qua such a question, for in that case the tribunal alone can entertain and determine any such question. The bar of jurisdiction contained in Section 85 is in that sense much wider than that contained in Section 6(5) r/w Section 7 of the Wakf Act. While the latter bars the jurisdiction of the civil court only in relation of questions specified in Sections 6(1) and 7(1), the bar of jurisdiction contained in Section 85 would exclude the jurisdiction of the civil courts not only in relation to matters that specifically fall in Sections 6 and 7 but also other matters required to be determined by a tribunal under the Act. [Para 16] [962-D-H; 963-A-B]

4. Section 85 of the Act clearly bars jurisdiction of the civil courts to entertain any suit or proceedings in relation to orders passed by or proceedings that may be commenced before the tribunal. It follows that although Section 85 is wider than what is contained in Sections 6 and 7 of the Act, the exclusion of jurisdiction of civil courts even u/s. 85 is not absolute. It is limited only to matters that are required by the Act to be determined by a tribunal. So long as the dispute or question raised before the civil court does not fall within four corners of the powers vested in the tribunal, the jurisdiction of the former to entertain a suit or proceedings in relation to any such question cannot be said to be barred. [Para 18] [963-H; 964-A-C]

5. Section 83 of the Act, does not deal with the exclusion of the jurisdiction of the civil courts to entertain civil suits generally or suit of any particular class or category. The exclusion of civil court's jurisdiction is dealt with by Section 6(5) and Section 85 of the Act. To interpret Section 83 as a provision that excludes the jurisdiction of the civil courts is not, therefore, legally correct, for that provision deals with constitution of tribunals, the procedure which the tribunals would follow and matters relating thereto. There is nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the civil courts 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. 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. [Paras 19 and

21] [964-E-G; 967-D-G]

6. 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 the Act to be determined by the tribunal. 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. [Para 21] [967-G-H; 968-A-B]

7. In the instant cases, the Act does not provide for any proceedings before the Wakf 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. [Para 22] [968-B-C]

T. Shivalingam v. A.P. Wakf Tribunal, Hyderabad and Ors. **1999 (3) ALT 602;** *P. Rama Rao and Ors. v. High Court of Andhra Pradesh, rep. by Registrar (Vigilance) and Ors.* **2000 (1) ALT 210;** *Jai Bharat Co-operative Housing Society Ltd. v. A.P. State Wakf Board Hyderabad* **2000 (5) ALD 743;** *Syed Muneer v. Chief Executive Officer and 5 Ors.* **2001 (4) ALD 430;** *Anjuman A. Burhani v. Daudi Bohra Jamaet, Registered Society and Anr.* **AIR 2009 Raj. 150;** *Wakf Imambara Imlipura v. Smt. Khursheeda Bi and Ors.* **AIR 2009**

MP238; *Aliyathammada Beethathabiyyapura Pookoya Haji v. Pattakkal Cheriyakoya and Ors.* **AIR 2003 Ker. 366;** *Surinder Singh v. Punjab Wakf Board and Ors.* **CR No.32 of 2009(1) – disapproved.**

St. Gregorious Orthodox Cathedral, Bangalore v. Aga Ali Asgar Wakf, Bangalore and Anr. **2008 (6) Kar LJ 358;** *Saleem v. PA Kareem and Ors.* **2008 (2) CTC 492 (Mad);** *Suresh Kumar v. Managing Committee* **2009 INDLAW All 1770;** *Abdul Kadar @ Babbu s/o Ismail v. Masjid Juma Darwaja a registered Public Trust through its Secretary Manzoor Mohammad z/o Zahoor Mohammad* **2009 (1) BomCR 498 – affirmed.**

Case Law Reference:

1999 (3) ALT 602	**Disapproved**	**Para 2**
2000 (1) ALT 210	**Disapproved**	**Para 2**
2000 (5) ALD 743	**Disapproved**	**Para 2**
2001 (4) ALD 430	**Disapproved**	**Para 2**
AIR 2009 Raj.150	**Disapproved**	**Para 2**
AIR 2009 MP 238	**Disapproved**	**Para 2**
AIR 2003 Ker. 366	**Disapproved**	**Para 2**
CR No.32 of 2009(1)	**Disapproved**	**Para 3**
2008 (6) Kar LJ 358	**Affirmed**	**Para 3**
2008 (2) CTC 492 (Mad)	**Affirmed**	**Para 3**
2009 INDLAW All 1770	**Affirmed**	**Para 3**
2009 (1) BomCR 498	**Affirmed**	**Para 3**
(2009) 4 SCC 299	**Relied on**	**Para 6**
(1968) 1 SCR 260	**Relied on**	**Para 7**

AIR 2003 SC 2508	**Relied on**	**Para 7**
(1968) 3 SCR 662	**Relied on**	**Para 7**
(1997) 5 SCC 536	**Relied on**	**Para 7**
(2000) 3 SCC 689	**Relied on**	**Para 7**
(2002) 6 SCC 416	**Relied on**	**Para 7**
AIR 2003 SC 2696	**Relied on**	**Para 7**
AIR 1986 SC 794	**Relied on**	**Para 7**
(1979) 2 SCC 468	**Relied on**	**Para 13**
(2000) 2 SCC 121	**Relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1182 of 2006.

From the Judgment & Order dated 03.02.2005 and 04.03.2005 of the High Court of Andhra Pradesh at Hyderabad in Civil Revision No. 3932 of 2004 and Civil Misc. Petition No. 1022 of 2005.

WITH

C.A. Nos. 1183 of 2006 and 3605 of 2008.

P.S. Narasimha, Yogesh Jagia, Hetu Arora,Amit Sood, Parmeshwar, Nikhil Mehra, Shishir Deshpande, Amit Yadav (for Sujata Kurdukar), R.B. Masodkaqr, Sanjay Hegde, A. Rasheed Qureshi, Dharmendra Kumar Sinha, Anis Ahmed Khan, Shoaib Ahmad Khan, Pratap Venugopal, Surekha Raman, Dileep P. for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These three appeals by special leave arise out of three different orders passed by the High Court of

Andhra Pradesh whereby revision petitions filed by the appellants against the orders of A.P. Wakf Tribunal have been dismissed and the orders of eviction passed by the Tribunal affirmed. Since the appeals raise a common question of law for our determination the same were heard together and shall stand disposed of by this common order. The question is whether the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 was competent to entertain and adjudicate upon disputes regarding eviction of the appellants who are occupying different items of what are admittedly Wakf properties. The Wakf Tribunal before whom the suits for eviction of the tenants were filed answered the question regarding its jurisdiction in the affirmative and decreed the suit filed against the appellant. Aggrieved by the said orders the appellants filed revision petitions before the High Court of Andhra Pradesh, inter alia, contending that the Tribunal was in error in assuming jurisdiction and directing their eviction. Dismissal of the Revision Petitions by the High Court has led to the filing of the present appeals as already noticed above.

2. Whether or not the Wakf Tribunal can entertain and adjudicate upon a dispute regarding eviction of a tenant holding wakf property under the Wakf Board, would depend upon the scheme of the Wakf Act, 1995 and express or implied exclusion of the jurisdiction of the Civil Courts to entertain any such dispute. If the Act excludes the jurisdiction of the Civil Courts whether such exclusion is absolute and all pervasive or limited only to a particular class of disputes is also an incidental question that may have to be addressed. There is a cleavage in the judicial opinion expressed on these questions by different High Courts in the country. The High Court of Andhra Pradesh has in *T. Shivalingam v. A.P. Wakf Tribunal, Hyderabad & Ors.* 1999 (3) ALT 602, *P. Rama Rao & Ors. v. High Court of Andhra Pradesh, rep. by Registrar (Vigilance) and Ors.* 2000 (1) ALT 210, *Jai Bharat Co-operative Housing Society Ltd. v. A.P. State Wakf Board, Hyderabad* 2000 (5) ALD 743 and *Syed Muneer v. Chief Executive Officer and 5 Ors.* 2001 (4)

ALD 430 taken the view that the Tribunal established under Section 83 of the Wakf Act is competent to entertain and adjudicate upon all kinds of disputes so long as the same relate to any wakf property. So also the High Court of Rajasthan in *Anjuman A. Burhani v. Daudi Bohra Jamaet, Registered Society and Anr.* AIR 2009 Raj. 150 has taken the view that, the very purpose of creating a Tribunal under the Wakf Act would be defeated if the jurisdiction of the Tribunal is construed in a narrow sense. A similar view has been expressed by the High Court of Madhya Pradesh in *Wakf Imambara Imlipura v. Smt. Khursheeda Bi & Ors.* AIR 2009 MP 238. The High Court of Kerala in *Aliyathammada Beethathabiyyapura Pookoya Haji v. Pattakkal Cheriyakoya & Ors.* AIR 2003 Ker. 366 and the High Court of Punjab & Haryana in *Surinder Singh v. Punjab Wakf Board & Ors.,* CR No.32 of 2009(1) have also taken a similar view.

3. A contrary view has been expressed by the High Court of Karnataka in *St. Gregorious Orthodox Cathedral, Bangalore v. Aga Ali Asgar Wakf, Bangalore and Anr.* 2008 (6) KarLJ 358 and by the High Court of Madras in *Saleem v. PA Kareem & Ors.* 2008 (2) CTC 492 (Mad). The High Court of Allahabad in *Suresh Kumar v. Managing Committee* 2009 INDLAW All 1770 has concurred with that line of reasoning. The High Court of Bombay in *Abdul Kadar @ Babbu s/o Ismail v. Masjid Juma Darwaja a registered Public Trust through its Secretary Manzoor Mohammad z/o Zahoor Mohammad* 2009 (1) BomCR 498 has also taken the view that in cases where the dispute is not regarding the nature of the property, it is a civil dispute which can be determined only by the competent Civil Court and not by the Tribunal constituted under Section 83 of the Act. We shall presently advert to the reasoning and the views taken by the High Courts in the decisions mentioned above. But before we do so, we need to briefly refer to the scheme of the Wakf Act, 1995 and the historical background in which the same was enacted.

4. Wakfs and matters relating thereto were for a long time governed by the Wakf Act, 1954. The need for a fresh legislation on the subject was, however, felt because of the deficiencies noticed in the working of the said earlier enactment especially those governing the Wakf Boards, their power of superintendence and control over the management of individual wakfs. Repeated amendments to the 1954 Act, having failed to provide effective answers to the questions that kept arising for consideration, the Parliament had to bring a comprehensive legislation in the form of Wakf Act 1995 for better administration of wakfs and matters connected therewith or incidental thereto. Chapter I of the 1995 Act deals with Preliminaries like definitions, title, extent and commencement and application of this Act. Chapter II provides for preliminary survey of wakfs, publication of list of wakfs, disputes regarding wakfs and also the powers of the Tribunal to determine such disputes. Chapter III deals with Central Wakf Council while Chapter IV deals with establishment of Boards and their functions. Chapter V, VI and VII regulate the registration of Wakfs and maintenance of accounts thereof and the finances of the Wakf Board. Chapter VIII, with which the controversy at hand is more intimately connected deals with judicial proceedings and, inter alia, provides for constitution of tribunals and adjudication of disputes by them as well as exclusion of jurisdiction of Civil Courts. Chapter IX is a miscellaneous chapter that confers power on the Central Government to regulate the secular activities of wakfs and empowers the State Government to issue directions apart from other provisions like establishment and reorganization and establishment of boards.

5. Before we take up the core issue whether the jurisdiction of Civil Court to entertain and adjudicate upon disputes regarding eviction of wakf property stands excluded under the Wakf Act we may briefly outline the approach that the Courts have to adopt while dealing with such questions. The well-settled rule in this regard is that the Civil Courts have the jurisdiction to try all suits of civil nature except those

entertainment whereof is expressly or impliedly barred. The jurisdiction of Civil Courts to try suits of civil nature is very expansive. Any statue which excludes such jurisdiction is, therefore, an exception to the general rule that all disputes shall be triable by a Civil Court. Any such exception cannot be readily inferred by the Courts. The Court would, lean in favour of a construction that would uphold the retention of jurisdiction of the Civil Courts and shift the onus of proof to the party that asserts that Civil Court's jurisdiction is ousted.

6. Even in cases where the statute accords finality to the orders passed by the Tribunals, the Court will have to see whether the Tribunal has the power to grant the reliefs which the Civil Courts would normally grant in suits filed before them. If the answer is in negative exclusion of the Civil Courts jurisdiction would not be ordinarily inferred. In *Rajasthan SRTC v. Bal Mukund Bairwa (2),* (2009) 4 SCC 299, a three-Judge Bench of this Court observed:

> "There is a presumption that a civil court has jurisdiction. Ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or tribunal acts without jurisdiction."

7. To the same effect are the decisions of this Court in *Pabbojan Tea Co. Ltd. v. Dy. Commr* (1968) 1 SCR 260, *Ramesh Chand Ardawatiya v. Anil Panjwani* AIR 2003 SC 2508, *Dhulabhai v. State of M.P.* (1968) 3 SCR 662, *Mafatlal Industries Ltd. v. Union of India,* (1997) 5 SCC 536, *State of A.P. v. Manjeti Laxmi Kantha Rao* (2000) 3 SCC 689, *Dhruv Green Field Ltd. v. Hukam Singh and Ors.* (2002) 6 SCC 416, *Dwarka Prasad Agarwal v. Ramesh Chandra Agarwala,* AIR 2003 SC 2696 *and State of Tamil Nadu v. Ramalinga Samigal Madam* AIR 1986 SC 794.

8. Let us now see whether the respondent-Wakf Board who claims exclusion of jurisdiction of Civil Court has discharged the onus that lay upon it. Section 6 of the Act which bears direct relevance to that question may at this stage be extracted:

"**Section 6. Disputes regarding wakfs**.-

(1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein 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 wakfs.

Explanation-For the purposes of this section and Section 7, the expression "any person interested therein", shall, in relation to any property specified as wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under Section 4.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf 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 wakfs shall, unless it is modified in pursuance of a decision of 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)."

9. A plain reading of sub-section (5) of Section 6 (supra) would show that the Civil Court's jurisdiction to entertain any suit or other proceedings stands specifically excluded in relation to any question referred to in sub-section (1). The exclusion it is evident from the language employed is not absolute or all pervasive. It is limited to the adjudication of the question (a) whether a particular property specified as wakf property in the list of wakfs is or is not a wakf property, and (b) whether a wakf specified in such list is a Shia wakf or a Sunni wakf. The Board or the mutawalli of the wakf or any person interested in the wakf is competent to institute a suit in a Tribunal for a decision on the above question or questions, which decision shall then be final provided that no such suit can be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.

10. We may at this stage refer to Section 7 of the Act which provides for the forum for determination of questions referred to therein and arising after the commencement of this Act. What is important is that the questions referred to in Section 7(1) are the very same questions that are referred to in Section 6(1) with the only difference that Section 7(1) refer to the said questions

arising after the commencement of the Act. Section 7 is extracted below:

"**Section 7. Power of Tribunal to determine disputes regarding wakfs**.-

(1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested 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 a case of the list of wakfs 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 wakfs; and

(b) in the case of the list of wakfs 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 entertained by Tribunal 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 wakf 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 wakfs 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."

11. Second proviso to Section 7(1) accords finality to the judgments of the Civil Court in suits instituted before such commencement. Sub-section (5) to Section 7 excludes from the jurisdiction of the Tribunal any dispute which is the subject matter of a suit in a Civil Court instituted before the commencement of the Act.

12. From a conjoint reading of the provisions of Sections 6 and 7 (supra) it is clear that the jurisdiction to determine whether or not a property is a wakf property or whether a wakf is a Shia wakf or a Sunni wakf rests entirely with the Tribunal and no suit or other proceeding can be instituted or commenced in a Civil Court in relation to any such question after the commencement of the Act. What is noteworthy is that under Section 6 read with Section 7 (supra) the institution of the Civil Court is barred only in regard to questions that are specifically enumerated therein. The bar is not complete so as to extend

to other questions that may arise in relation to the wakf property.

13. We may at this stage usefully digress from the core issue only to highlight the fact that Sections 6(1) and the proviso thereto has fallen for interpretation of this Court on a few occasions. In *Board of Muslim Wakfs Rajasthan v. Radha Kishan and Ors.* (1979) 2 SCC 468 one of the questions that fell for determination was, who are the parties that could be taken to be concerned in a proceeding under sub-section(1) of Section 6 of the Act. This Court held that under Section 6(1) the Board or the mutawalli of the wakf or any person interested therein is entitled to file a suit but the word "therein" following the expression "any person interested" must necessarily refer to the word "wakf" which immediately precedes it. The object underlying the proviso observed, this Court was to confine the power to file a suit to the mutawalli and persons interested in the Wakf. It did not extend to persons who are not persons interested in the wakf. Consequently the right, title and interest of a stranger, (a non-Muslim), to the wakf in a property cannot be put in jeopardy merely because that property is included in the list of wakfs. The special rule of limitation prescribed by the proviso to Section 6(1) was itself held inapplicable to him and a suit for declaration of title to any property included in the list of wakfs held maintainable even after the expiry of the period of one year. The following passage from the decision is in this regard apposite:

> "The question that arises for consideration, therefore, is as to who are the parties that could be taken to be concerned in a proceeding under sub-section (1) of Section 6 of the Act, and whether the list published under sub-section (2) of Section 5 declaring certain property to be wakf property, would bind a person who is neither a mutawalli nor a person interested in the wakf.
>
> The answer to these questions must turn on the true meaning and construction of the word 'therein' in the expression 'any person interested therein' appearing in

sub-section (1) of Section 6. In order to understand the meaning of the word 'therein' in our view, it is necessary to refer to the preceding words 'the Board or the mutawalli of the wakf'. The word 'therein' must necessarily refer to the 'wakf' which immediately precedes it. It cannot refer to the 'wakf property'. Sub-section (1) of Section 6 enumerates the persons who can file suits and also the questions in respect of which such suits can be filed. In enumerating the persons who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and 'any person interested therein', thereby necessarily meaning any person interested in the wakf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore, be logical and reasonable to infer that its provisions empower only those who are interested in the wakfs, to institute suits. Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub-section (1) of Section 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub-section (2) of Section 5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises."

14. To the same effect is the decision of this Court in *Punjab Wakf Board v. Gram Panchayat Alias Gram Sabha* (2000) 2 SCC 121.

15. The exclusion of the jurisdiction of the Civil Courts to adjudicate upon disputes whether a particular property specified in the wakf list is or is not a wakf property or whether

a wakf specified in list is a Shia wakf or a Sunni wakf is clear and presents no difficulty whatsoever. The difficulty, however, arises on account of the fact that apart from Section 6(5) which bars the jurisdiction of the Civil Courts to determine matters referred to in Section 6(1), Section 85 of the Act also bars the jurisdiction of the Civil Courts to entertain any legal proceedings in respect of any dispute, question or matter relating to a wakf property. Section 85 of the Act reads:

> "85. **Bar of jurisdiction of Civil Courts** – No suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal."

16. A plain reading of the above would show that the Civil Court's jurisdiction is excluded only in cases where the matter in dispute is required under the Act to be determined by the Tribunal. The words "which is required by or under this Act to be determined by Tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the Civil Court. Whenever a question arises whether "any dispute, question or other matter" relating to "any wakf or wakf property or other matter" falls within the jurisdiction of a Civil Court the answer would depend upon whether any such dispute, question or other matter is required under the Act to be determined by the Tribunal constituted under the Act. If the answer be in the affirmative, the jurisdiction of Civil Court would be excluded qua such a question, for in that case the Tribunal alone can entertain and determine any such question. The bar of jurisdiction contained in Section 85 is in that sense much wider than that contained in Section 6(5) read with Section 7 of the Wakf Act. While the latter bars the jurisdiction of the Civil Court only in relation of questions specified in Sections 6(1) and 7(1), the bar of jurisdiction contained in Section 85 would exclude the jurisdiction of the Civil Courts not only in relation to matters that

specifically fall in Sections 6 and 7 but also other matters required to be determined by a Tribunal under the Act. There are a host of such matters in which the Tribunal exercises original or appellate jurisdiction. To illustrate the point we may usefully refer to some of the provisions of the Act where the bar contained in the said section would get attracted. Section 33 of the Act deals with the power of inspection by a Chief Executive Officer or person authorized by him. In the event of any failure or negligence on the part of a mutawalli in the performance of his duties leading to any loss or damage, the Chief Executive Officer can with the prior approval of the Board pass an order for the recovery of the amount or property which has been misappropriated, misapplied or fraudulently retained. Sub-section (4) of Section 33 then entitles the aggrieved person to file an appeal to the Tribunal and empowers the Tribunal to deal with and adjudicate upon the validity of the orders passed by the Chief Executive Officer.

17. Similarly under Section 35 the Tribunal may direct the mutawalli or any other person concerned to furnish security or direct conditional attachment of the whole or any portion of the property so specified.

18. Section 47 of the Act requires the accounts of the wakfs to be audited whereas Section 48 empowers the Board to examine the audit report, and to call for an explanation of any person in regard to any matter and pass such orders as it may think fit including an order for recovery of the amount certified by the auditor under Section 47(2) of the Act. The mutawalli or any other person aggrieved by any such direction has the right to appeal to the Tribunal under Section 48. Similar provisions giving powers to the Wakf Board to pass orders in respect of matters stipulated therein are found in Sections 51, 54, 61, 64, 67, 72 and 73 of the Act. Suffice it to say that there are a host of questions and matters that have to be determined by the Tribunal under the Act, in relation to the wakf or wakf property or other matters. Section 85 of the Act clearly bars

jurisdiction of the Civil Courts to entertain any suit or proceedings in relation to orders passed by or proceedings that may be commenced before the Tribunal. It follows that although Section 85 is wider than what is contained in Sections 6 and 7 of the Act, the exclusion of jurisdiction of Civil Courts even under Section 85 is not absolute. It is limited only to matters that are required by the Act to be determined by a Tribunal. So long as the dispute or question raised before the Civil Court does not fall within four corners of the powers vested in the Tribunal, the jurisdiction of the former to entertain a suit or proceedings in relation to any such question cannot be said to be barred.

19. The High Courts of Andhra Pradesh, Rajasthan, Madhya Pradesh, Punjab and Haryana have in the decisions to which we have made reference in the earlier part of this judgment taken the view that the jurisdiction of the Civil Courts is barred in respect of disputes that concerns with any wakf or wakf property. The decisions rendered by these High Courts draw support for that conclusion from Section 83 of the Wakf Act, 1995. The language employed in Section 83 of the Act has been understood to be so wide as to include any dispute, question or other matter relating to a wakf or wakf property. Section 83 of the Act, however, does not deal with the exclusion of the jurisdiction of the Civil Courts to entertain civil suits generally or suit of any particular class or category. The exclusion of Civil Court's jurisdiction is dealt with by Section 6(5) and Section 85 of the Act. To interpret Section 83 as a provision that excludes the jurisdiction of the Civil Courts is not, therefore, legally correct, for that provision deals with constitution of Tribunals, the procedure which the Tribunals would follow and matters relating thereto. It reads:

"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 wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli person interested in a wakf 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 wakf.

(3) Where any application made under sub- section (1) relates to any wakf 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 wakf 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 wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf 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 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, and the appointment of every such person may be made either by name or by designation.

(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 he 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."

20. It is clear from sub-section(1) above that the State Government is empowered to establish as many Tribunals as it may deem fit for the determination of any dispute, question

or other matter relating to a wakf or wakf property under the Act and define the local limits of their jurisdiction. Sub-section (2) of Section 83 permits any mutawalli or other person interested in a wakf or any person aggrieved of an order made under the Act or the rules framed thereunder to approach the Tribunal for determination of any dispute, question or other matter relating to the wakf. What is important is that the Tribunal can be approached only if the person doing so is a mutawalli or a person interested in a wakf or aggrieved by an order made under the Act or the rules. The remaining provisions of Section 83 provide for the procedure that the Tribunal shall follow and the manner in which the decision of a Tribunal shall be executed. No appeal is, however, maintainable against any such order although the High Court may call for the records and decide about the correctness, legality or propriety of any determination made by the Tribunal.

21. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the Civil Courts extends 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. 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. 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.

22. 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. The contrary view expressed by the Tribunal and the High Court of Andhra Pradesh is not, therefore, legally sound. So also the view taken by the High Courts of Rajasthan, Madhya Pradesh, Kerala and Punjab and Haryana in the decisions referred to earlier do not declare the law correctly and shall to the extent they run counter to what we have said hereinabove stand overruled. The view taken by the High Courts of Allahabad, Karnataka, Madras and Bombay is, however, affirmed.

23. In the result these appeals succeed and are hereby allowed. The impugned orders passed by the High Court and those passed by the Wakf Tribunal shall stand set aside and the suit filed by the respondent-Wakf Board for the eviction of the appellants dismissed leaving the parties to bear their own costs. We make it clear that this order shall not prevent the Wakf Board from instituting, if so advised, appropriate civil action before the competent Civil Court for redress in accordance with law. No costs.

K.K.T Appeals allowed.

GEETA DEVI & ORS.
v.
PURAN RAM RAIGAR & ANR.
(Civil Appeal No. 7390 of 2010)

SEPTEMBER 6, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Code of Civil Procedure, 1908:

s.100-A – No further appeal in certain cases – Appeal against order of single Judge of High Court arising out of award of Motor Accident Claims Tribunal – Maintainability of – HELD: Division Bench of High Court rightly held that the appeal would not lie in view of s.100-A – However, dismissal of the instant appeal by Supreme Court will not prevent the appellants from filing an SLP directly against the judgment of single Judge of the High Court, if so advised, subject to all just exception including limitation – Constitution of India, 1950 – Article 136 .

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7390 of 2010.

From the Judgment & Order dated 5.7.2007 of the High Court of Judicature at Rajasthan at Jaipur Bench, Jaipur in D.B. Civil Special Appeal No. 10 of 2007 in S.B. Civil Misc. Appeal No. 2777 of 2003.

Mukesh Sharma (for Rameshwar Prasad Goyal) for the Appellants.

A.K. De, R. Dwivedi (for Debasis Misra), Mohan Pandey for the Respondents.

The following Order of the Court was delivered

ORDER

Leave granted.

Heard learned counsel for the appearing parties.

This Appeal has been filed against the judgment and order dated 05th July, 2007 passed by the Division Bench of the High Court of Rajasthan, Jaipur Bench, Jaipur in D.B.Civil Special Appeal No. 10 of 2007.

In our opinion, the Division Bench of the High Court has rightly held that the appeal against the order of the learned Single Judge dated 07th August, 2006 did not lie in view of Section 100-A, CPC. The learned Single Judge had decided the Misc. Appeal No. 2777/2003 against the award of the Motor Accident Claims Tribunal. In our opinion, this intra court appeal in the High Court was not maintainable in view of Section 100-A, CPC notwithstanding anything in the High Court Rules or the Letters Patent to the contrary. ˇHence, the appeal was rightly dismissed by the Division bench of the High Court and this appeal is, therefore, -2- dismissed. However, dismissal of this appeal will not prevent the appellants from filing a S.L.P. directly against the judgment of the learned Single Judge dated 07th August, 2006 dismissing the Misc. Appeal arising out of the impugned award dated 20th September, 2003 passed by the Motor Accident Claims Tribunal, Shahpura, District Jaipur in Claim Petition No. 177/2002, if so advised and subject to all just exceptions including limitation. No costs.

R.P. Appeals dismissed.

KALABHARATI ADVERTISING
v.
HEMANT VIMALNATH NARICHANIA AND ORS.
(Civil appeal No. 7349-50 of 2010)

SEPTEMBER 06, 2010

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Constitution of India, 1950:

Article 226 – The forum of the writ court cannot be used for the purpose of giving interim relief as the only and final relief to any litigant – Interim order.

Withdrawal of a petition – It is not permissible for a party filing a writ petition, to obtain certain orders during the pendency of the petition and then withdraw the petition without getting proper adjudication of the issue involved therein – In such a situation, the benefit of interim relief automatically gets withdrawn/neutralized on withdrawal of the said petition – Court should also pass express order neutralising the effect of all interim/consequential orders – Maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case – Maxim – Doctrine of restitution – Doctrine of merger.

Article 136 – If pursuant to directions of the High Court, Municipal Corporation passes an order then that order can be challenged in the Supreme Court.

Interim order:

If the court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the said party to that forum, it should not grant any interim relief in favour of such a litigant.

Review:

Review – Maintainability of – Held: Not maintainable in absence of statute/rules granting an express power of review.

Review – Held: Is a statutory remedy – Court cannot confer jurisdiction of review upon an authority – On facts, the High Court permitted the Corporation to withdraw its earlier order and gave liberty to it to pass fresh orders – Pursuant thereto, the Corporation recalled its earlier order and reviewed the same without assigning any reason and without giving opportunity to be heard to the parties – The order passed by the Corporation stood vitiated for not recording reasons and violating the principles of natural justice – It was obligatory on the part of the Corporation to explain as to what was the material on record on the basis of which the earlier order was changed – Administrative law – Jurisdiction – Malice – Natural justice.

Administrative law:

Statutory authority – Legal malice – Held: State is under obligation to act fairly without ill will or malice-in fact or in law – On facts, order of Municipal Corporation recalling its earlier order and reviewing the same without assigning any reasons and without giving opportunity of hearing to parties, establishes the allegation of malice – Malice – Natural justice.

Words and phrases:

"Legal malice" or "malice in law" – Meaning of.

'withdrawal' – Meaning of.

The appellant-firm was carrying on a business of advertisement hoardings in the city of Mumbai and was permitted to erect the hoardings in respondent no.13-Society. A Committee was constituted by the High Court in a writ petition against the Municipal Corporation challenging the grant of hoardings in Mumbai on the ground of various violations of guidelines issued by the

Corporation for the said purpose. The Committee found that 266 hoardings including that of the appellant were in violation of the guidelines. The High Court directed the aggrieved parties to file representations before the Statutory Authority. Accordingly, the appellant made a representation before the Municipal Commissioner. The Commissioner disposed of the representation on 6.4.2004 directing the appellant to apply to Chief Engineer for condonation of compulsory open space clause of guidelines with an observation that regularisation of the hoardings would be subject to the outcome of the writ petition. Thereafter the appellant made a representation before the competent authority. The authority examined the case and was of the view that there was no violation of the said guideline.

Some dispute arose between the Society and few of its members, who raised certain objections regarding the erection of the hoardings. The members approached the Co-operative Court challenging the grant of permission to erect the hoardings to the appellant and also made an application for interim relief. However, the Co-operative Court dismissed the application for interim relief. Aggrieved, respondent nos.1 to 5, the members of the Society, filed a writ petition before the High Court against the Society and the appellant, praying for cancellation of the permission granted in favour of the appellant. During the course of hearing of the said writ petition, on 4.2.2008, the Municipal Commissioner filed an affidavit to withdraw the earlier order approving the erection and for permission to pass a fresh order in accordance with law. The High Court accepted the said affidavit and permitted the Corporation to withdraw its earlier order and gave liberty to pass fresh orders without giving an opportunity of hearing to the appellant or to the Society. In pursuance of the said order, a fresh order was passed by the respondent-Corporation on 11.2.2008, not approving the

erection of hoarding which had earlier been approved. Moreover, respondent no. 1 to 5 were permitted to withdraw the writ petition by order dated 13.2.2008. The instant appeals were filed challenging the order dated 4.2.2008 and 13.2.2008 passed by the High Court.

Allowing the appeals, the Court

HELD: 1.1. It is a settled legal proposition that the forum of the writ court cannot be used for the purpose of giving interim relief as the only and the final relief to any litigant. If the court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the said party to that forum, it should not grant any interim relief in favour of such a litigant for an interregnum period till the said party approaches the alternative forum and obtains interim relief. It is settled proposition that an order of withdrawal of a suit does not amount to a decree of the court, which can be executed. It is not permissible for a party to file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefits of the interim orders or consequential orders passed in pursuance of the interim order passed by the writ court would continue. The benefit of the interim relief automatically gets withdrawn/neutralized on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after loosing the case in the court. The court should also pass order expressly neutralizing the effect of all consequential orders passed in pursuance of the interim order passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits. [Paras 22-24] [980-F-H; 981-A-F]

State of Orissa v. Madan Gopal Rungta **AIR 1952 SC 12;** *Amarsarjit Singh v. State of Punjab* **AIR 1962 SC 1305;** *State of Orissa v. Ram Chandra Dev* **AIR 1964 SC 685;** *State of Bihar v. Rambalak Singh "Balak" & Ors.* **AIR 1966 SC 1441;** *Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke & Ors.* **AIR 1975 SC 2238;** *Kandapazha Nadar & Ors. v. Chitraganiammal & Ors.* **AIR 2007 SC 1575;** *Abhimanyoo Ram v. State of U.P.* **(2008) 17 SCC 73 – relied on.**

1.2. "Withdrawal" means "to go away or retire from the field of battle or any contest." Thus, the word 'withdrawal' is indicative of the voluntary and conscious decision of a person. Therefore, if respondent Nos. 1 to 5 voluntarily abandoned their claim withdrawing the writ petition, they cannot be permitted to take any benefit of the orders passed by the High Court or the statutory authority in pursuance thereof. Once the foundation is removed, the super-structure is bound to fall. Interim relief is granted only in aid of and as ancillary to the main relief which may be available to the party at the time of final adjudication of the case by the court. In case the orders passed by the High Court and, consequently, by the Corporation are accepted to be in effect till date, it would be tantamount to allowing the writ petition without any adjudication on the issues involved therein. After obtaining interim relief, a party cannot avoid final adjudication of the dispute on merit and claim that he would enjoy the fruits of interim relief even after withdrawal/dismissal of the case. Law certainly would not permit such a course. Therefore, all orders passed by the High Court and the statutory authority stood washed away on withdrawal of the said writ petition and the said writ petitioners cannot claim any benefit of either of the same. [para 32] [994-C-G]

1.3. No litigant can derive any benefit from a mere pendency of a case in a court of law, as the interim order

always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the Court. The fact that the case is found ultimately devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim "*Actus Curiae neminem gravabit*", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation, the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. [Para 15] [987-B-D]

Dr. A.R. Sircar v. State of Uttar Pradesh & Ors. **1993 Supp. (2) SCC 734;** *Shiv Shanker & Ors. v. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr.* **1995 Supp. (2) SCC 726;** *Committee of Management, Arya Inter College, Arya Nagar, Kanpur & Anr. v. Sree Kumar Tiwary & Anr.* **AIR 1997 SC 3071;** *GTC Industries Ltd. v. Union of India & Ors.,* **AIR 1998 SC 1566;** *Jaipur Municipal Corporation v. C.L. Mishra* **(2005) 8 SCC 423;** *Ram Krishna Verma & Ors. v. State of U.P. & Ors.* **AIR 1992 SC 1888;** *Grindlays Bank Limited v. Income Tax Officer, Calcutta & Ors.* **AIR 1980 SC 656 ;** *Mahadeo Savlaram Shelke & Ors. v. Pune Municipal Corporation & Anr.* **(1995) 3 SCC 33;** *South Eastern Coalfields Ltd. v. State of M.P. & Ors.* **AIR 2003 SC 4482;** *Karnataka Rare Earth & Anr. v. Senior Geologist, Department of Mines & Geology & Anr.* **(2004) 2 SCC 783;** *Badrinath v. State of Tamil Nadu & Ors.* **AIR 2000 SC 3243 – relied on.**

2. Admittedly, the writ petition in which a Committee

was constituted and the High Court had passed certain directions and in pursuance of the same the Corporation found that there was no violation of the guidelines, is still pending before the High Court. In such a fact-situation, if respondent nos. 1 to 5 were aggrieved by the order passed by the Corporation, they ought to have filed an application for intervention and appropriate directions in the said writ petition. Undoubtedly, there could be no prohibition for filing a fresh writ petition, but it would have been more appropriate for them to file an application in the said pending writ petition, as it is necessary that contradictory orders must not be passed in similar circumstances. [Para 27] [991-E-H]

3.1. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the statute granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra-vires, illegal and without jurisdiction. In absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/ modification/correction, is not permissible. [Paras 12, 14] [986-B-C; G-H]

Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar & Anr. **AIR 1965 SC 1457;** *Harbhajan Singh v. Karam Singh & Ors.* **AIR 1966 SC 641;** *Patel Narshi Thakershi & Ors. v. Shri Pradyuman Singhji Arjunsinghji* **AIR 1970 SC 1273;** *Maj. Chandra Bhan Singh v. Latafat Ullah Khan & Ors.* **AIR 1978 SC 1814;** *Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) & Ors.* **AIR 1987 SC 2186;** *State of Orissa & Ors. v. Commissioner of Land Records and Settlement, Cuttack & Ors.* **(1998) 7 SCC 162;** *Sunita Jain v. Pawan Kumar Jain & Ors.* **(2008) 2 SCC 705 – relied on.**

3.2. The High Court could not have allowed the Corporation to recall its earlier order and pass a fresh order, that too, without giving an opportunity of hearing to the appellant and the Society. Review is a statutory remedy. The court cannot confer a jurisdiction upon any authority. Conferring jurisdiction upon a Court/Tribunal/ Authority is a legislative function and the same cannot be conferred either by the court or by the consent of the parties. Such an order passed by the High Court is without jurisdiction and, therefore, a nullity. Any order passed in pursuance thereof, also remains unenforceable and inexecutable. More so, the High Court could not have permitted the Corporation to pass an order without giving an opportunity of hearing to the appellant and the Society. More so, the Corporation could not pass an order recalling the order passed by it earlier and reviewing the same without assigning any reason. It was obligatory on the part of the Corporation to explain as to what was the material on record on the basis of which the earlier order has been changed. Thus, the order passed by the Corporation stood vitiated for not recording reasons and violating the principles of natural justice. [Para 28] [992-A-E]

4. The State is under obligation to act fairly without ill-will or malice-in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on

the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. Passing an order for an unauthorized purpose constitutes malice in law. The order of Corporation recalling its earlier order establishes the allegations of legal malice made by the appellant against the Corporation. [Paras 25, 26 and 28] [990-G-H; 991-A-D; 992-E]

Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla **AIR 1976 SC 1207;** *Smt. S.R. Venkataraman v. Union of India* **AIR 1979 SC 49;** *State of A.P. v. Goverdhanlal Pitti* **AIR 2003 SC 1941;** *Chairman and M.D., B.P.L. Ltd. v. S.P. Gururaja & Ors.* **(2003) 8 SCC 567;** *West Bengal State Electricity Board v. Dilip Kumar Ray* **AIR 2007 SC 976;** *Punjab State Electricity Board Ltd. v. Zora Singh & Ors.* **(2005) 6 SCC 776;** *Union of India Through Government of Pondicherry & Anr. v. V. Ramakrishnan & Ors.* **(2005) 8 SCC 394 – relied on.**

5. The submission made on behalf of respondent Nos.1 to 5 that the appellant could not challenge the orders passed by the Corporation directly before this Court without approaching the High Court is preposterous for the reason that Corporation passed the impugned orders in pursuance of the orders passed by the High Court itself. In fact, it could amount to challenging the basic order passed by the High Court before itself under the garb of challenging the consequential orders passed by the Corporation. [Para 29] [992-F-G]

Ram and Shyam Company v. State of Haryana & Ors. **AIR 1985 SC 1147 – relied on.**

Case Law Reference:

AIR 1965 SC 1457	**relied on**	**Para 12**
AIR 1966 SC 641	**relied on**	**Para 12**

AIR 1970 SC 1273	**relied on**	**Para 13**
AIR 1978 SC 1814	**relied on**	**Para 13**
AIR 1987 SC 2186	**relied on**	**Para 13**
(1998) 7 SCC 162	**relied on**	**Para 13**
(2008) 2 SCC 705	**relied on**	**Para 13**
1993 Supp. (2) SCC 734	**relied on**	**Para 15**
1995 Supp. (2) SCC 726	**relied on**	**Para 15**
AIR 1997 SC 3071	**relied on**	**Para 15**
AIR 1998 SC 1566	**relied on**	**Para 15**
(2005) 8 SCC 423	**relied on**	**Para 15**
AIR 1992 SC 1888	**relied on**	**Para 16**
AIR 1980 SC 656	**relied on**	**Para 16**
(1995) 3 SCC 33	**relied on**	**Para 17**
AIR 2003 SC 4482	**relied on**	**Para 18**
(2004) 2 SCC 783	**relied on**	**Para 19**
AIR 2000 SC 3243	**relied on**	**Para 21**
AIR 1952 SC 12	**relied on**	**Para 22**
AIR 1962 SC 1305	**relied on**	**Para 22**
AIR 1964 SC 685	**relied on**	**Para 22**
AIR 1966 SC 1441	**relied on**	**Para 22**
AIR 1975 SC 2238	**relied on**	**Para 22**
AIR 2007 SC 1575	**relied on**	**Para 23**
(2008) 17 SCC 73	**relied on**	**Para 24**
AIR 1976 SC 1207	**relied on**	**Para 25**

AIR 1979 SC 49	**relied on**	**Para 25**
AIR 2003 SC 1941	**relied on**	**Para 25**
(2003) 8 SCC 567	**relied on**	**Para 25**
AIR 2007 SC 976	**relied on**	**Para 25**
(2005) 6 SCC 776	**relied on**	**Para 26**
(2005) 8 SCC 394	**relied on**	**Para 26**
AIR 1985 SC 1147	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7349-7351 of 2010.

From the Judgment & Order dated 4.2.2008 & 13.2.2008 of the High Court of Judicature at Bombay in Writ Petition No. 2366 of 2007.

Ravi Shankar Prasad, Atul Yeshwant Chitale, Abhay Prakash Sahay, Shashi Pal Sharma, Niraj Kumar, Chander Shekhar Ashri, Sunaina Dutta Sniggdha Pandey, Suchitra Atul Chitale, S.M. Jadhav, Ratan Kumar Singh, Nikhilesh Krishnan, Paranay Mahapatra, Vipin Kumar Jha for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Delay condoned. Leave granted.

2. These appeals have been preferred against the judgment and orders dated 4.2.2008/13.2.2008 passed by the High Court of Judicature at Bombay in Writ Petition No.2366 of 2007 and the consequential order dated 8.2.2008, as amended vide order dated 11.2.2008 passed by the Municipal Corporation of Greater Mumbai by which the hoarding fixed by the appellant in the Anand Darshan Co-operative Housing Society Ltd., Respondent No.13 (hereinafter called the "Society") had been removed in spite of agreements between the parties.

3. Facts and circumstances giving rise to these appeals are that the appellant who is carrying out a business of

advertisement hoardings within the city of Bombay approached the Society in 2001 for grant of permission to erect a hoarding admeasuring 40'x20' in its compound. The Society passed a Resolution in the year 2001, permitting the appellant to erect a hoarding of the aforesaid measurement. The appellant applied to the Municipal Corporation (hereinafter called the "Corporation") for grant of necessary permission for erecting the same. The said application was allowed by the Corporation vide order dated 4.8.2001. Subsequent thereto an agreement dated 5.9.2001 was executed between the appellant and the Society for a period of three years on various terms and conditions mentioned therein, and was given effect to. The said agreement was renewed after expiry of the period of three years in the year 2004 by the Society and ultimately vide Resolution dated 12.8.2007 for a further period of three years.

4. During this period, a Public Interest Litigation, being Writ Petition No.1132 of 2002 was filed before the Bombay High Court by one Dr. Anahita Peadoin against the Municipal Corporation of Greater Mumbai pertaining to the grant of permission for hoardings in Mumbai alleging various violations of guidelines issued by the Corporation for the said purpose. The Bombay High Court while entertaining the writ petition constituted a Committee to find out violations of the guidelines of the hoardings in Mumbai and the Committee found that 266 hoardings including that of the appellant had been in violation of the guidelines issued by the Corporation. So far as the appellant is concerned, the Committee came to the conclusion that the said hoarding had been in violation of condition Nos.16(f) and 16(c), i.e., obstructing the air, light and ventilation and situated in the compulsory open space.

5. The Bombay High Court vide its order dated 1.10.2002 directed the aggrieved parties to file representation before the Statutory Authority, i.e., Deputy Municipal Commissioner, against the findings of the Committee constituted by the Court. Accordingly, the appellant made a representation before the said authority and the said representation was disposed of on

6.4.2004, after giving opportunity of hearing to the appellant and examining the facts in the presence of officers/ representatives of the respondent-Corporation, coming to the conclusion that the hoarding of the appellant was not violative of guideline No.16(f). So far as violation of guideline No.16(c) was concerned, the appellant was directed to apply to the Chief Engineer (DP) for condonation of compulsory open space clause of guidelines within 15 days with an observation that regularisation of the hoarding would be subject to the outcome of Writ Petition No.1132 of 2002.

6. In pursuance to the order dated 6.4.2004, appellant approached the said Authority vide representation dated 1.6.2004. The said representation was marked/assigned to the Assistant Engineer (BP) and he was directed to examine the case. The said Assistant Engineer (BP) City-III examined the case and had also made physical verification of the hoarding and prepared the report dated 16.7.2007 to the effect that there was no violation of clause 16(c) of the guidelines. The said report was placed before the Executive Engineer (BP) City-I of the Corporation who approved the same vide order dated 17.7.2007.

7. There had been some dispute between the Society and some of its members and those members raised certain objections/complaints against the erection of the hoarding in question. Those members approached the Co-operative Court challenging the Resolution passed by the Society in favour of the appellant for granting permission to erect the hoarding and also made an application for interim relief. However, the Co-operative Court dismissed the application for interim relief.

8. Being aggrieved, some of the members of the Society (Respondent Nos.1 to 5) filed Writ Petition No.2366 of 2007 before the Bombay High Court against the Society and the appellant for cancellation of the permission granted in favour of the appellant. During the course of hearing of the said writ petition on 4.2.2008, the Joint Municipal Commissioner

(Education), Shri S.S. Shinde filed an affidavit to withdraw the earlier order approving the erection and for permission to pass a fresh order in accordance with law. The court accepted the said affidavit and permitted the Corporation to withdraw its earlier order with further liberty to pass fresh orders without giving an opportunity of hearing to the appellant or the Society as it had already been done while passing the earlier order. In pursuance of the said order, a fresh order was passed by the respondent-Corporation on 11.2.2008, not approving the erection of hoarding which had earlier been approved. Hence, these appeals.

9. Shri Ravi Shankar Prasad, Ld. Senior Counsel for the appellant, submitted that as the PIL, i.e., Writ Petition (Civil) No.1132 of 2002 in which certain direction had been issued by the High Court and a Committee was constituted to examine as to whether hoardings were in violation of the guidelines and an action had been taken in pursuance thereof, is still pending, even if the respondent nos.1 to 5 were aggrieved of any order of the Corporation, they ought to have moved an application for intervention and for further direction in the said Writ Petition No.1132 of 2002. An independent writ petition could not have been filed. So far as the internal dispute between the Society and some of its members is concerned, it is still pending with the Co-operative Court. Only an application for interim relief had been dismissed. Therefore, the writ petition itself was not maintainable as the said respondents had chosen the forum of Co-operative Court under the provisions of Maharashtra Co-operative Societies Act, 1960 (hereinafter called as 'Act"). The High Court had permitted the respondent-Corporation to withdraw its earlier order and to pass a fresh order, that tantamounts to conferring the jurisdiction of review upon the statutory authority, though such power had not been conferred by the Statute. Therefore, the order conferring such power itself is without jurisdiction. The Corporation passed subsequent order without assigning any reason and giving opportunity of hearing to the appellant. It is a clear cut case of legal malice.

More so, the respondent Nos. 1 to 5, have been permitted to withdraw the Writ Petition No.2366 of 2007 itself vide order dated 13.2.2008, therefore, all orders passed therein by the High Court as well as the consequential orders passed by the Corporation stood automatically washed away. Thus, the appellant should be permitted to continue its business with the Society as if no order had ever been passed by the Court or Corporation in regard to the hoardings in question.

10. On the contrary, Shri Atul Yeshwant Chitale, Ld. Senior Counsel appearing for the respondent-Corporation, has submitted that a new policy dated 10.1.2008 has come into existence. The case of the appellant shall be considered strictly in accordance with the terms and conditions incorporated therein. Thus, an opportunity should be given to the respondent-Corporation to consider the case afresh.

Shri Ratan Kumar Singh, Ld. Counsel appearing for respondent nos.1 to 5 (original writ petitioners) has submitted that withdrawal of the writ petition does not have any bearing on these appeals as the same had been withdrawn after being satisfied that their grievances stood fully redressed by the interim orders passed by the High Court and consequential orders passed by the Corporation. The order passed by the Corporation could not be challenged before this Court directly, without approaching the High Court. The pendency of the dispute between the Society and its members before the Co-operative Court could not create any hindrance for them to approach the High Court by filing a fresh Writ Petition as they were not parties in the earlier Writ Petition No.1132 of 2002. The hoardings in question had been in violation of the guidelines of the Corporation and thus, subsequent orders passed by the Corporation do not require any interference. Thus, the appeals have no merit and are liable to be dismissed.

11. We have considered the rival submissions made by both the parties and perused the record.

LEGAL ISSUES:

Review in absence of statutory provisions:

12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed is ultra-vires, illegal and without jurisdiction. (vide: *Patel Chunibhai Dajibha v. Narayanrao Khanderao Jambekar & Anr.,* AIR 1965 SC 1457; and *Harbhajan Singh v. Karam Singh & Ors.,* AIR 1966 SC 641).

13. In *Patel Narshi Thakershi & Ors.* v. Shri *Pradyuman Singhji Arjunsinghji,* AIR 1970 SC 1273; *Maj. Chandra Bhan Singh v. Latafat Ullah Khan & Ors.,* AIR 1978 SC 1814; *Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P.) & Ors.,* AIR 1987 SC 2186; *State of Orissa & Ors. v. Commissioner of Land Records and Settlement, Cuttack & Ors.,* (1998) 7 SCC 162; and *Sunita Jain v. Pawan Kumar Jain & Ors.,* (2008) 2 SCC 705, this Court held that the power to *review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication* and in absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in absence of any statutory provision for the same is nullity being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/ modification/correction is not permissible.

Case dismissed/withdrawn- effect on interim relief:

15. No litigant can derive any benefit from the mere pendency of a case in a Court of Law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the Court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim "*Actus Curiae neminem gravabit*", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. (vide: *Dr. A.R. Sircar v. State of Uttar Pradesh & Ors.,* 1993 Supp. (2) SCC 734; *Shiv Shanker & Ors. v. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr.,* 1995 Supp. (2) SCC 726; *the Committee of Management, Arya Inter College, Arya Nagar, Kanpur & Anr. v. Sree Kumar Tiwary & Anr.,* AIR 1997 SC 3071; *GTC Industries Ltd. v. Union of India & Ors.,* AIR 1998 SC 1566; and *Jaipur Municipal Corporation v. C.L. Mishra,* (2005) 8 SCC 423).

16. In *Ram Krishna Verma & Ors. v. State of U.P. & Ors.,* AIR 1992 SC 1888, this Court examined the issue while placing reliance upon its earlier judgment in *Grindlays Bank Limited v. Income Tax Officer, Calcutta & Ors.,* AIR 1980 SC 656 and held that no person can suffer from the act of the Court and in case an interim order has been passed and the petitioner takes advantage thereof, and ultimately the petition stands dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

17. A similar view has been reiterated by this Court in *Mahadeo Savlaram Shelke & Ors. v. Pune Municipal Corporation & Anr.,* (1995) 3 SCC 33.

18. In *South Eastern Coalfields Ltd. v. State of M.P. & Ors.,* AIR 2003 SC 4482, this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting the applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party suffering an impoverishment which it would not have suffered but for the order of the Court and the act of such party. There is nothing wrong in the parties demanding to be placed in the same position in which they would have been had the Court not intervened by its interim order, when at the end of the proceedings, the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the Court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the Court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. The Court further held :

> *".....Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the Court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are earlier to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though*

the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated……"

19. In *Karnataka Rare Earth & Anr. v. Senior Geologist, Department of Mines & Geology & Anr.,* (2004) 2 SCC 783, a similar view has been reiterated by this Court observing that the party who succeeds ultimately is to be placed in the same position in which they would have been if the Court would not have protected them by issuing interim order.

20. The aforesaid judgments are passed on the application of legal maxim "*sublato fundamento cadit opus*", which means in case a foundation is removed, the superstructure falls.

21. In *Badrinath v. State of Tamil Nadu & Ors.,* AIR 2000 SC 3243, this Court observed that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically and this principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders.

Court-cannot be used only for interim relief:

22. It is a settled legal proposition that the forum of the writ court cannot be used for the purpose of giving interim relief as the only and the final relief to any litigant. If the Court comes to the conclusion that the matter requires adjudication by some other appropriate forum and relegates the said party to that forum, it should not grant any interim relief in favour of such a litigant for an interregnum period till the said party approaches the alternative forum and obtains interim relief. (vide: *State of Orissa v. Madan Gopal Rungta,* AIR 1952 SC 12; *Amarsarjit Singh v. State of Punjab,* AIR 1962 SC 1305; *State of Orissa*

v. Ram Chandra Dev, AIR 1964 SC 685; *State of Bihar v. Rambalak Singh "Balak" & Ors.,* AIR 1966 SC 1441; and *Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke & Ors.,* AIR 1975 SC 2238).

23. It is settled proposition that an order of withdrawal of a suit does not amount to a decree of the court, which can be executed. (See *Kandapazha Nadar & Ors. v. Chitraganiammal & Ors.* AIR 2007 SC 1575).

24. It is not permissible for a party to file a writ petition, obtaining certain orders during the pendency of the petition and withdraw the same without getting proper adjudication of the issue involved therein and insist that the benefits of the interim orders or consequential orders passed in pursuance of the interim order passed by the writ court would continue. The benefit of the interim relief automatically gets withdrawn/ neutralized on withdrawal of the said petition. In such a case concept of restitution becomes applicable otherwise the party would continue to get benefit of the interim order even after loosing the case in the court. The court should also pass order expressly neutralizing the effect of all consequential orders passed in pursuance of the interim order passed by the court. Such express directions may be necessary to check the rising trend among the litigants to secure the relief as an interim measure and then avoid adjudication on merits. (Vide *Abhimanyoo Ram v. State of U.P.,* (2008) 17 SCC 73).

Legal Malice:

25. The State is under obligation to act fairly without ill will or malice- in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which

is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla,* AIR 1976 SC 1207; *Smt. S.R. Venkataraman v. Union of India,* AIR 1979 SC 49; *State of A.P. v. Goverdhanlal Pitti,* AIR 2003 SC 1941; *Chairman and M.D., B.P.L. Ltd. V. S.P. Gururaja & Ors.,* (2003) 8 SCC 567; and *West Bengal State Electricity Board v. Dilip Kumar Ray,* AIR 2007 SC 976).

26. Passing an order for an unauthorized purpose constitutes malice in law. (Vide *Punjab State Electricity Board Ltd. v. Zora Singh & Ors.,* (2005) 6 SCC 776; and *Union of India Through Government of Pondicherry & Anr. v. V. Ramakrishnan & Ors.,* (2005) 8 SCC 394).

27. The instant case is required to be examined in the light of the aforesaid settled legal propositions.

Admittedly, Writ Petition No. 1132 of 2002, wherein the issue of examining the violation of guidelines issued by the Corporation had been raised and the High Court had passed certain directions which had been complied with and in pursuance of the same the Corporation passed an order dated 6.4.2004 that an order passed by it would be subject to the decision in the said Writ Petition No. 1132 of 2002 is still pending before the High Court. In such a fact-situation, if the respondent Nos. 1 to 5 were aggrieved by the order passed by the Corporation they ought to have filed an application for intervention and appropriate directions in the said writ petition. Undoubtedly, there could be no prohibition for filing a fresh writ petition, but it would have been more appropriate for them to file an application in the said pending writ petition as it is necessary that contradictory orders must not be passed in similar circumstances.

28. The High Court could not have allowed the Corporation to recall its earlier order and pass a fresh order, that too, without giving an opportunity of hearing to the appellant and the Society. Review is a statutory remedy. In spite of several queries put by us to the learned counsel for the respondents, no provision for review under the statute could be brought to our notice. The court cannot confer a jurisdiction upon any authority. Conferring jurisdiction upon a Court/Tribunal/Authority is a legislative function and the same cannot be conferred either by the court or by the consent of the parties. Such an order passed by the High Court is without jurisdiction and, therefore, a nullity. Any order passed in pursuance thereof, also remains unenforceable and inexecutable. More so, the High Court could not have permitted the Corporation to pass an order without giving an opportunity of hearing to the appellant and the society. More so, the Corporation could not pass an order recalling the order passed by it earlier and reviewing the same without assigning any reason. It was obligatory on the part of the Corporation to explain as to what was the material on record on the basis of which the earlier order has been changed. Thus, the order passed by the Corporation stood vitiated for not recording reasons and violating the principles of natural justice. It establishes the allegations of legal malice made by the appellant against the Corporation.

29. The submission made on behalf of respondent Nos. 1 to 5 that appellant could not challenge the orders passed by the Corporation directly before this Court without approaching the High Court is preposterous for the reason that Corporation passed the impugned orders in pursuance of the orders passed by the High Court itself. In fact, it could amount to challenging the basic order passed by the High Court before itself under the garb of challenging the consequential orders passed by the Corporation. "*The clitch of appeal from Ceasar to Ceasar's wife can only be bettered by appeal from one's own order to oneself.*" (See *Ram and Shyam Company v. State of Haryana & Ors.,* AIR 1985 SC 1147).

30. It has been mentioned by the appellant in the petition that respondent No. 1 himself has vetted the agreement reached between the appellant and the respondent-society and was a party to the same. Therefore, he was fully aware as what was the agreement and how it would be given effect to. The respondent No.1 has not denied this averment. Nor he has explained as to what were the changed circumstances, which made him aggrieved. More so, if the said respondent Nos. 1 to 5 were aggrieved of the order passed by the Co-operative Court rejecting their application of interim relief, they could have approached the appropriate forum challenging the same, rather they have chosen to approach the High Court leaving the matter pending before the Co-operative Court.

31. Respondent No.1 had approached the Co-operative Court and could not get the interim relief. He filed a writ petition along with others after meeting his waterloo there. Subsequently, after obtaining the interim orders from the High Court and consequential orders from the Corporation withdrew the writ petition.

The respondent Nos. 1 to 5 for the reasons best known to them have prayed for withdrawal of the Writ Petition No. 2366 of 2007 and the High court vide order dated 13.2.2008 allowed the said respondents to withdraw the same. The order reads as under:

> "As per the statement by Mr. S.U. Kamdar on 4th February, 2008, the earlier order has been withdrawn by the corporation and fresh order has been passed by the concerned officer. The copy of the said order is produced. It is marked Exhibit–X for identification purpose. Mr. S.U. Kamdar has further reported to the court that the action of removal of the hoardings has already been commenced and it will be completed within two to three days.
>
> In view of the fresh order passed by the corporation marked Exhibit-X and the statement of Mr. S.U. Kamdar, learned counsel for the petitioner states that the grievance in the petition is redressed and, therefore, he may be allowed to withdraw the petition with liberty to file similar type of petition if occasion so arises.
>
> Petition is allowed to be withdrawn with liberty as prayed for."

32. "Withdrawal" means "to go away or retire from the field of battle or any contest." Thus, the word 'withdrawal' is indicative of the voluntary and conscious decision of a person. Therefore, if the said writ petitioners (respondent Nos. 1 to 5) have voluntarily abandoned their claim withdrawing the said writ petition, they cannot be permitted to take any benefit of the orders passed by the High Court or the statutory authority in pursuance thereof. Once the foundation is removed, the super-structure is bound to fall. Interim relief is granted only in aid of and as ancillary to the main relief which may be available to the party at the time of final adjudication of the case by the court. In case the orders passed by the High Court and, consequently, by the Corporation are accepted to be in effect even today, it would be tantamount to allowing the writ petition without any adjudication on the issues involved therein. After obtaining interim relief, a party cannot avoid final adjudication of the dispute on merit and claim that he would enjoy the fruits of interim relief even after withdrawal/dismissal of the case. Law certainly would not permit such a course. Respondent No.1 is a practising advocate. He is not a layman, nor it can be assumed that he could not understand the consequences of withdrawal of the writ petition. Therefore, all orders passed by the High Court and the statutory authority stood washed away on withdrawal of the said writ petition and the said writ petitioners cannot claim any benefit of either of the same.

33. In view of the above, appeals deserve to be allowed to the effect that the appellant and the respondent-Society may act as if no order had ever been passed, adversely affecting their contract, by the High Court in Writ Petition No.2366 of

2007 or any statutory authority and they may proceed with the agreement/contract in accordance with law.

34. Needless to say that this judgment/order would have no bearing on the order passed by any court/tribunal or statutory authority independent of the proceedings taken in Writ Petition No. 2366 of 2007.

35. The appeals are allowed as explained hereinabove. No order as to cost.

D.G. Appeals allowed.

MAMTAJ BI BAPUSAB NADAF & ORS.
v.
UNITED INDIA INSURANCE CO. & ORS.
(Civil Appeal No. 7428 of 2010)

SEPTEMBER 07, 2010

[DALVEER BHANDARI AND DR. MUKUNDAKAM SHARMA, JJ.]

Motor Vehicles Act, 1988 – s. 147, Explanation – Liability of insurance company – Incident resulting in death of workmen – Workmen engaged in unloading food grain from tractor trailer to underground storage bin – Workers falling into grocery pit while cleaning the pit for storing food grain – Death due to asphyxia – Claim petition – Insurance Company held liable to pay compensation – High Court setting aside the liability of Insurance Company – Interference with – Held: Not called for – Vehicle was not involved in the accident – Death of workmen cannot said to have any proximate or direct connection with the vehicle - Compensation.

Two workmen were engaged in unloading food grain from the tractor-trailer to underground storage bin. The workmen while cleaning the grocery pit for storing food grain fell into the pit and died due to asphyxia. The legal representatives of the workmen filed claim petitions. The Commissioner for Workmen's Compensation allowed the petitions holding the respondent-Insurance Company liable to pay compensation. The Insurance Company filed appeals. The High Court modified the order passed by the Commissioner and set aside the liability of the Insurance Company. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: On the facts of the case, the Single Judge of the High Court has rightly held that the vehicle was not involved in the accident and the death of the workmen by no stretch of imagination can be said to have any proximate or direct connection with the vehicle; and that the mere fact that food grain was brought in the insured vehicle to the spot where the workmen died, would not render the Insurance Company liable in respect of the death, the cause of which was not proximate to the actual user of the vehicle. Therefore, no interference is called for. [Paras 7 and 14] [999-A-B; 1001-G-H]

Shivaji Dayanu Patil and Anr. vs. Vatschala Uttam More **(1991) 3 SCC 530 – distinguished.**

Case Law Reference:

(1991) 3 SCC 530 Distinguished. Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7428 of 2010.

From the Judgment & Order dated 25.10.2005 of the High Court of Karnataka at Bangalore in M.F.A. No. 5843 & 5844 of 2003 (WC).

Ajay Kumar M., V.N. Raghupathy for the Appellants.

A.K. De, Rajesh Dwivedi, Ashok K. Mahajan for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal emanates from the judgment and final order dated 25.10.2005 passed by the High Court of Karnataka at Bangalore in M.F.A. No.5843/2003 (WC) and M.F.A. No.5844/2003 (WC).

3. Brief facts which are relevant to dispose of this appeal are recapitulated as under:

The claimants-respondents in M.F.A. No.5843 of 2003 are the legal representatives of one Bapusab Nadaf and the claimants-respondents in M.F.A. No.5844 of 2003 are the legal representatives of Basappa Gurappa Hipparagi, who were workmen engaged in uploading Maize (foodgrain) from a tractor-trailer. When Maize was being unloaded from the tractor to an underground storage bin ('Hagevu'), both the labourers climbed the grocery pit in order to clean the same for storing Maize and while cleaning they fell into the grocery pit. They shouted from inside that they were suffocating, a rope was released to them but they did not catch it and they died due to asphyxia. These facts are not disputed.

4. The learned counsel for the appellants submitted that the Insurance Company has clear responsibility for this accident and the Insurance Company is liable and under an obligation to pay compensation to the appellants. This contention is rebutted by the learned counsel for the Insurance Company. According to him, the vehicle in question was not involved in the accident. He further submitted that there has been no proximity or direct connection with the death of the workmen with the vehicle in any manner. At the time of the accident the vehicle in question was not in operation.

5. The claim petitions filed by the appellants before the Commissioner for Workmen's Compensation, Bizapur, were allowed and the Commissioner vide its judgment dated 24th July, 2003, found the Insurance Company liable to pay compensation to the appellants.

6. Aggrieved by the said judgment, the Insurance Company preferred in M.F.A. No.5843/2003 and M.F.A. No.5844/2003 before the High Court of Karnataka at Bangalore. The High Court allowed the appeals and modified the order passed by the Commissioner and the liability of the Insurance Company was set aside. However, the appellants were at liberty to

recover the amount of compensation from the employer.

7. According to the reasoning of the High Court, the vehicle was not involved in the accident and the death of the workmen by no stretch of imagination can be said to have any proximate or direct connection with the vehicle. The High Court also observed that the mere fact that Maize was brought to the spot where the workmen had died in the insured vehicle, would not render the Insurance Company liable in respect of the death, the cause of which was not proximate to the actual user of the vehicle.

8. In the present case, the use of the vehicle was not even claimed as being a ground on which the liability is said to be fastened on the Insurance Company.

9. Learned counsel appearing on behalf of the appellants placed reliance on the decision of this Court in *Shivaji Dayanu Patil and Anr. vs. Vatschala Uttam More,* (1991) 3 SCC 530. Brief facts of that case are that a collision between a petrol tanker and a truck took place on a National Highway at about 3.00 a.m. as a result of which the tanker went off the road and fell on its left side at a distance of about 20 feet from the Highway. Due to overturning of the tanker, the petrol contained in it leaked out and collected nearby. At about 7.15 a.m. an explosion took place in the tanker causing burn injuries to those assembled near it including the respondent's son who later succumbed to the injuries. The facts of this case are entirely different and are not applicable to the present case. In this case, the petrol tanker was directly involved in the accident and that all the workmen were directly connected with the accident. This case does not help the appellants in any manner.

10. Learned counsel for the appellants has also placed reliance on a Division Bench judgment of the Karnataka High Court delivered on 24th February, 2006 in M.F.A. No.1870/2005 (WC). In that case, the workman who was working as a loader, went in the lorry and loaded the lorry with stones and thereafter he was required to unload the same close to the Crusher near

the quarry along with other loaders. At about 2.30 p.m. in the afternoon, the deceased workman got down from the lorry in order to unload the stones along with other loaders and when they opened the lock at the hind portion of the lorry, the entire load of stones in the lorry fell on him, as a result of which he sustained injuries and succumbed to the injuries on the spot. In this case, the vehicle was directly involved in the unfortunate accident.

11. Both the above-mentioned cases relied on by the learned counsel for the appellants are of no avail to him. These cases do not help the appellants in any manner.

12. Learned counsel for the Insurance Company has placed reliance on the Explanation to Section 147(1) of the Motor Vehicles Act, 1988, which reads as under:

"147. Requirements of policies and limits of liability.- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) against any liability which may be incurred by him in respect of of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of

a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation: For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

13. According to the learned counsel for the respondents, on a plain reading of the above quoted Explanation, the Insurance Company cannot be held liable for the death of the workmen and therefore, the Insurance Company cannot be held liable to pay compensation to the appellants.

14. In our considered opinion, on the facts of this case, the view taken by the learned Single Judge of the Karnataka High Court seems to be justified and correct. Therefore, no interference is called for. This appeal being devoid of any merit is accordingly dismissed. However, in the facts and circumstances of this case, the parties to bear their own costs.

N.J. Appeal dismissed.

SWAMI NATH

v.

NIRMAL SINGH

(SLP (Civil) No. 8317 of 2006)

SEPTEMBER 7, 2010

[ALTAMAS KABIR, A.K. PATNAIK AND ANIL R. DAVE, JJ.]

Rent Control and Eviction:

East Punjab Urban Rent Restriction Act, 1949:

s.13-B r/w. s.18-A – Eviction Petition – By non-resident Indian – Allowed by courts below – On appeal, held: Landlord entitled to eviction.

s. 13-B (As amended in the year 2001) – Interpretation of – Held: Interpretation of the provision that right of immediate possession can be exercised only once, would frustrate the object of the amendment to the provision.

The respondent-landlords who were non-resident Indians, filed petitions u/s. 13-B of East Punjab Urban Rent Restriction Act, 1949. They sought eviction of tenants from their respective tenanted premises. The Rent Controller allowed all the three eviction petitions. The petitioners-tenants moved the High Court in revision petition. In all the revision petitions, the common plea was that the landlords already being in possession of one shop, had no *bona fide* need for the suit premises. In one of the revision petitions the additional plea was that under the provisions of Section 13-B, the landlord was entitled to exercise his right of option for immediate possession only once; and that having obtained vacant possession of a shop room in the building in question,

such right was exhausted and, therefore, the landlord was no longer entitled further for relief u/s. 13-B. The High Court dismissed the revision petitions. Therefore, the instant Special Leave Petitions were filed by the tenants.

Dismissing the Special Leave Petitions, the Court

HELD: The interpretation sought to be given by the petitioners to the proviso to Section 13-B(1) of the East Punjab Urban Rent Restriction Act, 1949 that under the provisions of Section 13-B, the landlord was entitled to exercise his right of option for immediate possession only once, would lead to an absurd situation which was not contemplated by the legislature while introducing the provisions of Section 13-B by way of amendment in 2001. The very object of the amendment would be frustrated if the narrow and constricted meaning being canvassed on behalf of the petitioners is to be accepted. [Para 13] [1008-C-D]

Baldev Singh Bajwa v. Monish Saini **JT 2005 (12) SC 442 – relied on.**

Case Law Reference:

JT 2005 (12) SC 442 Relied on. Para 14

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 8317 of 2006.

From the Judgment & Order dated 28.02.2006 of the High Court of Punjab & Haryana at Chandigarh in Civil Revision No. 1146 of 2006.

WITH

SLP (C) Nos. 11719 & 11720 of 2006.

Neeraj Jain, Sanjay Singh, Sushat Kumar, Umang Shankar, Ugra Shankar Prasad, Kavita Wadia, Rajat Sharma,

A.P. Mohanty, Dr. Kailash Chand, R.V. Naik, S.K. Tandon, Raghavendra Naik, R.K. Gupta, Vinod K. Aggarwal, Rameshwar Prasad Goyal for appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Special Leave Petition (Civil) No.8317 of 2006 was taken up for hearing along with Special Leave Petition (Civil) Nos.11719 of 2006 and 11720 of 2006 as the issues involved in all the three matters were the same. All the three matters relate to interpretation of the provisions of Section 13-B read with Section 18-A of the East Punjab Urban Rent Restriction Act, 1949, hereinafter referred to as "the 1949 Act".

2. The common case in all these three Special Leave Petitions is that the Respondents as Non-Resident Indians filed petitions before the concerned Rent Controller under Section 13-B of the 1949 Act for eviction of the Petitioners from their respective tenanted premises and that all the three petitions were allowed and eviction of the Petitioners was ordered. In Special Leave Petition (Civil) No.8317 of 2006, the Petitioner being aggrieved by the order of the Rent Controller, Phagwara, moved the High Court in Civil Revision No.1146 of 2006.

3. In Special Leave Petition (Civil) No.11719 of 2006, the Petitioner being aggrieved by the order of eviction passed by the Rent Controller, Phillaur, moved the High Court in Civil Revision No.5979 of 2004 against the said order of the Rent Controller. Similarly, the Petitioner in Special Leave Petition (Civil) No.11720 of 2006 moved the High Court in Civil Revision No.5978 of 2004, since both the two matters were disposed of by a common judgment and order dated 8th May, 2006.

4. The main challenge of the Petitioners in Civil Revision No.5978 of 2004 and 5979 of 2004 before the High Court was that the Respondent/landlord was not entitled to seek ejectment of the tenants from the property in question as he already had

a shop room in his possession measuring 12 feet x 12 feet and was not, therefore, in bona fide need of the said premises. The said stand of the Petitioners/tenants was rejected both by the Rent Controller as well as the High Court. Having regard to the provisions of Section 13-B read with Section 18-A of the 1949 Act, both the forums were of the view that as a Non-Resident Indian, the Respondent was entitled to the benefit of the said provisions for recovery of possession contained therein.

5. Similar submissions were advanced by the Petitioner in Special Leave Petition (Civil) No.8317 of 2006 before the High Court. In addition, it was urged that under the provisions of Section 13-B, the landlord was entitled to exercise his right of option for immediate possession only once and that having obtained vacant possession of a shop room in the building in question, such right had been exhausted and the landlord was no longer entitled to immediate possession as contemplated in Section 13-B of the 1949 Act. It was sought to be urged that a shop room in a building would have to be treated as a separate unit or building for the purposes of Section 13-B of the above Act as otherwise the very object of Section 13-B would be frustrated as the landlord would have to approach the Court repeatedly for obtaining possession of different parts of the building, which was not contemplated in the said Section.

6. The High Court negated both the submissions and while upholding the view taken by the Rent Controller with regard to the bona fide need of the landlord of the suit premises, the High Court also rejected the additional submissions regarding the interpretation of Section 13-B as sought to be urged on behalf of the Petitioners herein.

7. Learned senior counsel, Mr. Neeraj Jain, appearing for the Petitioners in Special Leave Petition (Civil) No.8317 of 2006, contended that the High Court had failed to appreciate the scheme and object of the 1949 Act which was meant to be a beneficial piece of legislation to protect the tenants from eviction from their tenanted premises from landlords whose

needs were not as great as that of the tenants. It was urged that Section 13-B had been incorporated in the 1949 Act in 2001 as an exception to the provisions of the Act to accommodate Non-Resident Indians who after their return from abroad needed their own premises for the purposes of residence or even for starting a new business. Even then the right to immediate possession given to landlords under Section 13-B in the special circumstances was restricted and a choice of obtaining immediate possession of the premises was restricted to one choice only.

8. It was also urged that the provisions of Sub-section (1) of Section 13-B would have to be read in a manner so as not to defeat the main purpose and object of the Act. It was submitted that recourse could, therefore, be had to the provisions of Section 13-B only once which would support the theory that each shop room or other premises in the building would have to be treated as a separate unit and the landlord would be entitled to make a choice as to which of the units he wished to take possession of immediately. It was submitted that in these cases, since the landlord had already obtained possession of a portion of the building, it must be deemed that he had exhausted his option as given under Section 13-B and in order to evict the other tenants from the premises in question, he would have to file regular eviction petitions before the Rent Controller concerned, who would have to deal with the same in the regular manner without resorting to the emergency provisions of Section 13-B of the 1949 Act.

9. Learned senior counsel for the petitioner also contended that having regard to the definition of "Non-resident Indian" in Section 2(dd) of the 1949 Act, such Non-resident Indian would mean a person of Indian origin, who is either permanently or temporarily settled outside India for taking up employment outside India or for carrying on a business or vocation outside India or for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain

period. It was urged that the emphasis was on the condition that the NRI would be staying outside India and in order to avail the benefits of Section 13-B, he would have to return to India permanently.

10. Mr. Jain submitted that the Respondent had not been able to establish that he was an NRI within the meaning of Section 2(dd) of the 1949 Act and was not, therefore, entitled to the benefits of Section 13-B thereof. Mr. Jain reiterated his stand that having filed an Ejectment Petition in respect of one of the three shop rooms, the subsequent Ejectment Petitions were not maintainable and no order of ejectment could have been passed in respect thereof. Learned counsel submitted that the Rent Controller had exceeded his jurisdiction in passing the order of ejectment in respect of all the three matters despite the bar under the proviso to Section 13-B(1) of the aforesaid Act.

11. The submissions made on behalf of the Petitioners were strongly opposed on behalf of the Respondent/landlord. It was urged that the language of Section 13-B(1) of the 1949 Act was clear and unambiguous and the suggested interpretation of the proviso thereof would lead to an absurd situation if the building of the NRI was under the possession of various tenants and he was entitled to exercise his right of summary proceedings only in respect of one of the said units. It was submitted that such an interpretation would be absolutely contrary to the objects sought to be achieved by the introduction of Section 13-B in the 1949 Act by way of amendment in 2001.

12. Reliance was placed on the decision of this Court in *Baldev Singh Bajwa v. Monish Saini* [JT 2005 (12) SC 442] where the same question had come up for consideration and it was observed that on a plain reading of the provisions of Section 13-B, it would be obvious that once in a life-time possession is given to an NRI to get one building vacated in a summary manner. It was also submitted that the ownership of the Respondent/landlord in respect of only one building had not

been disputed by the Petitioners and the only contention that was raised on their behalf was that each separate tenancy in a building would amount to a separate unit and after exhausting the right of summary possession once, it was no longer available to the NRI landlord to exercise such an option for the second time to a particular building, which contention had been negated by the Courts below.

13. We have carefully considered the submissions made on behalf of the respective parties and we are unable to agree with the submissions made on behalf of the Petitioners. The interpretation sought to be given to the proviso to Section 13-B(1) of the 1949 Act would lead to an absurd situation which was not contemplated by the legislature while introducing the provisions of Section 13-B by way of amendment in 2001. The very object of the amendment would be frustrated if the narrow and constricted meaning being canvassed on behalf of the petitioners is to be accepted.

14. The provisions of Section 13-B of the 1949 Act have been correctly interpreted and dealt with in *Baldev Singh Bajwa's* case (supra) and in that view of the matter, the Special Leave Petitions must fail and are dismissed. I.A. No.2 of 2006 filed in SLP(C) No.11719 of 2006 by Gurdeep Ram to be impleaded as party in his personal capacity, is also disposed of, accordingly.

15. There will, however, be no order as to costs.

K.K.T SLPs dismissed.

STATE OF HARYANA

v.

SATISH KUMAR MITTAL AND ANOTHER

(Civil Appeal No. 7415 OF 2010)

SEPTEMBER 7, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

Service Law:

Date of birth – Correction of – Representation made 9 years after joining the service – Suit filed five years thereafter – HELD: Application for change in date of birth causes prejudice and disturbance in the working of the Department – Courts below should not have entertained the claim beyond the period provided in the Rules, which in the instant case, required the application to be made within two years – Whether the suit was time barred or not, the claim was, in any case, belated – Punjab Civil Services Rules, 1994 – Delay/ Laches.

The date of birth of respondent no. 1 at the time of his joining the Government service on 2.4.1992 was recorded in his service book as 25.3.1962 on the basis of his matriculation certificate. On 2.7.2001 he gave a representation for correction of his date of birth as 25.11.1962. By order dated 24.9.2002 his representation was rejected on the ground that no application for correction in date of birth submitted after two years from entry into service could be entertained. Respondent no. 1 gave a notice u/s 80 CPC on 10.11.2005, and thereafter filed a suit on 16.10.2006 for a declaration that the order dated 24.9.2002 was bad in law. The suit was decreed. The decree was affirmed by the first appellate court as also by the High Court in second appeal. Aggrieved, the State Government filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 The relevant rule always required an application for correction of date of birth to be submitted within two years from joining the service. The amended rule of 20.12.2000 made a slight modification that the application filed after two years could be considered which will be only on the recommendation of the Administrative Department. This provision has now been removed after the rule was amended on 13.8.2001. [para 12] [1017-H; 1018-A-B]

1.2 It has been held time and again that the application for correction of date of birth should not be dealt with keeping in view only the public servant concerned, but it is also to be looked into from the point of view of the department and the employees engaged therein. The other employees have expectations of promotion based on seniority and suddenly, if such change is permitted, it causes prejudice and disturbance in the working of the department. It is, therefore, quite correct for the State to insist that such application must be made within the time provided in the rules, say, two years, as in the present case. [para 14] [1019-D-E]

Secretary and Commissioner, Home Department vs. R. Kirubakaran **1993 (2) Suppl. SCR 376 =1994 Suppl. (1) SCC 155;** *State of UP vs. Gulaichi* **2003 (1) Suppl. SCR 762 = 2003 (6) SCC 483;** *State of Punjab vs. S C Chadha* **2004 (2) SCR 216 = 2004 (3) SCC 394; and** *State of Gujarat vs. Vali Mohmed Dosabhai Sindhi* **2006 (3) Suppl. SCR 685 = 2006 (6) SCC 537 – relied on.**

1.3 It is also seen that such applications are made very often, almost at the end of the service of the employee or, in any case, belatedly. In the instant case, the application was made after some nine years of

entering into service. Even assuming that respondent no. 1 came to know in June 2001 that there was an error in his date of birth entered in the matriculation certificate, as claimed by him, he took more than three years to issue the notice u/s 80 CPC and then to file the suit. Whether the suit was time barred or not, the claim was in any case belated. It has to be filed within the time provided or within a reasonable time and it is not to be entertained merely on the basis of plausible material. [para 15] [1019-F-H; 1020-A]

State of UP vs. Shiv Narayan Upadhyay **2005 (1) Suppl. SCR 847 = 2005 (6) SCC 49 – relied on.**

1.4 In the circumstances, the High Court as well as the courts below clearly erred in entertaining the claim of respondent No.1 for correction in his date of birth at a belated stage. The rules, in the instant case, all throughout required such application to be made within two years. Therefore, the courts clearly erred in finding fault with the appellant for allegedly applying the Notification of 13.8.2001 retrospectively which was not the case over here. [para 16-17] [1020-C-D; 1021-F]

Union of India vs. Harnam Singh **1993 (1) SCR 862 = 1993 (2) SCC 162 – referred to.**

Case Law Reference:

1993 (2) Suppl. SCR 376	**relied on**	**para 13**
2003 (1) Suppl. SCR 762	**relied on**	**para 13**
2004 (2) SCR 216	**relied on**	**para 13**
2006 (3) Suppl. SCR 685	**relied on**	**para 13**
2005 (1) Suppl. SCR 847	**relied on**	**para 15**
1993 (1) SCR 862	**referred to**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7415 of 2010.

From the Judgment & Order dated 18.09.2007 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 3013 of 2007.

Manjit Singh, Sukhda Pritam, Prashant Shukla, Kamal Mohan Gupta for the Appellant.

Manoj Swarup, Ankit Swarup, Devesh Kumar Tripathi, Ajay Kumar, for the Respondents.

The Judgment of the Court was delivered by

GOKHALE, J. 1. Leave granted.

2. This appeal seeks to challenge the order passed by the High Court of Punjab and Haryana in Regular Second Appeal No.3013/2007 dated 18.9.2010 whereby the learned single judge has confirmed the judgment of the Additional District Judge and that of the Civil Judge, Senior Division, whereby he had granted a decree in favour of the Ist respondent herein.

The short facts leading to this appeal are as follows:

3. Respondent No.1 joined the office of the Director of Prosecution, Haryana, as an Assistant District Attorney on 2.4.1992. At that time, he got the date of his birth recorded in the service book on the basis of the Matriculation Certificate in which the date was mentioned as 25.3.1962. It is the case of the first respondent that there was a family function in June 2001 where his relatives gathered, and wherein during the discussion he came to know that his date of birth was actually 25.11.1962, and that the one recorded in the matriculation certificate was erroneous.

4. The first respondent made a representation on 2.7.2001 for correction of the date of birth, which was rejected by the

communication dated 24.9.2002 from the Superintendent of Jails and the Judicial and Financial Commissioner (who is also the Principal Secretary to the Administration of Judicial Department) addressed to the Director of Prosecution, State of Haryana. The representation was rejected on the basis of Finance Department's Notification dated 13.8.2001, which laid down that no application for correction in date of birth, submitted after two years from entry into service, can be entertained.

5. The first respondent gave a notice under section 80 of the Code of Civil Procedure (hereinafter referred to as the 'CPC' for short) on 10.11.2005 and thereafter filed a suit on 16.10.2006 for a declaration that the decision dated 24.9.2002 was bad in law. The second respondent herein viz. Secretary, Board of School Education, Haryana, was joined as second defendant in the suit though he was a proforma-defendant.

6. The Learned Addl. Civil Judge, Senior Division, who decided the suit, being Civil Suit No.18 of 2006 took the view that the appellant was giving a retrospective effect to the Notification dated 13.8.2001 and that was not permissible. The Learned Civil Judge held that the suit was within time and granted a decree that the order dated 24.9.2002 was illegal, null and void and that the date of birth of the first respondent was 25.11.1962.

7. The appellant filed an appeal against this judgment and order to the Court of the Additional District Judge, Karnal being Civil Appeal No.66/2007 which came to be dismissed and so also the Regular Second Appeal No.3013/2007, which was filed against that order. The Learned Single Judge dismissed the second appeal by a short order in view of the concurrence of views of the courts below.

8. Being aggrieved by all these orders, the present appeal by Special Leave has been filed. It is submitted on behalf of the appellant that the first respondent joined as the Assistant

District Attorney on 2.4.1992 and the date of birth given by him on the basis of the matriculation certificate was recorded in his service book. Nine years later, he has sought to correct the date of birth, allegedly on the basis of the discussion at a family function and by pointing out the extracts of births of his brothers and sisters (though in none of them, there is any name of the child). Even after his representation was turned down on 24.9.2002 on the basis of the Government Notification dated 13.8.2001, he took more than three years to serve the notice under Section 80 of the CPC, which was served on 10.11.2005 and the suit was filed almost one year thereafter on 16.10.2006. The appellant submitted that the action on part of the first respondent was belated. It suffers from latches and the suit was also barred by limitation. The Respondent No.1 on the other hand, defended the impugned judgments as correctly rendered.

9. It was submitted on behalf of the appellant that the Courts below have erred in not accepting the appellant's submission on the basis of the Notification dated 13.8.2001 issued by the Finance Department, Government of Haryana, containing the amendments to the Punjab Finance Rules framed under Article 283(2) of the Constitution of India. It is submitted that the Courts have erred in treating this as a case of retrospective application of the relevant rule. It is pointed out that prior to the Notification dated 13.8.2001 also there was the governing rule 2.5 of the Punjab Civil Services Rules 1994 which laid down that the date of birth of the government employees, once recorded in the service book, cannot be corrected except in case of a clerical error without previous order of the government. The rule further provided that the date of birth/declaration of age made at the time of entry into service shall be deemed to be conclusive as against the government servant, unless he applies for correction of his age within two years from the date of his entry into government service.

The relevant Rule contained in paragraph 1 of those rules reads as follows:-

"ANNEXURE (A)

(Referred to in Rule 2.5 and Note 3 thereunder)

1. In regard to the date of birth a declaration of age made at the time or for the purpose of entry into Government service shall, as against the Government employee in question be deemed to be conclusive. The employee already in the service of the Government of Punjab on the date of coming into force of the Punjab Civil Services (First Amendment) Rules. Volume-I, Part-I, 1994, may apply for the change of date of birth within a period of two years from the coming into force of these rules on the basis of confirmatory documentary evidence such as Matriculation Certificate or Municipal Birth Certificate etc. No request for the change of date of birth shall be entertained after the expiry of the said period of two years. Government, however, reserves the right to make a correction in the recorded age of a Government employee at any time against the interest of the Government employee when it is satisfied that the age recorded in his service book or in the History of service of a Gazetted Government employee is incorrect and has been incorrectly recorded with the object that the Government employee may derive some unfair advantage therefrom."

10. This provision was later on amended and under the rules amended on 20.12.2000, it was provided that if application is made beyond two years, it must be considered on the recommendation of the Administrative Department and the Chief Secretary only in consultation with the Finance Department. It was entirely left to the discretion of the government whether to entertain any such application. The principle provision, which required that the employee must apply within two years, remained unaltered. This rule amended on 20.12.2000 reads as follows:

"*1. These rules may be called Punjab Financial*

Volume-I (Haryana First Amendment) Rules, 2000.

2. In the Punjab Financial Rules, Volume-I, in Annexure 'A' referred to in Rule 7-3 and Note 3 thereunder,-

(I) For paragraph 1, the following paragraph shall be substituted, namely:-

1. In regard to the date of birth a declaration of age made at the time of, or for the purpose of entry into Government service, shall be against the Government employee in question, be deemed to be conclusive unless he applied for correction of his age as recorded within two years from the date of his entry into Government service. Wherever, it is proposed to consider the application of the employee for correction of his age within a period of two years from the date of his entry into government service, the same would be considered by the government in consultation with the Chief Secretary to Government of Haryana. In cases where such application has been made beyond the stipulated period and is proposed to be accepted, the same shall be considered on recommendations of the Administrative Department and the Chief Secretary to Government of Haryana, in consultation with the Finance Department, Government however, reserves the right to make a correction in the recorded age of the government employee at any time against the interest of that government employee when it is satisfied that the age recorded in his service book or in the history of services of a government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage therefrom."

11. Subsequently, by the notification dated 13.8.2001 amending the rules, it is once again made clear that unless the application is made within two years, no change in the date of

birth will be entertained. This new rule 1, as amended on 13.8.2001 reads as follows:

> *" 1. These rules may be called Punjab Financial Volume-I (Haryana First Amendment) Rules, 2001.*
>
> 2. In the Punjab Financial Rules, Volume-I, in Annexure 'A' referred to in Rule 7.3 and Note 3 thereunder:-
>
> (i) for paragraph 1, the following paragraph shall be substituted, namely:-
>
> 1. In regard to the date of birth, a declaration of age made at the time of, or for the purpose of entry into government service, shall as against the government employee in question, be deemed to be conclusive unless he applied for correction of his age as recorded within two years from the date of his entry into government service. No application submitted beyond the stipulated period of two years for change in date of birth will be entertained. Wherever the application for correction of his age is submitted by the employee within a period of two years from the date of his entry into government service, the same would be considered by the government in consultation with the Chief Secretary to Government of Haryana. The government, however, reserves the right to make a correction in the recorded age of government employee at any time against the interest of that government employee when it is satisfied that the age recorded in his service book or in the history of services of a government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage therefrom."

12. Thus, as seen from the above position, the relevant rule always required an application for correction of date of birth to be submitted within two years from joining the service. The

amended rule of 20.12.2000 made a slight modification that application filed after two years could be considered which will be only on the recommendation of the Administrative Department. This provision has now been removed after the rule was amended on 13.8.2001.

13. The import of such a provision has been clarified by this court from time to time. Thus, in paragraph 7 of the *Secretary and Commissioner, Home Department vs. R.Kirubakaran* [1994 (Suppl. 1) SCC 155] this Court held as follows:

> **"** An application for correction of the date of birth should not be dealt with by the tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose their promotions for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case, on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible. Before any such direction is issued, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in

accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed within the time, which can be held to be reasonable."

The Court has, thereafter stated that burden in such cases lies on the applicant and noted that in many of such cases, the employees approach the Court on the eve of retirement. The Courts and Tribunals must be slow in granting any interim relief in such cases. The same principle has been reiterated in *State of UP vs. Gulaichi* [2003 (6) SCC 483]; *State of Punjab vs. S C Chadha* [2004 (3) SCC 394]; and *State of Gujarat vs. Vali Mohmed Dosabhai Sindhi* [2006 (6) SCC 537].

14. As recorded above, it has been held time and again that the application for correction of date of birth is also to be looked into from the point of view of the concerned department and the employees engaged therein. The other employees have expectations of promotion based on seniority and suddenly if such change is permitted; it causes prejudice and disturbance in the working of the department. It is, therefore, quite correct for the State to insist that such application must be made within the time provided in the rules, say, two years, as in the present case.

15. It is also seen that such applications are made very often, almost at the end of the service of the employee or in any case, belatedly. Whatever may be the reason, the fact remains that in the present case, the application was made after some nine years of joining into service. Even assuming that first respondent came to know in June 2001 that there was an error in his date of birth entered in the matriculation certificate, as claimed by him, he took more than three years to issue the notice under Section 80 of the CPC and then to file the suit. Whether the suit was time barred or not, the claim was in any case belated. It has to be filed within the time provided or within a reasonable time and it is not to be

entertained merely on the basis of plausible material as held in *Kirbukaran* (supra). As observed by this Court in *State of UP vs. Shiv Narayan Upadhyaya* [2005 (6) SCC 49]:

> "As such, unless a clear case on the basis of clinching materials which can be held to be conclusive in nature, is made out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the Tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible."

16. In the circumstances in our view, the High Court as well as the courts below clearly erred in entertaining the claim of Respondent No.1 for correction in his date of birth at a belated stage. In such a matter, we are concerned with the correction in the date of birth for the purpose of service record and not for any other purpose. The observation of this Court in para 7 of the *Union of India vs. Harnam Singh* [1993 (2) SCC 162] in this behalf are quite apt.

> **"7.** A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the reason that the right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the

Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the courts and tribunals. It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age. ……."

17. This being so, the courts should not have entertained the claim of the first respondent belatedly and beyond the period provided in the rules. The rules, in the instant case, all throughout required such application to be made within two years. Therefore, the courts clearly erred in finding fault with the appellant for allegedly applying the Notification of 13.8.2001 retrospectively which was not the case over here.

18. In the circumstances, we allow this appeal and set aside the orders passed by the High Court as well as by the courts below. The suit filed by the first respondent will stand dismissed.

R.P. Appeal allowed.

K.K. POONACHA

v.

STATE OF KARNATAKA AND OTHERS

(Civil Appeal No. 730 of 2004)

SEPTEMBER 07, 2010

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Bangalore Development Authority Act, 1976 – Constitutional validity of – Challenged on the ground of non-compliance of Article 31(3) – Held: The 1976 Act cannot be declared unconstitutional or void only on the ground that the Act was not reserved for the consideration of the President and did not receive the assent as per the requirement of Article 31(3) – If a post-Constitution law is within the legislative competence of the Union or State and does not infringe any of the rights conferred by Part III of the Constitution, then the same cannot be declared void on the ground of non-compliance of the procedural requirement of prior recommendation or sanction, if assent is given in the manner provided under Article 255 – The 1976 Act was enacted for the development of the city of Bangalore and adjacent area and it contains incidental provisions for acquisition of land – It is enacted by Legislature of the State with reference to Entry 5 of List II – Constitution of India, 1950 – Articles 31(3), 255, 256; Seventh Schedule List II Entry 5.

The question which arises for consideration in these appeals is whether the Bangalore Development Authority Act, 1976 is liable to be declared void on the ground that the same was not reserved for the consideration of the President and did not receive his assent as per the requirement of Article 31(3) of the Constitution of India, 1950.

Dismissing the appeals, the Court

HELD: 1. The Bangalore Development Authority Act, 1976 cannot be declared unconstitutional or void only on the ground that the same was not reserved for consideration of the President and did not receive his assent. [Para 21]

2.1 Article 13(1) of the Constitution of India, 1950, deals with pre-Constitution laws and declares that all laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent they are inconsistent with the provisions of Part III. Article 13(2) injuncts the State from enacting any law which takes away or abridges the rights enumerated in Part III of the Constitution and declares that any law made in contravention of that clause shall be void. Article 13(2) contains a constitutional prohibition against enactment of any law by the State which infringes the rights guaranteed to the citizens and others under Part III of the Constitution. Article 31(1), as it stood till 20.6.1979, contained a general injunction against depriving any person of his property except by authority of law. Article 31(2) laid down that no property shall be requisitioned save for a public purpose and save by authority of law which provides for acquisition and requisitioning of property subject to payment of compensation. Clause (2A) of Article 31 was added by the Constitution (Fourth Amendment) Act, 1955. This clause clarified the meaning of the words 'acquisition' and 'requisitioning' used in clause (2) and laid down that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, such law shall not be treated as one providing for compulsory acquisition or requisitioning of property despite the fact that it may deprive any person of his property. Article 31(3) laid down that no law enacted by the Legislature of a State with reference to clause (2) shall

be effective unless such law, having been reserved for the consideration of the President, has received his assent. This clause of Article 31 did not contain a constitutional inhibition against enactment of law by the Legislature of a State under clause (2), but merely contained a post-enactment procedural provision which was required to be complied with for making such law effective. What was implicit in the language of Article 31(3) was that the particular law was within the legislative competence of the State and such law did not violate the provisions contained in Part III or any other provision of the Constitution. The assent given by the President in terms of Article 31(3) of the Constitution to a law enacted by the Legislature of a State did not mean that the particular enactment acquired immunity from challenge even though the same was not within the legislative competence of the State or was otherwise violative of any constitutional provision. [Para 6] [1038-C-H; 1039-A-D]

2.2 Clause (1) of Article 254 lays down that in the event of conflict between a law enacted by Parliament and a State law enacted on a subject enumerated in the Concurrent List (List III of Seventh Schedule), the former prevails over the latter. In other words, if the law enacted by the Legislature of a State on a subject enumerated in the Concurrent List is repugnant to a law enacted by Parliament on that subject, then to the extent of repugnancy, State law shall be void. Clause (2) of Article 254 engrafts an exception to the rule enshrined in clause (1) and provides that if the President assents to a State law, which has been reserved for his consideration, then the State law will prevail notwithstanding any repugnancy with an earlier law enacted by Parliament. In such a case, Parliamentary legislation will give way to the State law to the extent of inconsistency. Proviso to Article 254(2) empowers Parliament to repeal or amend a repugnant

State law, either directly or by itself enacting a law repugnant to the State law with respect to the same subject. Even if a subsequent law enacted by Parliament does not expressly repeal an existing State law, the State legislation will become void to the extent of repugnancy with a subsequent Parliamentary legislation. If Article 31(3) is read in the light of Article 254, it becomes clear that object thereof was to ensure that the law enacted by the Legislature of a State with reference to clause (2) of Article 31 may not be inconsistent with or repugnant to the provisions of a law made by Parliament and in the event of conflict or repugnancy, such law shall not become effective without the assent of the President. Article 255, by its very nomenclature indicates that the provision contained therein is procedural in nature. This Article declares that no Act of Parliament or of the Legislature of a State and no provision of any such Act, shall be invalid by reason only that the requirement contained in other provisions of the Constitution regarding recommendation or previous sanction has not been complied with if assent to that Act was given by the concerned constitutional functionary mentioned in clauses (a) to (c). [Para 6] [1039-D-H; 1040-A-C]

M.P.V. Sundararamier and Company v. The State of Andhra Pradesh **1958 SCR 1422;** *Deep Chand v. The State of Uttar Pradesh and Ors.* **(1959) Supp. 2 SCR 8;** *Mahant Sankarshan Ramanuja Das Goswami etc. v. The State of Orissa and Anr.* **(1962) 3 SCR 250;** *Jawaharmal v. State of Rajasthan and Ors.* **(1966) 1 SCR 890;** *Behram Khurshed Pesikaka v. The State of Bombay* **(1955) 1 SCR 613;** *Saghir Ahmad v. The State of U.P. and Ors.* **(1955) 1 SCR 707;** *Mahendra Lal Jaini v. The State of U.P.* **(1963) Supp. 1 SCR 912;** *Bhikaji Narain Dhakras v. The State of Madhya Pradesh and Anr.* **(1955) 2 SCR 589;** *Keshavan Madhava Menon v. The State of Bombay* **1951 SCR 228;** *The State of Bombay*

and Anr. v. The United Motors (India) Ltd. and Ors. **1953 SCR 1069;** *The Bengal Immunity Company Ltd. v. The State of Bihar and Ors.* **(1955) 2 SCR 603;** *The State of Bombay v F.N. Balsara* **1951 SCR 682 – referred to.**

John M. Wilkerson v. Charles A. Rahrer **(1891) 140 U.S. 545;** *Carter v. Egg and Egg Pulp Marketing Board* **(1942) 66 C.L.R. 557;** ***Newberry v. Unit*** **(1921) 265 U.S. 232 – referred to.**

'Constitution of the United States' Volume I, Willoughby – **referred to.**

3.1 A post-Constitution law is *void ab initio* if it is not within the domain of the Legislature or is violative of the rights conferred by Part III of the Constitution. If the law is within the legislative competence of the Union or State and does not infringe any of the rights conferred by Part III of the Constitution, then the same cannot be declared void on the ground of non-compliance of the procedural requirement of prior recommendation or sanction, if assent is given in the manner provided under Article 255 of the Constitution. If post-enactment assent is necessary for making the law effective, then such law cannot be enforced or implemented till such assent is given. If a law is within the competence of the Legislature, the same does not become void or is blotted out of the statute book merely because post-enactment assent of the President has not been obtained. Such law remains on the statute book but cannot be enforced till the assent is given by the President. Once the assent is given, the law becomes effective and enforceable. If the provision requiring pre-enactment sanction or post-enactment assent of the President is repealed, then the law becomes effective and enforceable from the date of repeal and such law cannot be declared unconstitutional only on the ground that the same was not reserved for consideration of the President

and did not receive his assent. The provision contained in Article 31(3) did not have even a semblance of similarity with Article 13(2). The procedural provision contained in clause (3) of Article 31 did not create any substantive right in favour of any citizen or non-citizen like those conferred by other Articles of Part III including clauses (1) and (2) of Article 31. The only consequence of non-compliance of clause (3) of Article 31 was that the same did not become effective and the State Government or the Bangalore Development Authority could not have taken action for implementation of the provisions contained therein. Once Article 31 was repealed, the necessity of reserving the 1976 Act for consideration of the President and his assent disappeared and the provisions contained therein automatically became effective and the three-Judge Bench in *_Bondu Ramaswamy v. Bangalore Development Authority and others_ case rightly negatived challenge to its constitutionality. It cannot be said that the judgment of three-Judge Bench in *_Bondu Ramaswamy's_ case requires re-consideration. [Para 20] [1065-D-H; 1066-A-E; 1069-E-F]

Bondu Ramaswamy v. Bangalore Development Authority and Ors.* **(2010) 5 SCALE 70 – relied on.

3.2 The 1976 Act was enacted by the Legislature of the State of Karnataka to provide for the establishment of a Development Authority for the development of the city of Bangalore and the area adjacent thereto and for matters connected therewith. It is not a law enacted for acquisition or requisitioning of property. The terms like 'amenity', 'civic amenity', 'Bangalore Metropolitan Area', 'betterment tax', 'building', 'building operations', 'development', 'engineering operations', 'means of access', 'street' defined in s. 2 of the 1976 Act are directly related to the issue of development. Section 14 lays down that the object of the Authority constituted u/s. 3

shall be to promote and secure the development of the Bangalore Metropolitan Area and for that purpose it shall have the power to acquire, hold, manage and dispose of movable and immovable property, within or outside the area of its jurisdiction, to carry out building, engineering and other operations and generally to do all things necessary or expedient for the purpose of such development and for purposes incidental thereto. Chapter 3 of the 1976 Act contains provisions relating to development schemes. The provisions relating to acquisition of land contained in chapter 4 (ss. 35 and 36) are only incidental to the main object of enactment, namely development of the city of Bangalore and area adjacent thereto. Therefore, the 1976 Act was enacted for the development of the city of Bangalore and the area adjacent thereto and it contains incidental provisions in sections 35 and 36 for acquisition of land. The 1976 Act is a law enacted by the Legislature of the State with reference to Entry 5 of List II and is not a law enacted under Entry 42 of List III. [Paras 21 and 22] [1066-E-H; 1067-A-E; 1069-D-E]

Munithimmaiah v. State of Karnataka **(2002) 4 SCC 326 – relied on.**

Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P. **(1980) 4 SCC 136 – held inapplicable.**

Case Law Reference:

1958 SCR 1422	**Referred to.**	**Paras 2, 3, 12**
(1959) Supp. 2 SCR 8	**Referred to.**	**Paras 2, 16**
(1962) 3 SCR 250	**Referred to.**	**Paras 2, 18**
(1966) 1 SCR 890	**Referred to.**	**Paras 2, 19**
(1955) 1SCR 613	**Referred to.**	**Paras 2, 14**
(1955) 1 SCR 707	**Referred to.**	**Paras 2, 15**

(1963) Supp. 1 SCR 912	**Referred to.**	**Para 2, 3, 17**
(1891) 140 U.S. 545	**Referred to.**	**Para 9**
(1942) 66 C.L.R. 557	**Referred to.**	**Para 10**
(1955) 2 SCR 589	**Referred to.**	**Para 11**
1951 SCR 228	**Referred to.**	**Para 11**
1953 SCR 1069	**Referred to.**	**Para 12**
(1955) 2 SCR 603	**Referred to.**	**Para 12**
(1951) SCR 682	**Referred to.**	**Para 14**
(1921) 265 U.S. 232	**Referred to.**	**Para 16**
(2010) 5 SCALE 70	**Relied on.**	**Paras 20, 23**
(2002) 4 SCC 326	**Relied on.**	**Para 21**
(1980) 4 SCC 136	**Held inapplicable.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 730 of 2004.

From the Judgment & Order dated 14.02.2003 of the High Court of Karnatka at Bangalore in Writ Appeal No. 4687 of 2002.

WITH

C.A. Nos. 737, 738, 739-746 & 747-752 of 2004.

Dushyant Dave, Altaf Ahmed, R.S. Hegde, Amit Wadhwa, Yashvardhan (for P.P. Singh), Ajay Kumar, M., B. Subrahmanya Prasad (for Ajit Bhasme), S.K. Kulkarni, M. Gireesh Kumar, Khwairakpam Nobin Singh, K.R. Joshi, Ramesh K. Mishra, Sanjay R. Hegde for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether the Bangalore Development Authority Act, 1976 (for short, "the 1976 Act") is liable to be declared void on the ground that the same was not reserved for the consideration of the President and did not receive his assent as per the requirement of Article 31(3) of the Constitution is the question that arises for consideration in these appeals filed against the judgments of the Division Bench of Karnataka High Court which upheld the order of the learned Single Judge declining to interfere with the acquisition of the appellants' land.

2. Although, the above noted question was considered and answered in negative by three-Judge Bench in *Bondu Ramaswamy v. Bangalore Development Authority and others* (2010) 5 SCALE 70, Shri Dushyant Dave, learned senior counsel appearing for the appellants argued that the issue needs reconsideration because the three-Judge Bench solely relied upon the judgment of the Constitution Bench in *M.P.V. Sundararamier and Company v. The State of Andhra Pradesh* 1958 SCR 1422 but did not deal with the other Constitution Bench judgments in *Deep Chand v. The State of Uttar Pradesh and others* (1959) Supp. 2 SCR 8, *Mahant Sankarshan Ramanuja Das Goswami etc. v. The State of Orissa and another* (1962) 3 SCR 250 and *Jawaharmal v. State of Rajasthan and others* (1966) 1 SCR 890, which according to the learned senior counsel lay down that any law enacted by the Legislature in violation of the provisions contained in Part III of the Constitution is void. Shri Dave submitted that Article 31(3), which was in existence at the time of enactment of the 1976 Act postulated that any law made by the Legislature of a State for compulsory acquisition/requisition of the property shall not be effective unless such law is reserved for consideration of the President and has received his assent and as the 1976 Act was not even sent to the President for his consideration, the same remained still-born, invalid and inoperative and did not become valid merely because Article 31(3) was repealed with effect from 20.6.1979. Shri Dave emphasized that the

provision contained in Article 31(3) was mandatory and non compliance thereof had the effect of rendering the legislation enacted by the State for acquisition/requisition of land void from its inception. In support of his arguments, the learned senior counsel relied upon the Constitution Bench judgments of this Court in *Behram Khurshed Pesikaka v. The State of Bombay* (1955) 1 SCR 613, *Saghir Ahmad v. The State of U.P. and others* (1955) 1 SCR 707, *Deep Chand v. The State of Uttar Pradesh and others* (supra), *Mahendra Lal Jaini v. The State of U.P.* (1963) Supp. 1 SCR 912, *Mahant Sankarshan Ramanuja Das Goswami etc. v. The State of Orissa and another* (supra) and *Jawaharmal v. State of Rajasthan and others* (supra). Learned senior counsel further argued that the judgment of two-Judge Bench in *Munithimmaiah v. State of Karnataka* (2002) 4 SCC 326 upon which reliance has been placed by the three-Judge Bench for holding that the 1976 Act is a law enacted with reference to Entry 5 of List II does not lay down correct law because it runs contrary to the Constitution Bench judgment in *Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P.* (1980) 4 SCC 136. Learned senior counsel made a pointed reference to paragraphs 12 and 25 of that judgment to show that power to legislate for acquisition of property is an independent and separate power and is exercisable only under Entry 42 of List III.

3. Shri Altaf Ahmed, learned senior counsel appearing for the Bangalore Development Authority fairly conceded that the 1976 Act was not reserved for the consideration of the President but argued that non compliance of Article 31(3) does not have the effect of rendering the legislation void because the same falls within the ambit of Article 31(2A). Shri Altaf Ahmed then referred to Sections 17, 18, 19, 35 and 36 of the 1976 Act and the judgment of this Court in *Munithimmaiah v. State of Karnataka* (supra) and submitted that the 1976 Act was enacted for the establishment of a Development Authority for the development of the City of Bangalore and areas adjacent thereto and acquisition of land under Sections 35 and 36

thereof is ancillary to the planned development of the City and, as such, the same cannot be treated as a law enacted with reference to Entry 42 of List III of the Constitution. Learned senior counsel pointed out that the provisions of the Land Acquisition Act, 1894 are attracted only when the acquisition of land under the 1976 Act is otherwise than by agreement as provided under Section 35. He further argued that Article 31(3) as it existed up to 20.6.1979, neither impinged upon the legislative competence of the State to enact law for acquisition of land nor it contained a negative mandate like the one enshrined in Article 13(2) of the Constitution. Shri Altaf Ahmad argued that the provision contained in Article 31(3) was procedural in nature and non compliance thereof did not affect validity of the 1976 Act, which was within the legislative competence of the State but merely postponed its implementation and once Article 31 was repealed, the Legislation automatically became effective. Learned senior counsel emphasized that the validity of the legislation is to be tested on the date of its enactment to find out whether the Legislature is competent to enact such law and whether the same violates the provisions contained in Part III or any other provisions of the Constitution and non compliance of a procedural provision like the one contained in Article 31(3) of the Constitution does not affect validity of the legislation. Learned senior counsel finally submitted that the judgment in *Bondu Ramaswamy v. Bangalore Development Authority and others* (supra) does not require reconsideration because the three-Judge Bench had followed the ratio of the Constitution Bench judgment in *M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh* (supra).

4. We have considered the respective submissions. In *Bondu Ramaswamy v. Bangalore Development Authority and others* (supra), the three-Judge Bench rejected challenge to the constitutionality of the 1976 Act by making the following observations:

"It is no doubt true that the BDA Act received only the assent of the Governor and was neither reserved for the assent of the President nor received the assent of the President. As Clause (3) of Article 31 provided that a law providing for acquisition of property for public purposes, would not have effect unless such law received the assent of the President, it was open to a land owner to contend that the provisions relating to acquisition in the BDA Act did not come into effect for want of President's assent. But once Article 31 was omitted from the Constitution on 20.6.1979, the need for such assent disappeared and the impediment for enforcement of the provisions in the BDA Act relating to acquisition also disappeared. Article 31 did not render the enactment a nullity, if there was no assent of the President. It only directed that a law relating to compulsory acquisition will not have effect unless the law received the assent of the President. As observed in *Munithimmaiah v. State of Karnataka* [2002 (4) SCC 326], acquisition of property is only an incidental and not the main object and purpose of the BDA Act. Once the requirement of assent stood deleted from the Constitution, there was absolutely no bar for enforcement of the provisions relating to acquisition in the BDA Act. The Karnataka Legislature had the legislative competence to enact such a statute, under Entry 5 of List II of the Seventh Schedule to the Constitution. If any part of the Act did not come into effect for non-compliance with any provision of the Constitution, that part of the Act may be unenforceable, but not invalid."

The three-Judge Bench then noticed the propositions of law laid down in *M.P.V. Sundararamier and Company v. The State of Andhra Pradesh and another* (supra) and *Mahendra Lal Jaini v. The State of U.P.* (supra) and observed:

"On a careful consideration of the aforesaid observations, we are of the view that the said decision does not in any

way express any view contrary to the clear enunciation of law in *Sundaramier*. In *Mahendra Lal Jaini*, this constitutional laws governed by Article 13(1) and post-constitutional laws which are governed by Article 13(2) and held that any post-constitutional law made in contravention of provisions of part III, to the extent of contravention is a nullity from its inception. Let us now examine whether any provision of the BDA Act violated any provisions of Article 31 in part III of the Constitution. Clause (1) of Article 31 provided that no person shall be deprived of his property save by authority of law. As we are examining the validity of a law made by the state legislature having competence to make such law, there is no violation of Article 31(1). Clause (2) of Article 31 provided that no law shall authorise acquisition unless it provided for compensation for such acquisition and either fixed the amount of compensation, or specified the principles on which, and the manner in which, the compensation was to be determined and given. BDA Act, does not fix the amount of compensation, but Section 36 thereof clearly provides that the acquisition will be regulated by the provisions of the Land Acquisition Act, 1894 so far as they are applicable. Thus the principles on which the compensation is to be determined and the manner in which the compensation is to be determined set out in the LA Act, become applicable to acquisitions under BDA Act. Thus there is no violation of Article 31(2). Article 31(3) merely provides that no law providing for acquisition *shall have effect* unless such law has received the assent of the President. Article 31(3) does not specify any fundamental right, but relates to the procedure for making a law providing for acquisition. As noticed above, it does not nullify any laws, but postpones the enforcement of a law relating to acquisition, until it receives the assent of the President. There is therefore no *violation* of Part III of the Constitution that can lead to any part of the BDA Act being treated as a nullity. As stated above, the effect of Article 31(3) was that enforcement of the provisions relating to

acquisition was not possible/permissible till the assent of the President was received. Therefore, once the requirement of assent disappeared, the provisions relating to acquisition became enforceable."

5. We shall now examine whether the view expressed by the three-Judge Bench on the constitutionality of the 1976 Act needs reconsideration by a larger Bench because the judgments of the Constitution Benches on which reliance has been placed by Shri Dushyant Dave were not considered. For this purpose, it will be useful to notice the provisions of Article 13, Article 31 as it existed till 20.6.1979 and Articles 254 and 255 of the Constitution. The same read as under:

"13. Laws inconsistent with or in derogation of the fundamental rights. – (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,–

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

31. Compulsory acquisition of property.– (1) No person shall be deprived of his property save by authority of law.

(2) No property shall be requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question any court on the ground that the amount so fixed the whole or any part of such amount is to be given otherwise than in cash.

Provided that in making any law providing for compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(2B) Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2).

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) to (6) xxx xxx xxx

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.–– (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

255. Requirements as to recommendations and previous sanctions to be regarded as matters of procedure only.–– No Act of Parliament or of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given-

(a) where the recommendation required was that of the Governor, either by the Governor or by the President;

(b) where the recommendation required was that of the Rajpramukh, either by the Rajpramukh or by the President;

(c) where the recommendation or previous sanction required was that of the President, by the President."

6. Article 13(1) deals with pre-Constitution laws and declares that all laws in force in the territory of India immediately before commencement of the Constitution shall be void to the extent they are inconsistent with the provisions of Part III. Article 13(2) injuncts the State from enacting any law which takes away or abridges the rights enumerated in Part III of the Constitution and declares that any law made in contravention of that clause shall be void. To put it differently, Article 13(2) contains a constitutional prohibition against enactment of any law by the State which infringes the rights guaranteed to the citizens and others under Part III of the Constitution. Article 31(1), as it stood till 20.6.1979, contained a general injunction against depriving any person of his property except by authority of law. Article 31(2) laid down that no property shall be requisitioned save for a public purpose and save by authority of law which provides for acquisition and requisitioning of property subject to payment of compensation. Clause (2A) of Article 31 was added by the Constitution (Fourth Amendment) Act, 1955. This clause clarified the meaning of the words 'acquisition' and 'requisitioning' used in clause (2) and laid down that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, such law shall not be treated as one providing for compulsory acquisition or requisitioning of property despite the fact that it may deprive any person of his property. Article 31(3) laid down that no law enacted by the

Legislature of a State with reference to clause (2) shall be effective unless such law, having been reserved for the consideration of the President, has received his assent. This clause of Article 31 did not contain a constitutional inhibition against enactment of law by the Legislature of a State under clause (2), but merely contained a post enactment procedural provision which was required to be complied with for making such law effective. What was implicit in the language of Article 31(3) was that the particular law was within the legislative competence of the State and such law did not violate the provisions contained in Part III or any other provision of the Constitution. The assent given by the President in terms of Article 31(3) of the Constitution to a law enacted by the Legislature of a State did not mean that the particular enactment acquired immunity from challenge even though the same was not within the legislative competence of the State or was otherwise violative of any constitutional provision. Clause (1) of Article 254 lays down that in the event of conflict between a law enacted by Parliament and a State law enacted on a subject enumerated in the Concurrent List (List III of Seventh Schedule), the former prevails over the latter. In other words, if the law enacted by the Legislature of a State on a subject enumerated in the Concurrent List is repugnant to a law enacted by Parliament on that subject, then to the extent of repugnancy, State law shall be void. Clause (2) of Article 254 engrafts an exception to the rule enshrined in clause (1) and provides that if the President assents to a State law, which has been reserved for his consideration, then the State law will prevail notwithstanding any repugnancy with an earlier law enacted by Parliament. In such a case, Parliamentary legislation will give way to the State law to the extent of inconsistency. Proviso to Article 254(2) empowers Parliament to repeal or amend a repugnant State law, either directly or by itself enacting a law repugnant to the State law with respect to the same subject. Even if a subsequent law enacted by Parliament does not expressly repeal an existing State law, the State legislation will become void to the extent of repugnancy with a subsequent

Parliamentary legislation. If Article 31(3) is read in the light of Article 254, it becomes clear that object thereof was to ensure that the law enacted by the Legislature of a State with reference to clause (2) of Article 31 may not be inconsistent with or repugnant to the provisions of a law made by Parliament and in the event of conflict or repugnancy, such law shall not become effective without the assent of the President. Article 255, by its very nomenclature indicates that the provision contained therein is procedural in nature. This Article declares that no Act of Parliament or of the Legislature of a State and no provision of any such Act, shall be invalid by reason only that the requirement contained in other provisions of the Constitution regarding recommendation or previous sanction has not been complied with if assent to that Act was given by the concerned constitutional functionary mentioned in clauses (a) to (c).

7. In the light of the above, we shall now consider whether the 1976 Act is liable to be treated as unconstitutional and void on the ground that the same was not reserved for consideration of the President and did not receive his assent or in the absence of Presidential assent, the 1976 Act remained dormant and became effective as soon as Article 31 including clause (3) thereof was repealed. The consideration of the aforesaid question needs to be prefaced with an observation that the appellants have not questioned constitutionality of the 1976 Act on the ground that it is beyond legislative competence of the State or violates any of their rights guaranteed under Part III of the Constitution or any other provision of the Constitution. Indeed, it was not even argued by Shri Dushyant Dave, learned senior counsel for the appellants that the 1976 Act violates the mandate of Article 31(2) of the Constitution.

8. In his work on "Constitution of the United States" Volume I, Willoughby says:

> "The Court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to

recognize it, and determines the rights of the parties just as if such statute had no application.

……

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted. 'An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted.'

However, it has been held that where an act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as, for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the act does not need to be re-enacted in order to be enforced, if this cause of its unconstitutionality is removed."

9. In *John M. Wilkerson v. Charles A. Rahrer* (1891) 140 U.S. 545, the Supreme Court of the United States considered the question whether the prohibitory Liquor Law enacted by the State of Kansas, which could not operate until the passage of the Act by the United States Congress became effective on the passing of such Act by the Congress and answered the same in affirmative. The facts of that case were that in June 1990, the petitioner, a citizen of the United States and an agent of Maynard, Hopkins & Co., received from his principal intoxicating liquor in packages. The packages were shipped from the State of Missouri to various points in the State of Kansas and other States. On August 9, 1890, the petitioner offered for sale and sold two packages in the State of Kansas.

He was prosecuted for violating the prohibitory Liquor Law of the State of Kansas. On August 8, 1890, an Act of Congress was passed making the State law applicable once intoxicating liquors were transported into any State. The Supreme Court of the United States considered the question whether the prohibitory Liquor Law enacted by the State of Kansas, which was within the competence of the Legislature of the State but which law did not operate upon packages of liquors imported into the Kansas State in the course of inter-State commerce because regulation of inter-State commerce was within the powers of the Congress, became effective from August 8, 1890 when the Congress enacted a law making intoxicating liquors transported into a State subject to the laws of that State and held:

"It was not necessary, after the passage of the Act of Congress of August 8, 1890, to re-enact the Law of Kansas of 1899, forbidding the sale of intoxicating liquors in that State, in order to make such State Law operative on the sale of imported liquors."

"This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State Law was required before it could have the effect upon imported which it had always had upon domestic property.'

A reference to those decisions brings out in bold relief the distinction between the two classes of cases referred to therein. It will be seen from the two decisions that in the former the Act was void from its inception and in the latter it was valid when made but it could not operate on certain articles imported in the course of inter-State trade.

On that distinction is based the principle that an after-acquired power cannot, ex proprio vigore, validate a statute in one case, and in the other, a law validly made would take effect when the obstruction is removed."

(emphasis supplied)

10. A somewhat similar issue was considered by the Australian Court in *Carter v. Egg and Egg Pulp Marketing Board* (1942) 66 C.L.R. 557 in the context of Section 109 of the Australian Constitution which provided that if a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall be invalid to the extent of inconsistency. Commenting on that section, Latham, C.J., observed:

"This section applies only in cases where, apart from the operation of the section, both the Commonwealth and the State Laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power, no question can arise under the section. The word 'invalid' in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed the State law would again become operative."

11. In none of the judgments relied upon by the learned counsel for the parties, this Court was called upon to consider the effect of non compliance of a provision like the one contained in Article 31(3) but in some of them the Court did consider the effect of removing a constitutional embargo/ limitation on the operation of a statute. In *Bhikaji Narain Dhakras v. The State of Madhya Pradesh and another* (1955) 2 SCR 589, the Constitution Bench considered the effect of the Constitution (First Amendment) Act, 1951 on the provisions of the Motor Vehicles Act, 1939 as amended by the C.P. & Berar Motor Vehicles (Amendment) Act, 1947. By virtue of the amendments made in the 1939 Act, the Government got power

(i) to fix fares or freights throughout the Province or for any area or for any route, (ii) to cancel any permit after the expiry of three months from the date of notification declaring its intention to do so and on payment of such compensation as might be provided by the Rules, (iii) to declare its intention to engage in the business of road transport generally or in any area specified in the notification, (iv) to limit the period of the license to a period less than the minimum specified in the Act, and (v) to direct the specified Transport Authority to grant a permit, inter alia, to the Government or any undertaking in which Government was financially interested. After commencement of the Constitution on 26.1.1950, the Amending Act became an existing law within the meaning of Article 13(1). Since all private motor transport operators were excluded from the field of transport business, they challenged the vires of the Amending Act. The Constitution Bench expressed the view that the same appear to be violative of Article 19(1)(g) read with clause (6) of that Article and became void to that extent. By the Constitution (First Amendment) Act, 1951, clause (2) of Article 19 was substituted with retrospective effect. Clause (6) was also amended but was not given retrospective effect. It was argued on behalf of the petitioners that the law having become void could not be vitalized by a subsequent amendment of the Constitution which removed the constitutional objection unless the same was re-enacted. In support of this argument, reliance was placed on the judgment of this Court in *Saghir Ahmad v. The State of U.P. and others* (supra). The Constitution Bench referred to that judgment and also the judgment in *Keshavan Madhava Menon v. The State of Bombay* 1951 SCR 228 and observed:

"The impugned Act was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by Article 19(1)(*g*) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under Article 13(1) that existing law became void "to the extent of such inconsistency". As

explained in *Keshavan Madhava Menon's case* (*supra*) the law became void not *in toto* or for all purposes or for all times or for all persons but only "to the extent of such inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens. It did not become void independently of the existence of the rights guaranteed by Part III. In other words, on and after the commencement of the Constitution the existing law, as a result of its becoming inconsistent with the provisions of Article 19(1)(*g*) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution, as was held in *Keshavan Madhava Menon's case.* The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right. In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19(1)(*g*) read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26-1-1950 and the 18-6-1951 the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under Article 19(1)(*g*). The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. *The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then it is not intelligible what "existing law" could have been sought to be saved from the operation of Article 19(1)(g) by the amended clause (6) insofar as it sanctioned the creation of State monopoly, for, ex hypothesi, all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of clause (6) as it then stood.* The American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still born as it were. The American authorities, therefore, cannot fully apply to pre-Constitution laws which were perfectly valid before the Constitution. But apart from this distinction between pre-Constitution and post-Constitution laws on which, however, we need not rest our decision, it must be held that these American authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article 13, rendered void "to the extent of such inconsistency". Such laws were not dead for all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition. *In our judgment, after the amendment of clause (6) of Article 19 on the 18-6-1951, the impugned Act ceased to be unconstitutional and became revivified and enforceable against citizens as well as against non-citizens. It is true that as the amended clause (6) was not made retrospective the impugned Act could have no operation as against citizens between the 26-1-1950 and the 18-6-1951 and no rights and obligations could be founded on the provisions of the impugned Act during the said period whereas the amended clause (2) by reason of its being expressly made retrospective had effect even during that period. But after the amendment of clause (6) the impugned Act immediately became fully operative even as against the citizens. The notification*

declaring the intention of the State to take over the bus routes to the exclusion of all other motor transport operators was published on the 4-2-1955 when it was perfectly constitutional for the State to do so. In our judgment the contentions put forward by the respondents as to the effect of the Constitution (First Amendment) Act, 1951 are well-founded and the objections urged against them by the petitioners are untenable and must be negatived.

(emphasis supplied)

The Constitution Bench then considered the argument of the petitioners that the impugned Act violated their right to property guaranteed under Article 31 of the Constitution. While rejecting the contention, the Court observed:

"There can be no question that the amended provisions, if they apply, save the impugned law, for it does not provide for the transfer of the ownership or right to possession of any property and cannot, therefore, be deemed to provide for the compulsory acquisition or requisitioning of any property. But the petitioners contend, as they did with regard to the Constitution (First Amendment) Act, 1951, that these amendments which came into force on the 27-4-1955 are not retrospective and can have no application to the present case. It is quite true that the impugned Act became inconsistent with Article 31 as soon as the Constitution came into force on the 26-1-1950 as held by this Court in *Shagir Ahmad's case* (*supra*) and continued to be so inconsistent right up to the 27-4-1955 and, therefore, under Article 13(1) became void "to the extent of such inconsistency." *Nevertheless, that inconsistency was removed on and from the 27-4-1955 by the Constitution (Fourth Amendment) Act, 1955. The present writ petitions were filed on the 27-5-1955, exactly a month after the Constitution (Fourth Amendment) Act, 1955 came into force, and, on a parity of reasoning*

hereinbefore mentioned, the petitioners cannot be permitted to challenge the constitutionality of the impugned Act on and from the 27-4-1955 and this objection also cannot prevail."

(emphasis supplied)

12. In *M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh* (supra), the Constitution Bench considered the effect of the Sales Tax Laws Validation Act, 1956 enacted by Parliament on the petitioners' challenge to the constitutionality of the Madras General Sales Tax Act, 1939, which was a pre-Constitution legislation. The facts of that case were that petitioners were dealers carrying on business of sale and purchase of yarn in the City of Madras. The dealers in the State of Andhra Pradesh used to purchase yarn from the petitioners. The goods were delivered ex-godown at Madras and thereafter dispatched to the purchasers. After coming into force of the Constitution of India, the President in exercise of the powers conferred upon him by Article 372(2) made Adaption Orders with reference to the Sales Tax Laws of all the States. As regards the Madras General Sales Tax Act, 1939, he issued an amendment inserting Section 22 in that Act, which was a verbatim reproduction of the Explanation to Article 286(1)(a) of the Constitution. On July 13, 1954, the Board of Revenue (Commercial Taxes), Andhra Pradesh relying upon the decision of this Court in *The State of Bombay and another v. The United Motors (India) Ltd. and others* 1953 SCR 1069, called upon the dealers in the State of Madras to submit returns of their turnover of sales in which goods were delivered in the State of Andhra Pradesh for consumption. The petitioners filed writ petitions under Article 32 of the Constitution and claimed immunity from taxes under Article 286(2) of the Constitution. During the pendency of the writ petitions, this Court rendered judgment in *The Bengal Immunity Company Ltd. v. The State of Bihar and others* (1955) 2 SCR 603, in terms of which the petitioners could not have been taxed under the State Sales

Tax Act. However, before the writ petitions could be decided, Parliament enacted Sales Tax Laws Validation Act, 1956. Section 2 of the Validation Act provided that no law of a State imposing or authorizing the imposition of tax on inter-State sales during the period between April 1, 1951 and September 6, 1955 shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that sales took place in the course of the inter-State trade. On behalf of the petitioners, many contentions were raised for challenging the constitutionality of the Validation Act. One of the arguments was that Section 22 was unconstitutional when it was enacted and, therefore, void and no proceedings could be taken thereunder on the basis of the Validation Act because the effect of unconstitutionality of the law was to efface it out of the statute book. Venkatarama Aiyer, J. who delivered the majority judgment, prefaced his views by making the following observations:

> "Now, in considering the question as to the effect of unconstitutionality of a statute, it is necessary to remember that unconstitutionality might arise either because the law is in respect of a matter not within the competence of the legislature, or because the matter itself being with its competence, its provisions of end some constitutional restrictions. In a Federal Constitution where legislative powers are distributed between different bodies, the competence of the legislature to enact a particular law must depend upon whether the topic of that legislation has been assigned by the Constitution Act to that legislature. Thus, a law of the State on an Entry in List I, Sch. VII of the Constitution would be wholly incompetent and void. But the law may be on a topic within its competence, as for example, an Entry in List II, but it might infringe restrictions imposed by the Constitution on the character of the law to be passed, as for example, limitations enacted in Part III of the Constitution. Here also, the law to the extent of the repugnancy will be void. *Thus, a legislation on a topic not within the competence of the legislature and a legislation*

> *within its competence but violative of constitutional limitation have both the same reckoning in a court of law; they are both of them unenforceable. But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes? This question has been the subject of consideration in numerous decisions in the American Courts, and the preponderance of authority is in favour of the view that while a law on a matter not within the competence of the legislature is a nullity, a law on a topic within its competence but repugnant to the constitutional prohibitions is only unenforceable. This distinction has a material bearing on the present discussion. If a law is on a field not within the domain of the legislature, it is absolutely null and void, and a subsequent cession of that field to the legislature will not have the effect to breathing life into what was a still-born piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the legislature but its provisions disregard constitutional prohibitions, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment. "*
>
> (emphasis supplied)

The learned Judge then referred to Willoughby on the Constitution of the United States, the judgment of the U.S. Supreme Court in *John M. Wilkerson v. Charles A. Rahrer* (supra) as also of this Court in *Bhikaji Narain Dhakras v. The State of M.P.* (supra) and summed up legal position in the following words:

> *"Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for*

the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the Constitutional bar is removed, and there is no need for a fresh legislation to give effect thereto. On this view, the contention of the petitioners with reference to the Explanation in s. 22 of the Madras Act must fail. The Explanation operates, as already stated, on two classes of transactions. It renders taxation of sales in which the property in the goods passes in Madras but delivery takes place outside Madras illegal on the ground that they are outside sales falling within Art.286(1)(a). It also authorises the imposition of tax on the sales in which the property in the goods passes outside Madras but goods are delivered for consumption within Madras. It is valid in so far as it prohibits tax on outside sales, but invalid in so far as sales in which goods are delivered inside the State are concerned, because such sales are hit by Art.286(2). The fact that it is invalid as to a part has not the effect of obliterating it out of the statute book, because it is valid as to a part and has to remain in the statute book for being enforced as to that part. The result of the enactment of the impugned Act is to lift the ban under Art. 286(2) and the consequence of it is that that portion of the Explanation which relates to sales in which property passes outside Madras but the goods are delivered inside Madras and which was unenforceable before, become valid and enforceable. In this view, we do to feel called upon to express any opinion as to whether it would make any difference in the result if the impugned provision was unconstitutional in its entirety."

(emphasis supplied)

13. In *Keshavan Madhava Menon v. The State of Bombay* (supra), this Court was called upon to consider the question whether a prosecution launched under the Indian Press

(Emergency Powers) Act, 1931 before commencement of the Constitution could be continued after 26.1.1950. The objection taken was that the 1931 Act was void because it was violative of the fundamental rights guaranteed under Part III of the Constitution. By a majority judgment, this Court held that Article 13(1) of the Constitution did not make existing laws which were inconsistent with the fundamental rights void *ab initio*, but only rendered such laws ineffective and void with respect to the exercise of the fundamental rights on and after the date of the commencement of the Constitution and that it had no retrospective effect. Das, J. expressed his views in the following words:

"They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights.... Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution."

In his separate opinion, Mahajan, J. observed:

"The effect of Article 13(1) is only prospective and it operates in respect to the freedoms which are infringed by the State subsequent to the coming into force of the Constitution but the past acts of a person which came within the mischief of the law then in force are not affected by Part III of the Constitution."

The learned Judge then referred to American Law on the subject and observed:

"It is obvious that if a statute has been enacted and is repugnant to the Constitution, the statute is void since its very birth and anything done under it is also void and illegal.

The courts in America have followed the logical result of this rule and even convictions made under such an unconstitutional statute have been set aside by issuing appropriate writs. If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law. This rule, however, is not applicable in regard to laws which were existing and were constitutional according to the Government of India Act, 1935. Of course, if any law is made after 25-01-1950, which is repugnant to the Constitution, then the same rule will have to be followed by courts in India as is followed in America and even convictions made under such an unconstitutional law will have to be set aside by resort to exercise of powers given to this Court by the Constitution."

14. In *Behram Khurshed Pesikaka's* case, the Court considered the legal effect of the declaration made in the case of *The State of Bombay v. F.N. Balsara* 1951 SCR 682 that clause (*b*) of Section 13 of the Bombay Prohibition Act (Bom. XXV of 1949) is void under Article 13(1) of the Constitution insofar as it affects the consumption or use of liquid medicinal or toilet preparations containing alcohol and held that it was to render part of Section 13(*b*) of the Bombay Prohibition Act inoperative, ineffective and ineffectual and thus unenforceable. Bhagwati, J., cited all the relevant passages from text books on Constitutional Law and accepted the view that an unconstitutional law is like a legislation which had never been passed. Jagannadhadas, J., noticed the distinction between the scope of Clauses (1) and (2) of Article 13 of the Constitution, referred to 'Willoughby on Constitution of the United States' and observed:

"This and other similar passages from other treatises relate, however, to cases where the entire legislation is unconstitutional from the very commencement of the Act,

a situation which falls within the scope of Article 13(2) of our Constitution. They do not directly cover a situation which falls within Article 13(1).... The question is what is the effect of Article 13(1) on a pre-existing valid statute, which in respect of a severable part thereof violates fundamental rights. Under Article 13(1) such part is 'void' from the date of the commencement of the Constitution, while the other part continues to be valid. Two views of the result brought about by this voidness are possible viz. (1) the said severable part becomes *unenforceable,* while it remains part of the Act, or (2) the said part goes out of the Act and the Act stands appropriately amended pro tanto. The first is the view which appears to have been adopted by my learned Brother. Justice Venkatarama Aiyar, on the basis of certain American decisions. I feel inclined to agree with it. This aspect, however, was not fully presented by either side and was only suggested from the Bench in the course of arguments. We have not had the benefit of all the relevant material being placed before us by the learned advocates on either side. The second view was the basis of the arguments before us. It is, therefore, necessary and desirable to deal with this case on that assumption."

In the same case, Mukherjea, J. observed as under:

"We think that it is not a correct proposition that constitutional provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative lower. The legislative power of Parliament and the State

Legislatures as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of Constitution. A mere reference to the provisions of Article 13(2) and Articles 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution."

Venkatarama Aiyer, J. expressed his views in the following words:

"Another point of distinction noticed by American jurists between unconstitutionality arising by reason of lack of legislative competence and that arising by reason of a check imposed on a competent legislature may also be mentioned. While a statute passed by a legislature which had no competence cannot acquire validity when the legislature subsequently acquires competence, a statute which was within the competence of the legislature at the time of its enactment but which infringes a constitutional prohibition could be enforced proprio vigore when once the prohibition is removed."

15. In *Saghir Ahmad v. The State of U.P. and others* (supra), the Court examined challenge to the constitutional validity of the U.P. State Transport Act, 1951 under which the State was enabled to run stage carriage service to the exclusion of others. In exercise of its power under the Act, the State Government made a declaration extending the Act to a particular area and framed a scheme for operation of the stage carriage service on certain routes. At the relevant time, the State did not have the power to deny a citizen of his right to carry on transport service. However, after the Constitution (First Amendment) Act, 1951, the State became entitled to carry on any trade or business either by itself or through corporations owned or controlled by it to the exclusion of private citizens wholly or in part. One of the questions raised was whether the

Constitution (First Amendment) Act could be invoked to validate an earlier legislation. The Court held that the Act was unconstitutional at the time of enactment and, therefore, it was still-born and could not be vitalized by the subsequent amendment of the Constitution removing the constitutional objections and must be re-enacted. Speaking for the Court, Mukherjea, J. observed as under:

"As Professor Cooley has stated in his work on *Constitutional Limitations* (Vol. I, p. 304 note.) 'a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted.' We think that this is sound law and our conclusion is that the legislation in question which violates the fundamental right of the appellants under Article 19(1)(*g*) of the Constitution and is not shown to be protected by clause (6) of the article, as it stood at the time of the enactment, must be held to be void under Article 13(2) of the Constitution."

16. In *Deep Chand's* case (supra), this Court considered challenge to the constitutionality of the U.P. Transport Service (Development) Act, 1955, which was passed by the Legislature of the State after obtaining the assent of the President and legality of the scheme of nationalization framed and the notifications issued under it. The appellants were plying buses on different routes in U.P. on the basis of permits granted under Motor Vehicles Act, 1939. In exercise of the powers under the 1955 Act, the State Government issued notification directing that the routes on which the appellants were operating shall be exclusively served by the State buses. The writ petitions filed by the appellants were dismissed by the High Court. The appeals filed against the judgment of this Court were also dismissed. Speaking for majority of the Court, Subba Rao, J., (as his Lordship then was) observed:

"The combined effect of the said provisions may be stated thus: Parliament and the Legislatures of States have

power to make laws in respect of any of the matters enumerated in the relevant lists in the Seventh Schedule and that power to make laws is subject to the provisions of the Constitution including Art. 13, i.e., the power is made subject to the limitations imposed by Part III of the Constitution. The general power to that extent is limited. A Legislature, therefore, has no power to make any law in derogation of the injunction contained in Art. 13. Article 13(1) deals with laws in force in the territory of India before the commencement of the Constitution and such laws in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency be void. The clause, therefore, recognizes the validity of the pre-Constitution laws and only declares that the said laws would be void thereafter to the extent of their inconsistency with Part III; whereas cl. (2) of that article imposes a prohibition on the State making laws taking away or abridging the rights conferred by Part III and declares that laws made in contravention of this clause shall, to the extent of the contravention, be void. There is a clear distinction between the two clauses. Under cl. (1), a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas, no post-Constitution law can be made contravening the provisions of Part III, and therefore the law, to that extent, though made, is a nullity from its inception. If this clear distinction is borne in mind, much of the cloud raised is dispelled. When cl. (2) of Art. 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part III, it will not avail the State to contend either that the clause does not embody a curtailment of the power to legislate or that it imposes only a check but not a prohibition. A constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on the provisions of other Constitutions; nor can we appreciate the argument that the

words "any law" in the second line of Art. 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and therefore any law made in contravention of that clause presupposes that the law made is not a nullity. This argument may be subtle but is not sound. The words "any law" in that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still-born law."

The learned Judge then referred to the opinions of various American jurists including Prof. Cooley, the judgments of the U.S. Supreme Court in *John M. Wilkerson v. Charles A. Rahrer* (supra) and *Newberry v. United State* (1921) 265 U.S. 232 and of this Court in *Keshavan Madhava Menon v. The State of Bombay* (supra), *Behram Khurshed Pesikaka v. The State of Bombay* (supra), *Saghir Ahmad v. The State of U.P.* (supra) and *Bhikaji Narain Dhakras v. The State of Madhya Pradesh and another* (supra) and observed:

"The Constitutional validity of a statute depends upon the existence of legislative power in the State and the right of a person to approach the Supreme Court depends upon his possessing the fundamental right i.e. he cannot apply for the enforcement of his right unless it is infringed by any law. The cases already considered supra clearly establish that a law, whether pre-Constitution or post-Constitution, would be void and nugatory insofar as it infringed the fundamental rights. We do not see any relevancy in the reference to the directive principles; for, the legislative power of a State is only guided by the directive principles of State Policy. The directions, even if disobeyed by the State, cannot affect the legislative power of the State, as they are only directory in scope and operation. The result

of the aforesaid discussion may be summarized in the following propositions: (*i*) whether the Constitution affirmatively confers power on the legislature to make laws subject-wise or negatively prohibits it from infringing any fundamental right, they represent only two aspects of want of legislative power; (*ii*) the Constitution in express terms makes the power of a legislature to make laws in regard to the entries in the Lists of the Seventh Schedule subject to the other provisions of the Constitution and thereby circumscribes or reduces the said power by the limitations laid down in Part III of the Constitution; (*iii*) it follows from the premises that a law made in derogation or in excess of that power would be ab initio void wholly or to the extent of the contravention as the case may be; and (*iv*) *the doctrine of eclipse can be invoked only in the case of a law valid when made, but a shadow is cast on it by supervening constitutional inconsistency or supervening existing statutory inconsistency; when the shadow is removed, the impugned Act is freed from all blemish or infirmity."*

(emphasis supplied)

17. In *Mahendra Lal Jaini v. The State of U.P.* (supra), the petitioners questioned the constitutional validity of U.P. Land Tenures (Regulation of Transfers) Act, 1952 and Indian Forest (U.P. Amendment) Act, 1956. The petitioner had obtained a permanent lease from the Maharaja Bahadur of Nahan in respect of certain land known as "asarori" land situated in District Dehradun, Uttar Pradesh. The U.P. Zamindari Abolition and Land Reforms Act, 1951 was made applicable from July 1, 1952. By that Act all transfers made by intermediaries after the date of enforcement of the Act were declared void. The petitioner was directed not to clear the land or take any action in violation of the U.P. Private Forests Act, 1948. On March 23, 1955, a notification was issued under Section 4 of the Indian Forest Act, 1927 declaring certain lands

including the land in dispute as reserved forest. Thereafter, a proclamation was issued under Section 6 and objections were invited from the claimants. In March, 1956, the Indian Forest (U.P. Amendment) Act, 1956 was passed and a fresh notification was issued under Section 38-B of the amended Act prohibiting various acts mentioned therein. The petitioners challenged the constitutionality of the Transfer Act and the Forest Amendment Act. The Constitution Bench of this Court reviewed various precedents and observed that the doctrine of eclipse will apply to pre-Constitution laws which are governed by Article 13(1) and would not apply to post-Constitution laws which are governed by Article 13(2). The Court rejected the argument that there should be no difference in the matter of the application of doctrine of eclipse to both the clauses of Article 13 and observed:

> "Article 13(2) on the other hand begins with an in-junction to the State not to make a law which takes away or abridges the rights conferred by Part III. There is thus a constitutional prohibition to the State against making laws taking away or abridging fundamental rights. The legislative power of Parliament and the legislatures of States under Article 245 is subject to the other provisions of the Constitution and therefore subject to Article 13(2), which specifically prohibits the State from making any law taking away or abridging the fundamental rights. Therefore, it seems to us that the prohibition contained in Article 13(2) makes the State as much incompetent to make a law taking away or abridging the fundamental rights as it would be where law is made against the distribution of powers contained in the Seventh Schedule to the Constitution between Parliament and the legislature of a State. Further, Article 13(2) provides that the law shall be void to the extent of the contravention. Now contravention in the context takes place only once when the law is made, for the contravention is of the prohibition to make any law which takes away or abridges the fundamental rights. There is

no question of the contravention of Article 13(2) being a continuing matter. *Therefore, where there is a question of a post-Constitution law, there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In view of this clear provision, it must be held that unlike a law covered by Article 13(1) which was valid when made, the law made in contravention of the prohibition contained in Article 13(2) is a stillborn law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse*. A plain reading therefore of the words in Article 13(1) and Article 13(2) brings out a clear distinction between the two. Article 13(1) declares such pre-Constitution laws as are inconsistent with fundamental rights void. Article 13(2) consists of two parts; the first part imposes an inhibition on the power of the State to make a law contravening fundamental rights, and the second part, which is merely a consequential one, mentions the effect of the breach. Now what the doctrine of eclipse can revive is the operation of a law which was operative until the Constitution came into force and had since then become inoperative either wholly or partially; it cannot confer power on the State to enact a law in breach of Article 13(2) which would be the effect of the application of the doctrine of eclipse to post-Constitution laws. Therefore, in the case of Article 13(1) which applies to existing law, the doctrine of eclipse is applicable as laid down in *Bhikaji Narain case*; but in the case of a law made after the Constitution came into force, it is Article 13(2) which applies and the effect of that is what we have already indicated and which was indicated by this Court as far back as *Saghir Ahmad case*."

(emphasis supplied)

18. In *Mahant Sankarshan Ramanuja Das Goswami etc. v. The State of Orissa and another* (supra), this Court considered whether the Orissa Estates Abolition (Amendment) Act, 1954 was unconstitutional. The amendment Act was challenged on the ground that the unamended Act may fall within the ambit of Article 31A, which was inserted by the Constitution (First Amendment) Act, 1951 because it was a law for the compulsory acquisition of property for public purposes but not to the amendment Act because it was not such a law. While rejecting this argument, the Court observed as under:-

> "The first argument is clearly untenable. It assumes that the benefit of Article 31-A is only available to those laws which by themselves provide for compulsory acquisition of property for public purposes and not to laws amending such laws, the assent of the President notwithstanding. This means that the whole of the law, original and amending, must be passed again, and be reserved for the consideration of the President, and must be freshly assented to by him. This is against the legislative practice in this country. It is to be presumed that the President gave his assent to the amending Act in its relation to the Act it sought to amend, and this is more so, when by the amending law the provisions of the earlier law relating to compulsory acquisition of property for public purposes were sought to be extended to new kinds of properties. In assenting to such law, the President assented to new categories of properties being brought within the operation of the existing law, and he, in effect, assented to a law for the compulsory acquisition for public purposes of these new categories of property. The assent of the President to the amending Act thus brought in the protection of Article 31-A as a necessary consequence. The amending Act must be considered in relation to the old law which it sought to extend and the President assented to such an extension or, in other words, to a law for the compulsory acquisition of property for public purposes."

19. In *Jawaharmal v. State of Rajasthan and others* (supra), the scope of Article 255 was considered in the backdrop of challenge to the Rajasthan Passengers and Goods Taxation (Amendment and Validation) Act, 1964 by which the State Finance Acts of 1961 and 1962 were sought to be validated. Section 4 of the amendment Act which contained a non obstante clause declared that certain provisions of Rajasthan Finance Acts of 1961, 1962 and 1963 shall not be deemed to be invalid or ever to have been invalid during the period between 9.3.1961 and the date of commencement of the amendment Act merely by reason of the fact that the Bills were introduced in the Rajasthan Legislature without the previous sanction of the President as per the requirement of proviso to Article 304(b) of the Constitution and were not assented to by the President. While rejecting the argument that failure of the Legislature to comply with the provisions of Article 255 of the Constitution renders the Financial Acts void *ab initio* and as such, they cannot be validated by subsequent legislation, this Court observed:

> "Article 255 provides, inter alia, that no Act of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to the Act was given by the President later. The position with regard to the laws to which Article 255 applies, therefore, is that if the assent in question is given even after the act is passed, it serves to cure the infirmity arising from the initial non-compliance with its provisions. *In other words, if an Act is passed without obtaining the previous assent of the President, it does not become void by reason of the said infirmity; it may be said to be unenforceable until the assent is secured. Assuming that such a law is otherwise valid, its validity cannot be challenged only on the ground that the assent of the President was not obtained earlier as required by the other relevant provisions of the Constitution. The said infirmity is cured by the subsequent assent and the law becomes enforceable.* It is unnecessary for the purpose of the present proceedings to consider when such a law becomes enforceable, whether subsequent assent makes it enforceable from the date when the said law purported to come into force, or whether it becomes enforceable from the date of its subsequent assent. Besides, it is plain that the Legislature may, in a suitable case, adopt the course of passing a subsequent law re-introducing the provisions of the earlier law which had not received the assent of the President, and obtaining his assent thereto as prescribed by the Constitution. We see no substance in the argument that an Act which has not complied with the provisions of Article 255, cannot be validated by subsequent legislation even where such subsequent Act complies with Article 255 and obtains the requisite assent of the President as prescribed by the Constitution. *Whether the infirmity in the Act which has failed to comply with the provisions of Article 255, should be cured by obtaining the subsequent assent of the President or by passing a subsequent Act re-enacting the provisions of the earlier law and securing the assent of the President to such Act, is a matter which the Legislature can decide in the circumstances of a given case. Legally, there is no bar to the legislature adopting either of the said two courses."*

(emphasis supplied)

However, the Court disapproved the enactment of Section 4 of the amending Act by making the following observations:

> *"What Section 4 in truth and in substance says is that the failure to comply with the requirements of Article 255 will not invalidate the Finance Acts in question and will not invalidate any action taken, or to be taken, under their respective relevant provisions. In other words, the Legislature seems to say by Section 4 that even though*

Article 255 may not have been complied with by the earlier Finance Acts, it is competent to pass Section 4 whereby it will prescribe that the failure to comply with Article 255 does not really matter, and the assent of the President to the Act amounts to this that the President also agrees that the Legislature is empowered to say that the infirmity resulting from the non-compliance with Article 255 does not matter. In our opinion, the Legislature is incompetent to declare that the failure to comply with Article 255 is of no consequence; and, with respect, the assent of the President to such declaration also does not serve the purpose which subsequent assent by the President can serve under Article 255."

(emphasis supplied)

20. The result of the above discussion and analysis of various precedents is that a post-Constitution law is *void ab initio* if it is not within the domain of the Legislature or is violative of the rights conferred by Part III of the Constitution. If the law is within the legislative competence of the Union or State and does not infringe any of the rights conferred by Part III of the Constitution, then the same cannot be declared void on the ground of non compliance of the procedural requirement of prior recommendation or sanction, if assent is given in the manner provided under Article 255 of the Constitution. If post enactment assent is necessary for making the law effective, then such law cannot be enforced or implemented till such assent is given. In other words, if a law is within the competence of the Legislature, the same does not become void or is blotted out of the statute book merely because post enactment assent of the President has not been obtained. Such law remains on the statute book but cannot be enforced till the assent is given by the President. Once the assent is given, the law becomes effective and enforceable. If the provision requiring pre enactment sanction or post enactment assent of the President is repealed, then the law becomes effective and enforceable

from the date of repeal and such law cannot be declared unconstitutional only on the ground that the same was not reserved for consideration of the President and did not receive his assent. The provision contained in Article 31(3) did not have even a semblance of similarity with Article 13(2) which was considered in most of the judgments relied upon by Shri Dushyant Dave. The procedural provision contained in clause (3) of Article 31 did not create any substantive right in favour of any citizen or non citizen like those conferred by other Articles of Part III including clauses (1) and (2) of Article 31. Therefore, the 1976 Act cannot be declared unconstitutional or void only on the ground that the same was not reserved for consideration of the President and did not receive his assent. The only consequence of non compliance of clause (3) of Article 31 was that the same did not become effective and the State Government or the B.D.A. could not have taken action for implementation of the provisions contained therein. Once Article 31 was repealed, the necessity of reserving the 1976 Act for consideration of the President and his assent disappeared and the provisions contained therein automatically became effective and the three-Judge Bench rightly negatived challenge to its constitutionality.

21.An ancillary question which needs to be addressed is whether the 1976 Act is a law enacted by the Legislature of the State with reference to Entry 5 of List II or it is a law enacted under Entry 42 of List III. The 1976 Act was enacted by the Legislature of the State of Karnataka to provide for the establishment of a Development Authority for the development of the city of Bangalore and the area adjacent thereto and for matters connected therewith. It is not a law enacted for acquisition or requisitioning of property. The terms like "amenity", "civic amenity", "Bangalore Metropolitan Area", "betterment tax", "building", "building operations", "development", "engineering operations", "means of access", "street" defined in Section 2 of the 1976 Act are directly related to the issue of development. Section 14 lays down that the

object of the Authority constituted under Section 3 shall be to promote and secure the development of the Bangalore Metropolitan Area and for that purpose it shall have the power to acquire, hold, manage and dispose of movable and immovable property, within or outside the area of its jurisdiction, to carry out building, engineering and other operations and generally to do all things necessary or expedient for the purpose of such development and for purposes incidental thereto. Chapter 3 of the 1976 Act contains provisions relating to development schemes. The provisions relating to acquisition of land contained in Chapter 4 (Sections 35 and 36) are only incidental to the main object of enactment, namely development of the city of Bangalore and area adjacent thereto. In *Munithimmaiah v. State of Karnataka* (supra), the two-Judge Bench analysed the provisions of the 1976 Act, considered some of the precedents on the subject and held that the law was enacted with reference to Entry 5 of List II of the Seventh Schedule under which the State Legislature is empowered to make law relating to local government and the same does not fall within the ambit of Entry 42 of List III which empowers Parliament and the State Legislature to enact law for acquisition and requisitioning of property. The relevant portion of paragraph 15 of the judgment which contains discussion on this aspect of the matter reads thus:

> "15. So far as the BDA Act is concerned, it is not an Act for mere acquisition of land but an Act to provide for the establishment of a development authority to facilitate and ensure planned growth and development of the city of Bangalore and areas adjacent thereto and acquisition of lands, if any, therefor is merely incidental thereto. In pith and substance the Act is one which will squarely fall under, and be traceable to the powers of the State Legislature under Entry 5 of List II of the Seventh Schedule and not a law for acquisition of land like the Land Acquisition Act, 1894 traceable to Entry 42 of List III of the Seventh Schedule to the Constitution of India, the field in respect

of which is already occupied by the Central enactment of 1894, as amended from time to time. If at all, the BDA Act, so far as acquisition of land for its developmental activities is concerned, in substance and effect will constitute a special law providing for acquisition for the special purposes of BDA and the same was not also considered to be part of the Land Acquisition Act, 1894. It could not also be legitimately stated, on a reading of Section 36 of the BDA Act that the Karnataka Legislature intended thereby to bind themselves to any future additions or amendments, which might be made by altogether a different legislature, be it Parliament, to the Land Acquisition Act, 1894. The procedure for acquisition under the BDA Act vis-à-vis the Central Act has been analysed elaborately by the Division Bench, as noticed supra, in our view, very rightly too, considered to constitute a special and self-contained code of its own and the BDA Act and Central Act cannot be said to be either supplemental to each other, or *pari materia* legislations. That apart, the BDA Act could not be said to be either wholly unworkable and ineffectual if the subsequent amendments to the Central Act are not also imported into consideration. On an overall consideration of the entire situation also it could not either possibly or reasonably be stated that the subsequent amendments to the Central Act get attracted or applied either due to any express provision or by necessary intendment or implication to acquisitions under the BDA Act. When the BDA Act, expressly provides by specifically enacting the circumstances under which and the period of time on the expiry of which alone the proceedings initiated thereunder shall lapse due to any default, the different circumstances and period of limitation envisaged under the Central Act, 1894, as amended by the amending Act of 1984 for completing the proceedings on pain of letting them lapse forever, cannot be imported into consideration for purposes of the BDA Act without doing violence to the language or destroying and defeating

the very intendment of the State Legislature expressed by the enactment of its own special provisions in a special law falling under a topic of legislation exclusively earmarked for the State Legislature."

22. In *Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P.* (supra), the Constitution Bench considered the provisions contained in U.P. Sugar Undertakings (Acquisition) Act, 1971 and held that power to legislate for acquisition of property is an independent and separate power and is exercisable under Entry 42 of List III and not as an incident of the power to legislate in respect of a specific head of legislation in any of the three Lists. This power of the State Legislature to legislate in respect of acquisition of property remains intact and untrammelled except to the extent where on assumption of control of an industry by a declaration as envisaged in Entry 52 of List I, a further power of acquisition is taken over by a specific legislation. In our view, this judgment has no bearing on the interpretation of the 1976 Act which, as mentioned above, was enacted for the development of the city of Bangalore and the area adjacent thereto and it contains incidental provisions in Sections 35 and 36 for acquisition of land.

23. Since, we have not accepted the argument of the learned senior counsel for the appellants that the judgment of three-Judge Bench in *Bondu Ramaswamy v. Bangalore Development Authority and others* (supra) requires reconsideration, it is not necessary to deal with the argument of Shri Altaf Ahmed, learned senior counsel for the B.D.A. that the 1976 Act is a law enacted with reference to Article 31(2A) of the Constitution.

24. In the result, the appeals are dismissed. The parties are left to bear their own costs.

N.J Appeals dismissed.

M/S. KRANTI ASSOCIATES PVT. LTD. & ANR.
v.
SH. MASOOD AHMED KHAN & OTHERS
(Civil Appeal No. 7472 of 2010)

SEPTEMBER 08, 2010

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Judgment/Order: Necessity of reasons – Held: Reasons are indispensable component of a decision making process – Even in administrative decisions, reasons should be recorded, if such decisions affect anyone prejudicially – Thus, a quasi-judicial authority must record reasons in support of its conclusions – National Commission has the trappings of a civil court and is a high-powered quasi-judicial forum for deciding lis between the parties – A non-reasoned order passed by National Commission is thus liable to be set aside – Consumer Protection Act, 1986 – ss.13, 22 – Penal Code, 1860 – ss.193, 228 – Code of Criminal Procedure, 1973 – s.195 – Natural justice – Administrative law – Quasi-judicial authority.

Appeal: Separate appeals – Held: Each appeal should be heard independently – Natural justice – Right of hearing.

Two separate appeals were filed by the builder and the Corporation Bank challenging the orders of the National Consumer Disputes Redressal Commission (National Commission). The case of the appellants was that the National Commission dismissed their revision petitions by non-speaking orders.

Allowing the appeals, the Court

HELD: 1.1. The power and procedure applicable to the National Consumer Disputes Redressal Commission

(National Commission) has been provided in Section 22 of the Consumer Protection Act. A perusal of Section 22(1) would show that the Sections 12, 13, 14 of the CP Act with necessary modifications are applicable to the decision making process by the National Commission. Under Section 13 of the CP Act, the District Forum has been vested, in certain matters, with the powers of the civil court while trying a suit. Section 13(4) of CP Act is applicable to the National Commission in view of Section 22(1) thereof. Similarly, Sections 13(5), (6) and (7) will also apply to the National Commission in view of Section 22(1). On a perusal of Sections 13(4), (5), (6) and (7) of the Consumer Protection Act, 1986, it is clear that the National Commission has been vested with some of the powers of a civil court. [Paras 11-12] [1078-G-H; 1079-A-C]

1.2. Under Section 13(5) of the Act, every proceeding of the National Commission will be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, IPC, and the said Commission shall be deemed to be a civil court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure. These provisions make it clear that the said Commission has the trappings of a civil court and is a high-powered quasi-judicial forum for deciding *lis* between the parties. [Paras 13-14] [1079-H; 1080-A-B]

2.1. As regards the necessity of giving reasons by a body or authority in support of its decision, the discussion in various judgments is summarized as follows: In India, the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially. A quasi-judicial authority must also record reasons in support of its conclusions. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not

only be done it must also appear to be done as well. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies. Reasons facilitate the process of judicial review by superior courts. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice. Insistence on reason is a requirement for both judicial accountability and transparency. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process. It cannot be doubted that transparency is the *sine qua non* of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. [Para 51] [1090-G-H; 1091-A-C; 1092-B-H; 1093-A]

A.K. Kraipak and others v. Union of India and others **AIR 1970 SC 150;** *Kesava Mills Co. Ltd. and another v. Union of India and others* **AIR 1973 SC 389;** *Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala and others* **AIR 1961 SC 1669;** *Bhagat Raja v. Union of India and others* **AIR 1967 SC 1606;** *M/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others* **AIR 1970 SC 1302;** *M/s. Travancore Rayons Ltd. v. The Union of India and others* **AIR 1971 SC 862;** *M/s. Woolcombers of India Ltd. v. Woolcombers Workers Union and another* **AIR 1973 SC 2758;** *Union of India v. Mohan Lal Capoor and others* **AIR 1974 SC 87;** *Siemens Engineering and Manufacturing Co. of India Ltd. v. The Union of India and another* **AIR 1976 SC 1785;** *Smt. Maneka Gandhi v. Union of India and Anr.* **AIR 1978 SC 597;** *Rama Varma Bharathan Thampuran v. State of Kerala and Ors.* **AIR 1979 SC 1918;** *Gurdial Singh Fijji v. State of Punjab and Ors.* **(1979) 2 SCC 368;** *Shri Swamiji of Shri Admar Mutt etc. etc. v. The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors.* **AIR 1980 SC 1;** *M/s. Bombay Oil Industries Pvt. Ltd. v. Union of India and Others* **AIR 1984 SC 160;** *Ram Chander v. Union of India and others* **AIR 1986 SC 1173;** *M/s. Star Enterprises and others v. City and Industrial Development Corporation of Maharashtra Ltd. and others* **(1990) 3 SCC 280;** *Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi and others* **(1991) 2 SCC 716;** *M.L. Jaggi v. Mahanagar Telephones Nigam Limited and others* **(1996) 3 SCC 119;** *Charan Singh v. Healing Touch Hospital and others* **AIR 2000 SC 3138;** *Som Datt Datta v. Union of India and others* **AIR 1969 SC 414;** *S.N. Mukherjee v. Union of India* **AIR 1990 SC 1984 – relied on.**

Rigina vs. Gaming Board Ex parte Benaim **(1970) 2 WLR 1009;** *Marta Stefan v. General Medical Council* **(1999) 1 WLR 1293;** *R v. Civil Service Appeal Board, ex parte Cunningham* **(1991) 4 All ER 310;** *North Range Shipping*

Limited v. Seatrans Shipping Corporation **(2002) 1 WLR 2397;** *English v. Emery Reimbold and Strick Limited* **(2002) 1 WLR 2409;** *Cullen v. Chief Constable of the Royal Ulster Constabulary* **(2003) 1 WLR 1763;** *Securities and Exchange Commission v. Chenery Corporation* **(1942) 87 Law Ed 626;** *John T. Dunlop v. Walter Bachowski* **(1975) 44 Law Ed 377;** *Anya v. University of Oxford* **2001 EWCA Civ 405 – referred to.**

Strasbourg Jurisprudence **(1994) 19 EHRR 553 – referred to.**

2.2. In the case of the builder, the National Commission did not give any reason and dismissed the revision petition by passing a cryptic order. The said Commission cannot considering the way it is structured, dismiss the revision petition by refusing to give any reasons and by just affirming the order of the State Commission. The order of the National Commission is set aside and the matter is remanded to it for deciding the matter by passing a reasoned order. [Paras 3, 4, 52] [1077-C-D; 1093-D]

Defence of Judicial Candor **(1987) 100 Harward Law Review 731-737 by David Shapiro – referred to.**

2.3. In so far as the appeal filed by the Bank is concerned, the National Commission gave some reasons in its finding. The perusal of the order of the State Commission dated 26.7.07 in connection with the appeal filed by the Bank shows that the State Commission did not independently consider Bank's appeal. The State Commission dismissed the Bank's appeal for the reasons given in its order in connection with the appeal of the builders. Since the Bank had filed a separate appeal, it had a right to be heard independently in support of its appeal. That right was denied by the State Commission. In that view of the matter, the order dated

26.7.07 passed by the State Commission as also the order of the National Commission dated 4th April 2008 which had affirmed the order of the State Commission are set aside and the case is remanded to the State Commission for hearing on merits. [Paras 54-57] [1094-A-E]

Case Law Reference:

AIR 1970 SC 150	**relied on**	**Para 15**
AIR 1973 SC 389	**relied on**	**Para 16**
(1970) 2 WLR 1009	**referred to**	**Para 16**
AIR 1961 SC 1669	**relied on**	**Para 19**
AIR 1967 SC 1606	**relied on**	**Para 22**
AIR 1970 SC 1302	**relied on**	**Para 23**
AIR 1971 SC 862	**relied on**	**Para 24**
AIR 1973 SC 2758	**relied on**	**Para 25**
AIR 1974 SC 87	**relied on**	**Para 26**
AIR 1976 SC 1785	**relied on**	**Para 27**
AIR 1978 SC 597	**relied on**	**Para 28**
AIR 1979 SC 1918	**relied on**	**Para 31**
(1979) 2 SCC 368	**relied on**	**Para 32**
AIR 1980 SC 1	**relied on**	**Para 33**
AIR 1984 SC 160	**relied on**	**Para 35**
AIR 1986 SC 1173	**relied on**	**Para 36**
(1990) 3 SCC 280	**relied on**	**Para 37**
(1991) 2 SCC 716	**relied on**	**Para 38**
(1996) 3 SCC 119	**relied on**	**Para 39**

AIR 2000 SC 3138	**relied on**	**Para 40**
AIR 1969 SC 414	**relied on**	**Para 41**
AIR 1990 SC 1984	**relied on**	**Para 42**
(1999) 1 WLR 1293	**referred to**	**Para 45**
(1991) 4 All ER 310	**referred to**	**Para 46**
(2002) 1 WLR 2397	**referred to**	**Para 48**
(2002) 1 WLR 2409	**referred to**	**Para 49**
(2003) 1 WLR 1763	**referred to**	**Para 49**
(1942) 87 Law Ed 626	**referred to**	**Para 50**
(1975) 44 Law Ed 377	**referred to**	**Para 50**
2001 EWCA Civ 405	**referred to**	**Para 51**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7472 of 2010.

From the Judgment & Order dated 31.08.2007 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 2889 of 2007.

WITH

C.A. No. 7474 of 2010.

Krishnan Venugopal, Dr. Sarabjit Sharma, Seema Agarwal, Sumit Sharma, Dr. S.K. Verma, Anshu Mahajan, Gaurav Kejriwal, Anilendra Pandey, Priya Kashyap, M.P. Shorawala for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. These two appeals, one at the instance of the builder

and the other at the instance of the Corporation Bank, have been filed impugning the Order of National Consumer Disputes Redressal Commission (hereinafter, the said Commission).

3. In the case of the builder, the said Commission has not given any reason and dismissed the revision petition by passing a cryptic order dated 31.8.2007 which reads as under:

"Heard.

In view of the concurrent findings of the State Commission, we do not find any force in this revision petition.

The revision Petition is dismissed."

4. In so far as the case of the builder is concerned, this Court is of the opinion that the said Commission cannot, considering the way it is structured, dismiss the revision petition by refusing to give any reasons and by just affirming the order of the State Commission.

5. The said Commission has been defined under Section 2(k) of the Consumer Protection Act, 1986 (hereinafter CP Act) as follows:

"2(k) "National Commission" means the National Consumer Disputes Redressal Commission established under clause (c) of Section 9;"

6. Under section 9(c) of CP Act, the said Commission has been established by the Central Government by a notification.

7. The composition of the said Commission has been provided under Section 20 of the CP Act and wherefrom it is clear that the said Commission is a high-powered adjudicating forum headed by a sitting or a retired judge of the Supreme Court.

8. Section 21 of the CP Act provides for the jurisdiction of the said Commission.

9. In order to appreciate the questions involved in this case, the provision relating to jurisdiction of the said Commission is set out hereunder:

"21. Jurisdiction of the National Commission.- Subject to the other provisions of this Act, the National Commission shall have jurisdiction-

(a) to entertain-

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds [rupees one crore]; and

(ii) appeals against the orders of any State Commission; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity."

10. Under Section 23 of the CP Act, an appeal would lie against the order of the said Commission passed in exercise of its powers under Section 21(1)(a), to this Court, within 30 days, subject to extension of time by this Court on sufficient cause being shown. Under Section 21(1)(b), the said Commission exercises revisional power over orders of State Commission.

11. The power and procedure applicable to the said Commission has been provided under Section 22 of the CP Act. A perusal of Section 22(1) would show that Sections 12, 13 and 14 of CP Act, with necessary modification, are applicable to the decision making process by the said

Commission. Under Section 13 of the CP Act, the District Forum has been vested, in certain matters, with the powers of a Civil Court while trying a suit. Section 13(4) of CP Act is applicable to the said Commission in view of Section 22(1) thereof. Similarly, Sections 13(5), (6) and (7) will also apply to the said Commission in view of Section 22(1).

12. On a perusal of Sections 13(4), (5), (6) and (7) of the CP Act, it is clear that the said Commission has been vested with some of the powers of a Civil Court. The following powers have been vested on the said Commission:

> "13(4) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:-
>
> (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath,
>
> (ii) the discovery and production of any document or other material object producible as evidence,
>
> (iii) the reception of evidence on affidavits,
>
> (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source,
>
> (v) issuing of any commission for the examination of any witness, and
>
> (vi) any other matter which may be prescribed.

13. Under Section 13(5) of CP Act, every proceeding of the said Commission will be deemed to be a judicial

proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code, and the said Commission shall be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure.

14. The above provisions make it clear that the said Commission has the trappings of a Civil Court and is a high-powered quasi-judicial forum for deciding lis between the parties.

15. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognized a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in *A.K. Kraipak and others vs. Union of India and others* reported in AIR 1970 SC 150.

16. In *Kesava Mills Co. Ltd. and another vs. Union of India and others* reported in AIR 1973 SC 389, this Court approvingly referred to the opinion of Lord Denning in *Rigina vs. Gaming Board Ex parte Benaim* [(1970) 2 WLR 1009] and quoted him as saying "that heresy was scotched in Ridge and Boldwin, 1964 AC 40".

17. The expression 'speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See 1878-97 Vol. 4 Appeal Cases 30 at 40 of the report)

18. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the 'inscrutable face of a Sphinx'.

19. In the case of *Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala and others,* AIR 1961 SC 1669, the question of recording reasons came up for consideration in the context of a refusal by Harinagar to transfer, without giving reasons, shares held by Shyam Sunder. Challenging such refusal, the transferee moved the High Court contending, inter alia, that the refusal is mala fide, arbitrary and capricious. The High Court rejected such pleas and the transferee was asked to file a suit. The transferee filed an appeal to the Central Government under Section 111 Clause (3) of Indian Companies Act, 1956 which was dismissed. Thereafter, the son of the original transferee filed another application for transfer of his shares which was similarly refused by the Company. On appeal, the Central Government quashed the resolution passed by the Company and directed the Company to register the transfer. However, in passing the said order, Government did not give any reason. The company challenged the said decision before this Court.

20. The other question which arose in *Harinagar* (supra) was whether the Central Government, in passing the appellate order acted as a tribunal and is amenable to Article 136 jurisdiction of this Court.

21. Even though in *Harinagar* (supra) the decision was administrative, this Court insisted on the requirement of recording reason and further held that in exercising appellate powers, the Central Government acted as a tribunal in exercising judicial powers of the State and such exercise is subject to Article 136 jurisdiction of this Court. Such powers, this Court held, cannot be effectively exercised if reasons are not given by the Central Government in support of the order (Para 23, page 1678-79).

22. Again in the case of *Bhagat Raja vs. Union of India and others*, AIR 1967 SC 1606, the Constitution Bench of this Court examined the question whether the Central Government was bound to pass a speaking order while dismissing a

revision and confirming the order of the State Government in the context of Mines and Minerals (Regulation and Development) Act, 1957, and having regard to the provision of Rule 55 of Mineral and Concessions Rules. The Constitution Bench held that in exercising its power of revision under the aforesaid Rule the Central Government acts in a quasi-judicial capacity (See para 8 page 1610). Where the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying any reason, this Court, exercising its jurisdiction under Article 136, may find it difficult to ascertain which are the grounds on which Central Government upheld the order of the State Government (See para 9 page 1610). Therefore, this Court insisted on reasons being given for the order.

23. In *M/s. Mahabir Prasad Santosh Kumar vs. State of U.P and others,* AIR 1970 SC 1302, while dealing with U.P. Sugar Dealers License Order under which the license was cancelled, this Court held that such an order of cancellation is quasi-judicial and must be a speaking one. This Court further held that merely giving an opportunity of hearing is not enough and further pointed out where the order is subject to appeal, the necessity to record reason is even greater. The learned Judges held that the recording of reasons in support of a decision on a disputed claim ensures that the decision is not a result of caprice, whim or fancy but was arrived at after considering the relevant law and that the decision was just. (See para 7 page 1304).

24. In the case of *M/s. Travancore Rayons Ltd. vs. The Union of India and others,* AIR 1971 SC 862, the Court, dealing with the revisional jurisdiction of the Central Government under the then Section 36 of the Central Excise and Salt Act, 1944, held that the Central Government was actually exercising judicial power of the State and in exercising judicial power reasons in support of the order must be disclosed on two grounds. The

first is that the person aggrieved gets an opportunity to demonstrate that the reasons are erroneous and secondly, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power (See para 11 page 865-866).

25. In *M/s. Woolcombers of India Ltd. vs. Woolcombers Workers Union and another,* AIR 1973 SC 2758, this Court while considering an award under Section 11 of Industrial Disputes Act insisted on the need of giving reasons in support of conclusions in the Award. The Court held that the very requirement of giving reason is to prevent unfairness or arbitrariness in reaching conclusions. The second principle is based on the jurisprudential doctrine that justice should not only be done, it should also appear to be done as well. The learned Judges said that a just but unreasoned conclusion does not appear to be just to those who read the same. Reasoned and just conclusion on the other hand will also have the appearance of justice. The third ground is that such awards are subject to Article 136 jurisdiction of this Court and in the absence of reasons, it is difficult for this Court to ascertain whether the decision is right or wrong (See para 5 page 2761).

26. In *Union of India vs. Mohan Lal Capoor and others,* AIR 1974 SC 87, this Court while dealing with the question of selection under Indian Administrative Service/Indian Police Service (Appointment by Promotion Regulation) held that the expression "reasons for the proposed supersession" should not be mere rubber stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two (See para 28 page 98).

27. In *Siemens Engineering and Manufacturing Co. of*

India Ltd. vs. The Union of India and another, AIR 1976 SC 1785, this Court held that it is far too well settled that an authority in making an order in exercise of its quasi-judicial function, must record reasons in support of the order it makes. The learned Judges emphatically said that every quasi-judicial order must be supported by reasons. The rule requiring reasons in support of a quasi-judicial order is, this Court held, as basic as following the principles of natural justice. And the rule must be observed in its proper spirit. A mere pretence of compliance would not satisfy the requirement of law (See para 6 page 1789).

28. In *Smt. Maneka Gandhi vs. Union of India and Anr.,* AIR 1978 SC 597, which is a decision of great jurisprudence significance in our Constitutional law, Chief Justice Beg, in a concurring but different opinion held that an order impounding a passport is a quasi-judicial decision (Para 34, page 612). The learned Chief Justice also held when an administrative action involving any deprivation of or restriction on fundamental rights is taken, the authorities must see that justice is not only done but manifestly appears to be done as well. This principle would obviously demand disclosure of reasons for the decision.

29. Justice Y.V. Chandrachud (as His Lordship then was) in a concurring but a separate opinion also held that refusal to disclose reasons for impounding a passport is an exercise of an exceptional nature and is to be done very sparingly and only when it is fully justified by the exigencies of an uncommon situation.

30. The learned Judge further held that law cannot permit any exercise of power by an executive to keep the reasons undisclosed if the only motive for doing so is to keep the reasons away from judicial scrutiny. (See para 39 page 613).

31. In *Rama Varma Bharathan Thampuran vs. State of Kerala and Ors.,* AIR 1979 SC 1918, Justice V.R. Krishna Iyer speaking for a three-Judge Bench held that the functioning of

the Board was quasi-judicial in character. One of the attributes of quasi-judicial functioning is the recording of reasons in support of decisions taken and the other requirement is following the principles of natural justice. Learned Judge held that natural justice requires reasons to be written for the conclusions made (See para 14 page 1922).

32. In *Gurdial Singh Fijji vs. State of Punjab and Ors.,* (1979) 2 SCC 368, this Court, dealing with a service matter, relying on the ratio in *Capoor* (supra), held that "rubber-stamp reason" is not enough and virtually quoted the observation in *Capoor* (supra) to the extent that reasons "are the links between the materials on which certain conclusions are based and the actual conclusions." (See para 18 page 377).

33. In a Constitution Bench decision of this Court in *Shri Swamiji of Shri Admar Mutt etc. etc. vs. The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors.,* AIR 1980 SC 1, while giving the majority judgment Chief Justice Y.V. Chandrachud referred to Broom's Legal Maxims (1939 Edition, page 97) where the principle in Latin runs as follows:

"Ces-sante Ratione Legis Cessat Ipsa Lex"

34. The English version of the said principle given by the Chief Justice is that:

> "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." (See para 29 page 11)

35. In *M/s. Bombay Oil Industries Pvt. Ltd. vs. Union of India and Others,* AIR 1984 SC 160, this Court held that while disposing of applications under Monopolies and Restrictive Trade Practices Act the duty of the Government is to give reasons for its order. This court made it very clear that the faith of the people in administrative tribunals can be sustained only if the tribunals act fairly and dispose of the matters before them by well considered orders. In saying so, this Court relied on its

previous decisions in *Capoor* (supra) and *Siemens Engineering* (supra), discussed above.

36. In *Ram Chander vs. Union of India and others,* AIR 1986 SC 1173, this Court was dealing with the appellate provisions under the Railway Servants (Discipline and Appeal) Rules, 1968 condemned the mechanical way of dismissal of appeal in the context of requirement of Rule 22(2) of the aforesaid Rule. This Court held that the word "consider" occurring to the Rule 22(2) must mean the Railway Board shall duly apply its mind and give reasons for its decision. The learned Judges held that the duty to give reason is an incident of the judicial process and emphasized that in discharging quasi-judicial functions the appellate authority must act in accordance with natural justice and give reasons for its decision (Para 4, page 1176).

37. In *M/s. Star Enterprises and others vs. City and Industrial Development Corporation of Maharashtra Ltd. and others,* (1990) 3 SCC 280, a three-Judge Bench of this Court held that in the present day set up judicial review of administrative action has become expansive and is becoming wider day by day and the State has to justify its action in various field of public law. All these necessitate recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justification for not doing so (see Para 10, page 284-285).

38. In *Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi and others,* (1991) 2 SCC 716, this Court held that even in domestic enquiry if the facts are not in dispute non-recording of reason may not be violative of the principles of natural justice but where facts are disputed necessarily the authority or the enquiry officer, on

consideration of the materials on record, should record reasons in support of the conclusion reached (see para 22, pages 738-739)

39. In the case of *M.L. Jaggi vs. Mahanagar Telephones Nigam Limited and others,* (1996) 3 SCC 119, this Court dealt with an award under Section 7 of the Telegraph Act and held that since the said award affects public interest, reasons must be recorded in the award. It was also held that such reasons are to be recorded so that it enables the High Court to exercise its power of judicial review on the validity of the award. (see para 8, page 123).

40. In *Charan Singh vs. Healing Touch Hospital and others,* AIR 2000 SC 3138, a three-Judge Bench of this Court, dealing with a grievance under CP Act, held that the authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is, therefore, imperative that such a body should arrive at conclusions based on reasons. This Court held that the said Act, being one of the benevolent pieces of legislation, is intended to protect a large body of consumers from exploitation as the said Act provides for an alternative mode for consumer justice by the process of a summary trial. The powers which are exercised are definitely quasi-judicial in nature and in such a situation the conclusions must be based on reasons and held that requirement of recording reasons is "too obvious to be reiterated and needs no emphasizing". (See Para 11, page 3141 of the report)

41. Only in cases of Court Martial, this Court struck a different note in two of its Constitution Bench decisions, the first of which was rendered in the case of *Som Datt Datta vs. Union of India and others,* AIR 1969 SC 414, Mr. Justice Ramaswami delivering the judgment for the unanimous Constitution Bench held that provisions of Sections 164 and 165 of the Army Act do not require an order confirming proceedings of Court Martial to be supported by reasons. The Court held that an order confirming such proceedings does not

become illegal if it does not record reasons. (Para 10, page 421-422 of the report).

42. About two decades thereafter, a similar question cropped up before this Court in the case of *S.N. Mukherjee vs. Union of India,* AIR 1990 SC 1984. A unanimous Constitution Bench speaking through Justice S.C. Agrawal confirmed its earlier decision in *Som Datt* (supra) in para 47 at page 2000 of the report and held reasons are not required to be recorded for an order confirming the finding and sentence recorded by the Court Martial.

43. It must be remembered in this connection that the Court Martial as a proceeding is *sui generis* in nature and the Court of Court Martial is different, being called a Court of Honour and the proceeding therein are slightly different from other proceedings. About the nature of Court Martial and its proceedings the observations of Winthrop in *Military Law and Precedents* are very pertinent and are extracted herein below:

> "Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

44. Our Constitution also deals with Court Martial proceedings differently as is clear from Articles 33, 136(2) and 227(4) of the Constitution.

45. In England there was no common law duty of recording of reasons. In *Marta Stefan vs. General Medical Council,* (1999) 1 WLR 1293, it has been held, "the established position of the common law is that there is no general duty imposed on our decision makers to record reasons". It has been

acknowledged in the Justice Report, Administration Under Law (1971) at page 23 that "No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions".

46. Even then in the case of *R vs. Civil Service Appeal Board, ex parte Cunningham* reported in (1991) 4 All ER 310, Lord Donaldson, Master of Rolls, opined very strongly in favour of disclosing of reasons in a case where the Court is acting in its discretion. The learned Master of Rolls said:

> "..It is a corollary of the discretion conferred upon the board that it is their duty to set out their reasoning in sufficient form to show the principles on which they have proceeded. Adopting Lord Lane CJ's observations (in *R vs. Immigration Appeal Tribunal, ex p Khan (Mahmud)* [1983] 2 All ER 420 at 423, (1983) QB 790 at 794-795), the reasons for the lower amount is not obvious. Mr. Cunningham is entitled to know, either expressly or inferentially stated, what it was to which the board were addressing their mind in arriving at their conclusion. It must be obvious to the board that Mr. Cunningham is left with a burning sense of grievance. They should be sensitive to the fact that he is left with a real feeling of injustice, that having been found to have been unfairly dismissed, he has been deprived of his just desserts (as he sees them)".

47. The learned Master of Rolls further clarified by saying:

> "..thus, in the particular circumstances of this case, and without wishing to establish any precedent whatsoever, I am prepared to spell out an obligation on this board to give succinct reasons, if only to put the mind of Mr. Cunningham at rest. I would therefore allow this application."

48. But, however, the present trend of the law has been

towards an increasing recognition of the duty of Court to give reasons (See *North Range Shipping Limited vs. Seatrans Shipping Corporation,* (2002) 1 WLR 2397). It has been acknowledged that this trend is consistent with the development towards openness in Government and judicial administration.

49. In *English vs. Emery Reimbold and Strick Limited,* (2002) 1 WLR 2409, it has been held that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The House of Lords in *Cullen vs. Chief Constable of the Royal Ulster Constabulary,* (2003) 1 WLR 1763, Lord Bingham of Cornhill and Lord Steyn, on the requirement of reason held, "First, they impose a discipline … which may contribute to such decisions being considered with care. Secondly, reasons encourage transparency … Thirdly, they assist the Courts in performing their supervisory function if judicial review proceedings are launched." (Para 7, page 1769 of the report)

50. The position in the United States has been indicated by this Court in *S.N. Mukherjee* (supra) in paragraph 11 at page 1988 of the judgment. This Court held that in the United States the Courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the Court cannot exercise their duty of review unless they are advised of the considerations underlying the action under review". In *S.N. Mukherjee* (supra) this court relied on the decisions of the U.S. Court in *Securities and Exchange Commission vs. Chenery Corporation,* (1942) 87 Law Ed 626 and *John T. Dunlop vs. Walter Bachowski,* (1975) 44 Law Ed 377 in support of its opinion discussed above.

51. Summarizing the above discussion, this Court holds:

a. In India the judicial trend has always been to record reasons, even in administrative

decisions, if such decisions affect anyone prejudicially.

b. A quasi-judicial authority must record reasons in support of its conclusions.

c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

g. Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these

days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg

Jurisprudence. See (1994) 19 EHRR 553, at 562 para 29 and *Anya vs. University of Oxford,* 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

52. For the reasons aforesaid, we set aside the order of the National Consumer Disputes Redressal Commission and remand the matter to the said forum for deciding the matter by passing a reasoned order in the light of the observations made above. Since some time has elapsed, this Court requests the forum to decide the matter as early as possible, preferably within a period of six weeks from the date of service of this order upon it.

53. In so far as the appeal filed by the Bank is concerned, this Court finds that the National Consumer Disputes Redressal Commission in its order dated 4th April 2008 has given some reasons in its finding. The reasons, inter alia, are as under:

"We have gone through the orders of the District Forum and the State Commission, perused the record placed before us and heard the parties at length. The State Commission has rightly confirmed the order of the District Forum after coming to the conclusion that the Petitioner and the Builder – Respondents No.3 and 4 have colluded with each other and hence, directed them to compensate the complainant for the harassment caused to them."

54. From the order of the State Commission dated 26.7.07 in connection with the appeal filed by the Bank, we do not find that the State Commission has independently considered Bank's appeal. The State Commission dismissed the Bank's appeal for the reasons given in its order dated 6.7.07 in connection with the appeal of the builders.

55. This Court is of the view that since the Bank has filed a separate appeal, it has a right to be heard independently in support of its appeal. That right has been denied by the State Commission. In that view of the matter, this Court quashes the order dated 26.7.07 passed by the State Commission as also the order of the National Commission dated 4th April 2008 which has affirmed the order of the State Commission.

56. This case is remanded to the State Commission for hearing on merits as early as possible, preferably within a period of six weeks from the date of service of this order to the State Commission.

57. It is expected that the State Commission will hear out the matter independently and give adequate reasons for its conclusions. We, however, do not make any observations on the merits of the case.

58. Both these appeals are allowed. No order as to costs.

D.G. Appeals allowed.

MANJAPPA & ANR.
v.
STATE OF KARNATAKA
(Criminal Appeal No. 653 of 2007 etc.)

SEPTEMBER 8, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Penal Code, 1860:

ss. 366-A, 372 and 373 r/w s.34 – Kidnapping of a minor girl with an intention to force her to illicit intercourse and selling her for purpose of prostitution – HELD: In view of the evidence of the prosecution witnesses, High Court rightly set aside acquittal of one of the accused, confirmed the conviction of two, and imposed the sentence of 7 years imprisonment with a fine of Rs.50,000/- upon each of the three accused – In a case of this nature, it is just and proper to impose a deterrent sentence – Sentence/sentencing.

The two appellants (A-3) and (A-2) along with A-1 were prosecuted for committing offences of kidnapping a minor girl with an intention to force her to have illicit intercourse, and then selling her for purposes of prostitution. The trial court convicted and sentenced A-1 and A-2 u/ss 366A, 372 and 373 read with s.34 IPC. On the appeals filed by the State for enhancement of sentences of A-1 and A-2 and challenging acquittal of A-3, the High Court convicted A-3 also and sentenced him to imprisonment for seven years and to pay a fine of Rs. 50,000/- and enhanced the sentences of A-1 and A-2 to seven years imprisonment with fine of Rs. 50,000/- each. Aggrieved, A-3 and A-2 filed the appeals.

Dismissing the appeals, the Court

HELD: 1.1. All the three sections, viz. ss 366-A, 372 and 373 IPC, make it clear that if the victim is under the age of 18 years and whoever uses, procures, employs, buys or hires such person for prostitution or for illicit intercourse with any person or for any immoral purpose is liable to be punished. The maximum sentence prescribed is 10 years and also the fine. In the instant case, Medical Report dated 28.8.1997 clearly shows that the victim girl was at the time of occurrence below 18 years of age. [paras 4 and 5] [1099-C-D; G]

1.2. The High Court, after appreciating the evidence of PW.1, the father of the victim, PWs. 3 and PW.4 who accompanied the police party to rescue the girl and PW.2, the victim herself, rightly confirmed the conviction and enhanced the sentence to 7 years with a fine of Rs. 50,000/- each. Though leniency in sentence was pleaded, but in view of the conduct of the accused in taking a minor girl to a far away place, namely, Bombay, and selling her for illegal and immoral purposes, it is not a fit case for reduction of sentence. In a case of this nature, it is just and proper that a deterrent sentence is to be imposed on the accused. Looking from any angle and considering the fact that the victim was below 18 years as on the date of occurrence, the sentence of 7 years with a fine of Rs. 50,000/- awarded by the High Court is quite reasonable and acceptable. [paras 5- 6] [1099-G-H; 1100-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 653 of 2007.

From the Judgment & Order dated 06.02.2006 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 624 of 1999.

WITH

Criminal Appeal No. 735 of 2008.

Shankar Divate for the Appellant.

Anitha Shenoy for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the judgment and final order dated 06.02.2006 passed by the High Court of Karnataka at Bangalore in Criminal Appeal Nos. 624 and 616 of 1999 whereby the High Court allowed the appeals filed by the State of Karnataka - respondent herein and convicted the appellants herein for the offences punishable under Sections 366A, 372, 373 read with Section 34 I.P.C. and sentenced them to undergo imprisonment for a period of seven years with a fine of Rs.50,000/- each, in default, to undergo simple imprisonment for two years.

2. The case of the prosecution is as under:

(a) On 03.04.1997, Hanumanthappa, father of the victim, lodged a complaint alleging that his daughter Shilpa, aged 13 years, was kidnapped by the appellants herein on 24.01.1997 at about 11.00 a.m. from his house and they had taken her to Bombay with an intention to force her to have illicit intercourse and thereafter, had sold the victim to Shanta (A-1) at Bombay for Rs.5000/- for the purpose of prostitution and for immoral purposes. On the strength of the said complaint, Kumarapatnam Police registered a case in Crime No. 41 of 1997 and started investigation. On 24.04.1997, on receiving information about the victim, the Investigation Officer had gone to Bombay along with the panch witnesses and the complainant, traced out the girl and the appellants herein and returned to Kumarapatnam Police Station on 27.04.1997. On the same day, the statement of the victim Shilpa was recorded and she was sent to the C.G. Hospital Davanagere for medical examination. The appellants herein and Shanta were arrested on 27.04.1997 and charged for the commission of the offences punishable under Sections 366A, 372, 373 read with 34 I.P.C.

(b) The prosecution examined six witnesses in support of its case and marked several documents. By order dated 03.02.1999, the Sessions Judge convicted Shanta (A-1) and Vijay M.S.Balakrishna Madiwalar (A-2) (appellant in Crl. A. No.735/2008) for the offences punishable under Sections 366A, 372, 373 read with section 34 I.P.C. and acquitted Manjappa (A-3) (appellant in Crl.A. 653/07). Against the said order, the State preferred an appeal against the acquittal of A-3 and another for enhancement of the sentence of A-1 and A-2 before the High Court. The High Court, vide its judgment dated 06.02.2006, allowed both the appeals of the State confirmed the conviction of A-1 and A-2 and enhanced the sentence of imprisonment for a period of seven years with a fine of Rs.50,000/- each, in default, S.I. for two years and set aside the acquittal of A-3 and convicted him for the offences punishable under Sections 366A, 372, 373 read with Section 34 IPC and sentenced him to undergo imprisonment for a period of seven years with a fine of Rs.50,000/- in default S.I. for two years. Challenging the impugned judgment of the High Court, A-3 filed Crl.A. No. 653 of 2007 and A-2 filed Crl.A. No. 735 of 2008 before this Court.

3. Heard Mr. Shankar Divate, learned counsel for the appellants and Ms. Anitha Shenoy, learned counsel for the State of Karnataka.

4. Among the three accused, Manjappa (A-3) and Vijay M.S. Balakrishna Madiwalar (A-2) are before us. As already noticed, the appellants, along with one Shanta (A-1) were charged for committing offences punishable under Sections 366A, 372, 373 read with 34 IPC. Since the learned counsel for the appellants argued only for reduction of sentence, let us first understand the offences and the sentence, as fixed in the IPC. Section 366A relates to procuration of minor girl. As per the section, whoever induces any minor girl under the age of 18 years to go from any place or to do any act, forces or seduces to illicit intercourse with another person shall be

punishable with imprisonment up to 10 years and also liable to fine. Section 372 speaks of selling minor for purposes of prostitution. Here again, whoever involves in disposal of any person under the age of 18 years for the purpose of prostitution or illicit intercourse or for any unlawful and immoral purpose shall be punished with imprisonment up to 10 years and also liable to fine. Section 373 speaks about buying minor for purposes of prostitution. This section also makes it clear that whoever buys or obtains possession of any person under the age of 18 years with an intention to employ or use such person for the purpose of prostitution or illicit intercourse or for any unlawful or immoral purpose is liable to be punished up to 10 years and also liable to fine. All the three sections make it clear that if the victim is under the age of 18 years and whoever uses, procures, employs, buys or hires such person for prostitution or for illicit intercourse with any person or for any immoral purpose are liable to be punished. The maximum sentence prescribed is 10 years and also liable to fine.

5. In order to establish the prosecution case, apart from examining PW-1, father of the victim, PWs-3 and 4 who accompanied the policemen to Bombay, victim herself was examined as PW-2. In her evidence, she informed that at the time of occurrence in 1997 she was studying in 6th standard and her date of birth is 31.07.1985. She also narrated how these accused persons took her to Bombay on the assurance that they would get a job for her. She also explained that after reaching Bombay, A-2 and A-3 had sold her for a sum of Rs. 5,000/-. She informed the Court that A-1 used to purchase girls and engage them for immoral purposes. She asserted that A-1 used to engage her daily for prostitution against her wish. Medical Report dated 28.08.1997 (Annexure P-2) clearly shows that she is below 18 years of age. From her date of birth, it can easily be presumed that at the time of occurrence i.e. in 1997, she was below 18 years. Her father, PW-1, also explained how his daughter was taken to Bombay and the agony undergone by her. PWs 3 and 4, both accompanied the

policemen to Bombay were examined as panch witnesses. Considering the prosecution witnesses, particularly, PW-2, whose statement and assertion are acceptable, the High Court rightly confirmed the conviction and enhanced the sentence to 7 years with a fine of Rs. 50,000/- each. Though learned counsel for the appellants pleaded for leniency in view of the conduct of the accused/appellants in taking a minor girl to a far away place, namely, Bombay and sold her for illegal and immoral purposes, we feel that it is not a fit case for reduction of sentence. In a case of this nature, it is just and proper that a deterrent sentence is to be imposed on the accused.

6. Looking from any angle and considering the fact that the victim was below 18 years as on the date of occurrence, the sentence of 7 years with a fine of Rs. 50,000/- awarded by the High Court is quite reasonable and acceptable. There is no valid ground for interference in the quantum of sentence. Both the appeals fail and are accordingly dismissed.

R.P. Appeals dismissed.

DHARMARTH TRUST J & K JAMMU & ORS.
v.
DINESH CHANDER NANDA
(Civil Appeal No. 7465 of 2010)

SEPTEMBER 08, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Jammu and Kashmir Limitation Act, 1995 – Articles 56 and 119 – Suit by architect against trust claiming certain amount towards professional charges – Issue as regards maintainability/limitation – Contention by the trust that suit is governed by Article 56 and was barred by limitation on the date of its institution – Courts below holding that suit is governed by Article 119 and not Article 56 – Interference with – Held: Not called for – Services provided by architect are taxable under the Service Tax laws – Term 'work done' as appearing in Article 56 does not apply to architect providing services for a fee, thus Article 56 not applicable.

Words and Phrases: Terms 'price' and 'work done' – Meaning of – In the context of Article 56 of the Jammu and Kashmir Limitation Act, 1995.

The respondent-architect filed a suit against the appellant-trust claiming certain amount towards professional charges including interest for various projects. During the pendency of the suit, the respondent filed application for the amendment of the plaint. The issue was raised regarding the maintainability/limitation of the application. The trial court held that the case was governed by Article 119 and not by Article 56 of the Jammu and Kashmir Limitation Act, 1995 and allowed the amendment to the plaint. The appellant-trust filed a revision petition. The appellant-trust contended that the suit was governed by Article 56 of the Act and the same

was barred by limitation on the date of its institution. The High Court upheld the order passed by the trial court. Therefore, the appellant-trust filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The term 'work done' as appearing in Article 56 of the Jammu and Kashmir Limitation Act, 1995 does not apply to the respondent, who is an architect providing services for a fee. [Para 12] [1110-F-G]

1.2 The term 'price', as appearing in Article 56 of the Act, is to be understood in common parlance/ordinary or normal sense. It takes its colour from the meaning attached to the term 'price' in the Articles immediately preceding 'Articles 52 to 55'. 'Price' does not cover the services provided by the professionals such as architect, lawyer, doctor etc., as professionals charge a 'fee'. Also, the term 'work done' in Article 56 will not be applicable to professionals such as architect, lawyer, doctor etc. as these professionals render services to their clients. The remuneration of a professional is in the form of a 'fee' and, therefore, it cannot be said that the professional earns a 'price'. In common usage, the term 'price' refers to goods sold. The term 'price' is used in Articles 52 to 55 in correlation to goods delivered, goods sold and delivered and trees or growing crops sold. In the said way, 'price' would take a similar meaning when used in Article 56. [Paras 8 and 9] [1110-F-G]

Websters Encyclopedic Unabridged Dictionary; "Chambers Twentieth Century Dictionary; Law Lexicon by P. Ramanatha Iyer 2nd Edn. ***1997*** **– referred to.**

1.3 The specific treatment of attorneys/vakils who provide professional services is a reflection of the intention of the Legislature to treat the services provided

by professionals differently from work done by others. The word 'price' was never intended to be used synonymously with the word 'fee' and, therefore, the fee charged by an architect for services rendered by him would not be covered under Article 56 of the Act. In the instant case, the trial court as well as the High Court made a clear distinction between the terms 'work done' and 'services'. The 'work done' would refer work done by masons such as land filling or engineering projects etc. [Para 11] [1109-F-H; 1110-A]

1.4 The services provided by an architect are taxable under the Service Tax law. Whereunder the architects are considered as persons providing a service and are liable to pay service tax. The term 'work done' has not been defined anywhere. [Para 12] [1110-D]

1.5 The claim of the respondent that the profession of an Architect is one such service, hence Article 56 is not applicable, is accepted. There is no error in the conclusion arrived at by the trial court and upheld by the High Court. [Para 16] [1112-E-F]

Kaviraj Baroda Kant Sen vs. Court of Wards in Charge of Baraon Estate **AIR 1931 All. 752;** *Kakodonga Tea Estate vs. J.N. Saikia* **AIR 1973 Gau. 27 – approved.**

Case Law Reference:

AIR 1931 All. 752	**Approved.**	**Para 14**
AIR 1973 Gau. 27	**Approved.**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7465 of 2010.

From the Judgment & Order dated 18.10.2007 of the High Court of Jammu & Kashmir at Jammu in Civil Revision Petition bearing C. Rev. No. 177 of 2005.

Ashok Mathur, Anshul Narayan for the Appellants.

V. Giri, Rohit Bhat, Vikas Mehta for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 18.10.2007 passed by the High Court of Jammu & Kashmir at Jammu in Civil Revision No. 177 of 2005 whereby the High Court dismissed the revision filed by the Dharmarth Trust (hereinafter referred to as "the Trust")-appellants herein.

3. **Brief facts:**

(a) The Respondent, a qualified, registered and licensed Architect, is engaged in his professional business in the name of M/s Nanda Designers Consortium having its office at 60 Purani Mandi, Jammu. On 19.10.1992, he was engaged by the Trust for the purpose of providing professional consultancy services as an architect for various projects at different sites in Jammu. As per the terms of the said contract, a fee of 2.5% of the total project cost was fixed for providing such services.

(b) On 14.12.1993, the appellants-Trust telephonically communicated the respondent not to work further for their projects and terminated his services as an Architect. A formal communication was also served on 16.01.1994 regarding the termination of his services.

(c) On 16.10.1996, the Respondent served a legal notice to the Trust claiming compensation amounting to Rs. 38,77,263.75 towards professional charges including interest thereon for various projects. After not getting any reply from the Trust, after a gap of four years, on 29.01.1998, a suit was filed by the Respondent in the Court of the Ist Additional District Judge, Jammu, claiming an amount of Rs, 43,30,797/-. During

the pendency of the suit, on 08.02.1999, the Respondent filed an application under Order VI Rule 17 of the Code of Civil Procedure for amendment in the Plaint. On 22.09.1999, the Trust filed their reply objecting to the maintainability of the application. By order dated 08.10.1999, the trial Court allowed the application. Challenging the said order, the Trust filed Civil Revision No. 162 of 1999 before the High Court praying that the trial Court had committed an error in law by allowing the amendment in the plaint without addressing the legal issue regarding its maintainability. The High Court, vide order dated 19.07.2001, disposed of the civil revision petition filed by the Trust and remanded the matter back to the trial Court to address the legal issue regarding maintainability/limitation. Thereafter, on 27.09.2005, Ist Additional District Judge framed the issue and passed an order holding that the case is governed by Article 119 and not by Article 56 of the Jammu & Kashmir Limitation Act, 1995 (hereinafter referred to as "the Act") and consequently, allowed the amendment to the Plaint.

(d) Challenging the said order, the Trust filed Civil Revision No. 177 of 2005 before the High Court. Vide order dated 18.10.2007, the High Court dismissed the revision and upheld the order dated 27.09.2005, passed by the Ist Additional District Judge. Aggrieved by the said order, the Trust has filed this appeal by way of special leave before this Court.

4. Heard Mr. Ashok Mathur, learned counsel for the appellants and Mr. V. Giri, learned senior counsel for the respondent.

5. The short question that arises for consideration in this appeal is whether the suit filed by the respondent-Architect is covered under Article 56 of the Act or whether the said suit is covered under Article 119 of the Act.

6. The Trial Court and the High Court have held that the suit is covered by Article 119 of the Act. According to the appellants, the suit filed by the respondent-Architect is governed

by Article 56 of the said Act and the same was barred by limitation on the date of its institution. On the other hand, the submission of the respondent is that the same was covered by the residuary Article 119 which provides for a period of 6 years on the ground that the nature of services provided was professional services and the remuneration for the same being termed as 'fee' and the same does not fall within the expression 'price' for 'work done'.

7. Article 56 and Article 119 of the Schedule to the Jammu and Kashmir Limitation Act, 1995 provides as follows:-

Article 56	For the price of work done by the Plaintiff for the Defendant at his request, where no time has been fixed for payment.	Three Years	When the work is done.
Article 119	Suit for which no period of limitation provided elsewhere in the Scheduel.	Six Years	When the right to sue accrues.

8. The term 'price', as appearing in Article 56, is to be understood in common parlance/ordinary or normal sense. It takes it colour from the meaning attached to the term 'price' in the Articles immediately preceding 'Articles 52 to 55'. 'Price' does not cover the services provided by the professionals such as Architect, Lawyer, Doctor etc., as professionals charge a 'fee'. Also, the term 'work done' in Article 56 will not be applicable to professionals such as Architect, Lawyer, Doctor etc. as these professionals render services to their clients. The remuneration of a professional is in the form of a 'fee' and therefore, it cannot be said that the professional earns a 'price'. In common usage, the term 'price' refers to goods sold. For illustration, the term 'price' is defined in Section 2 (10) of the Sale of Goods Act, 1930 as "price" means the money consideration for a sale of goods.

9. The word 'price' according to Websters Encyclopedic Unabridged Dictionary means:

> "**Price**- 1. the sum or amount of money or its equivalent for which anything is bought, sold, or offered for sale 2. a sum offered for the capture of a person alive of dead: The authorities put a price on his head. 3. the sum of money, or other consideration, for which a person's support, consent, etc., may be obtained, esp. in cases involving sacrifice of integrity: They claimed that every man has his price. 4. that which must be given, done, or undergone in order to obtain a thing: He gained the victory, but at a heavy price. 5. Odds (def.2). 6. Archaic, value or worth: The price of an honest man is beyond measure. 7. Archaic, great value or worth (usually prec by of): Among the inventory were many articles of price. 8. at any price, at any cost, no matter how great: There were no bananas to be had at any price. He would have his own way at any price. 9. beyond or without price, of incalculable value; priceless: The crown jewels are beyond price.-v.t. 10. to fix the price of. 11. to ask or determine the price of: We spent the day pricing furniture at various stores.

"Chambers Twentieth Century Dictionary defines "price" to mean:

> "The amount, usually in money, for which a thing is sold or offered; that which one for goes or suffers for the sake of or in gaining something: money offered for capture or killing of anybody; that for which one can be bribed; betting odds; value."

According to P. Ramanatha Iyer, Law Lexicon (2nd Edn. 1997),

> "the term 'price' is the value which a seller places upon his goods for sale. It is not a fixed or unchangeable thing. It may be one thing today and another tomorrow and one

> valuation to one customer and a different one to another on the same day or hour. Whether a seller asks any one to give is the price until he changes it for another. The price asked is changed to another price, the former price is no longer an existing fact."

The Law Lexicon also defines the term 'price' as

> "the sum or amount of money or its equivalent, which a seller asks or obtains for goods in market—the exchangeable value of a commodity—and hence, as used in a contract providing for the sale of articles at a fixed price, and that if the price falls below such fixed price, a rebate will be given…"

> "The term 'price' is sometimes also used for "work done" in the context of work done by masons such as land filling etc. or engineering contracts. In view of the above, the term 'price' is in common usage used in correlation to either goods bought or sold or work done."

There is further indication of this word in the Act itself. The setting of Article 56 i.e. immediately after Articles 52 to 55 is important. Articles 52 to 55 uses the expression 'price'. These are reproduced hereinbelow:-

Article 52	For the price of goods delivered where no fixed period of credit is agreed	Three years upon.	The date of the delivery of goods.
Article 53	For the price of goods sold and delivered to be paid for after the expiry of fixed period of credit.	Three years	When the period of credit expires.
Article 54	For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years	When the period of the proposed bill elapses.

Article 55	For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years	The date of the sale

The term 'price' has been used in Articles 52 to 55 in correlation to goods delivered, goods sold and delivered and trees or growing crops sold. In this way, 'price' would take a similar meaning when used in Article 56.

10. The intention of the Legislature can also be ascertained by referring to Article 114 of the Act where the Legislature has specifically provided for the period of Limitation for suits filed by an attorney/vakil. Article 114 is as follows:-

Article 114	By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	Six Years	The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.

11. As rightly pointed out by Mr. Giri, learned senior counsel for the respondent that the specific treatment of attorneys/vakils who provide professional services is a reflection of the intention of the Legislature to treat the services provided by professionals differently from work done by others. The word 'price' was never intended to be used synonymously with the word 'fee' and, therefore, the fee charged by an Architect for services rendered by him would not be covered under Article 56 of the Act. In the case on hand, the Trial Court as well as the High Court have made a clear distinction between the terms

'work done' and 'services'. The 'work done' would refer work done by masons such as land filling or engineering projects etc.

12. It is useful to refer to the tax treatment of Architects under the Service Tax Law. Chapter V of the Finance Act, 1994, which contains the law relating to Service tax in India defines an "architect" in Section 65(6) as:-

> "any person whose name is, for the time being, entered in the register of architects maintained under section 23 of the Architect Act, 1972 and also includes any person engaged in any manner, whether directly or indirectly, in rendering services in the field of architecture."

It is brought to our notice that the services provided by an architect are taxable under the Service Tax law. Under the Service Tax Laws, the architects are considered as persons providing a service and are liable to pay service tax. The term 'work done' has not been defined anywhere. We have already pointed out the dictionary meaning to the definition of 'work'. The Law Lexicon defines 'work' as:-

> "the word "work" has a very wide meaning. It is really used in two senses of bestowing labour and that upon which labour has been bestowed. When used in plural the word certainly means some outstanding or important result of the labour that has been bestowed and large industrial and scientific establishment are called works"

We have already referred to Articles 52 to 55 which are placed above Article 56. It is clear that the term 'work done' as appearing in Article 56 does not apply to the respondent, who is an architect providing services for a fee.

13. It is also pointed out that Article 56 of the Act is a verbatim of Article 18 of the Indian Limitation Act, 1963. Article 18, in turn is the same as Article 56 of the old Indian Limitation Act, 1908.

14. The High Court of Allahabad in *Kaviraj Baroda Kant Sen vs. Court of Wards in Charge of Baraon Estate,* AIR 1931 All. 752, as early as in 1931, while interpreting Article 56 of the Indian Limitation Act, 1908 has stated as follows:

> "…..it is difficult to apply Article 56 which relates to a suit for the price of work done by the Plaintiff for the Defendant at his request. No special article appears to be applicable to a claim by a medical practitioner for recovery of his fees for attendance on a patient. The residuary Article 115 which applies to all breaches of contract, would therefore apply, for there was undoubtedly a contract, at east, an implied one, to pay the fee, and the non-payment of that fee amounted to a breach for which the plaintiff would be entitled to compensation. In Harish Chander Surmah vs Brojonath Chackerbutty [1870] 13 W.R. 96 a suit for recovery of compensation for the fees of a medical practitioner was held to lie under the corresponding article of the Limitation Act then in force"

15. The High Court of Gauhati in *Kakodonga Tea Estate vs. J.N. Saikia,* AIR 1973 Gau. 27, has also held that "a suit to recover unpaid professional fees by a Chartered Accountant falls under Article 113 and not under Article 18 or Article 55…". The High Court of Gauhati further specifically held as follows:

> "8. It is easy to assume that very deep thought must have been devoted by the Legislature in giving shape to the various Articles of the old as well as the new Limitation Act. It is equally legitimate to assume that the words of each Article must have been used in their commonly accepted connotation unless contrary intention is expressed in the body of the Act just as is apparent from Section 2 wherein certain expressions have been defined to mean something less or more than what their commonly known attributes are. The expression "price" used in Article 18 must, therefore, be taken to convey the commonly

> accepted sense implicit in it. According to the Chambers Twentieth Century dictionary the word "price" means: the amount, usually in money, for which a thing is sold or offered; that which one forgoes or suffers for the sake of or in gaining something: money offered for capture or killing of anybody: that for which one can be bribed; betting odds; values. In common parlance what a client pays to a professional person like an Advocate and a CA is described as "fee" and not "price". Likewise, what a patient pays to a medical-man for the services rendered to him by the latter is called "fee" and not "price". Therefore, it would be unduly straining the expression "price" used in Article 18 if it were held synonymous in connotation with the fee paid to an Advocate, a Medical-man or a CA. For this reason alone, I believe, Article 18 does not provide for a suit for the professional fee of the nature just stated….."

16. We agree with the ratio laid down by the Allahabad and Gauhati High Court relating to Article 56 of the Indian Limitation Act, 1908 that the term "price of work done" cannot be made applicable to professions where the professionals merely provides services for a "fee". We accept the claim of the respondent that the profession of an Architect is one such service, hence Article 56 is not applicable to the present case. Both the Trial Court as well as the High Court has arrived correct conclusion.

17. In the light of the above discussion, we do not find any error in the conclusion arrived at by the Trial Court and affirmed by the High Court. Consequently, the appeal fails and the same is dismissed with no orders as to costs. We further make it clear that our conclusion is confined to the interpretation relating to limitation and we have not expressed anything on the merits of the claim made by the parties.

N.J Appeal dismissed.

MAYA DEVI (DEAD) THROUGH LRS.

v.

SMT. RAJ KUMARI BATRA (DEAD) THROUGH LRS. & ORS.

(Civil Appeal No. 10249 of 2003)

SEPTEMBER 8, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Code of Civil Procedure, 1908 – Or. 21 rr. 66(2), 72 and 85 – Violation of – Decree – Attachment of property of judgment-debtor and issuance of sale proclamation – Proceedings for auction sale – Sale of property in favour of decree-holder on basis of compromise/adjustment between the parties – Confirmation of sale and issuance of sale certificate by executing court –Challenge to, on the ground of violation of the provisions of Or. 21 rr. 66(2), 72 and 85 – On appeal, held: Said issues were decided in three round of proceedings – In the first round, issue as regards confirmation of sale in favour of decree holder, grant of sale certificate to her as also compromise recorded in execution proceedings was declared to be valid – Said issue attained finality and cannot be re-agitated – Decree under execution was held to be a mortgage decree – In second round, executing court held that the decree continued to subsist till judgment-debtor delivered possession of premises in terms of compromise and the court accordingly issued warrants for delivery of possession to decree holder – Said order also attained finality – In the third round, application by decree holder was held to be within time and maintainable in law – It cannot be said that since the first appeal filed by judgment-debtor in the third round was dismissed in limini, by a non-speaking order, appellate court ought to have remitted the matter to Single Judge of High Court – Since the litigation was three decades old, appellate court decided to resolve the matter on merits

rather than remitting it back – Thus, interference under Article 136 not called for – Constitution of India, 1950 – Article 136 – Auction – Decree – Appeal – Judgment/order – Non-speaking order.

Judgment/order – Recording of reasons in appealable orders – Requirement of – Held: Recording of reasons in such cases is very important – Appellate court or authority ought to have advantage of examining reasons that prevailed with the court or the authority making the order – Absence of reasons in appealable order deprives appellate court or authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own – Appellate court or authority may in a given case decline to undertake any such exercise and remit the matter back to lower court or authority for a fresh and reasoned order – Remands are usually avoided if appellate court is of the view that it will prolong the litigation – Appeal – Delay/laches.

The respondent-plaintiff filed a recovery suit against the appellant-defendant and the same was decreed. In the execution of the decree, the defendant's property was attached and sold in public auction in favour of the decree-holder. The judgment-debtor filed objection to the legality of the auction, but during its pendency, the parties entered into a compromise that the decree holder would deposit a sum of Rs.35,000/- for payment to the judgment debtor, whereupon the latter would handover to the decree holder the vacant possession of the property. The judgment-debtor filed an application for setting aside the compromise as also an application for setting aside the sale for non-compliance of Or. 21 rr. 72 and 85 of CPC. The executing court confirmed the sale in favour of the decree-holder on basis of the compromise between the parties. The said order attained finality. Thereafter, the judgment-debtor filed fresh objections before the

executing court that the said property was exempt from attachment and sale because it was a residential premises, thus, the decree was a simple money decree. The executing court held that the confirmation of sale and issue of the sale certificate in favour of the decree-holder was legal and valid and that the decree-holder was entitled to possession of the property sold in her favour. It issued warrants for delivery of possession of the property in favour of the decree-holder. The judgment-debtor for the third time raised the objections to the delivery of possession on the ground that there was no decree for possession. The executing court held that the said issues had already been decided against the judgment-debtor by the earlier orders which had attained finality; and that the application under Or. 21 r. 97 CPC having been filed by the decree-holder within the stipulated period of 30 days from the date of resistance to the delivery of possession was maintainable. The judgment-debtor challenged the order. The Single Judge of the High Court dismissed the the execution first appeal. The Letters Patent Appeal was also dismissed. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The view taken by the executing court and by the High Court in regard to the issues relating to the procedure adopted and the order passed by the executing court up to the stage of confirmation of the sale in favour of the decree-holder, attained finality with the dismissal of the Special Leave Petition filed against the said orders whereby the confirmation of sale in favour of the decree-holder as also the grant of sale certificate to her was declared to be valid. Any attempt to re-agitate the very same questions that stand concluded by the said judgment and orders is, therefore, futile if not a clear abuse of the process of law. In particular, the decree

under execution was held to be a mortgage decree. The executing court held that where the decree-holder was himself the purchaser, the requirement of making a deposit of 25% of the bid money was not attracted. The challenge to the compromise entered into between the parties on the ground that the same was fraudulent was repelled by the executing court and the compromise was held to be valid in law. [Para 8] [1125-G-H; 1126-A-E]

Manilal Mohanlal Shah and Ors. v. Sardar Syed Ahmed Sayed Mahmad and Anr. **AIR 1954 SC 349 – referred to.**

1.2 In appeal against the order passed by the executing court whereby it confirmed the sale in favour of the decree-holder in accordance with the compromise between the parties, the Single Judge of the High Court upheld the view taken by the executing court and declared that a compromise could be recorded even in execution proceedings and that the bald allegations suggesting a fraud were wholly untenable. The dismissal of the Letters Patent Appeal and the Special Leave Petition against the said orders by this Court placed all these aspects beyond the pale of any further challenge or controversy. All contentions relating to the validity of the confirmation of sale in favour of the decree holder and the issue of a sale certificate in her favour which stood finally determined against the appellants in terms of the judgments and orders of the executing court and the High Court in the first round, stand concluded and cannot be re-agitated. [Para 8] [126-E-G]

1.3 In the second round, the executing court once again examined the matter and rejected the fresh set of objections raised by the judgment-debtor. The executing court held that the questions raised by the judgment-debtor stood answered by the earlier orders passed by the executing court and upheld by the High Court in

appeal; and that the decree continued to subsist till the judgment-debtor delivered possession of the premises in terms of the compromise. The court accordingly issued warrants for delivery of possession to the decree-holder. The view taken by the executing court in the said order also attained finality as no appeal or other proceedings were filed against the same. Any effort to re-kindle the controversy surrounding aspects which stand finally decided must necessarily fail. [Para 9] [1126-H;1127-A-D]

1.4 The third round of proceedings started with the objections raised by the judgment-debtor leading to the passing of an order by the executing court. The executing court decided the issues in favour of the decree holder and held that the application filed by the decree-holder was within time and maintainable in law. The said order when assailed before the High Court in FAO was upheld and the appeal was dismissed *in limine* by the Single Judge of the High Court. The Letters Patent Appeal assailing the said dismissal also met the same fate. The Division Bench noted that the questions sought to be raised in the third round of the proceedings had been dealt with and answered against the judgment-debtor in terms of the earlier orders passed by the executing court and the appellate court in appeal. There is nothing wrong with that view to warrant interference. The High Court took pains to recall the history of the litigation, the issues that were raised from time to time and the judgments that determined those issues. It was justified in taking the view that the judgment-debtor had successfully prevented delivery of possession of the property to the decree-holder for such a long time even after the sale of the property in her favour which was found by all the courts including this Court to be perfectly valid in law. The argument that even after the sale was declared to be legally valid, the decree-holder could not demand delivery of possession, as the decree stood fully

adjusted and satisfied, was also rightly rejected by the executing court against which the judgment-debtor sought no redress. [Para 10 & 11] [1127-E; 1128-B-F]

2.1 There is a requirement that courts and indeed all such authorities, who exercise the power to determine the rights and obligations of individuals, must give reasons in support of their orders. In a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promote fairness, inducing transparency and aiding equity. [Paras 13 and 14] [1129-C; 1130-B-D]

Hindustan Times Limited v. Union of India and Ors. **1998 (2) SCC 242;** *Arun s/o Mahadeorao Damka v. Addl. Inspector General of Police and Anr.* **1986 (3) SCC 696;** *Union of India and Ors. v. Jai Prakash Singh and Anr.* **2007 (10) SCC 712;** *Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Ors.* **2010 (3) SCC 732;** *Ram Phal v. State of Haryana and Ors.* **2009 (3) SCC 258;***Director, Horticulture Punjab and Ors. v. Jagjivan Parshad* **2008 (5) SCC 539 – referred to.**

2.2 The first and the most effective check against arbitrary exercise of power is that the orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. Application of mind in turn is best demonstrated by disclosure of the mind which is best demonstrated by recording reasons in support of the order or conclusion. [Para 15] [1130-E]

2.3 Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate court or the authority ought to have the advantage of examining the reasons that prevailed with the court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower court or authority for a fresh and reasoned order. However, it is not an inflexible rule, for an appellate court may notwithstanding the absence of reasons in support of the order under appeal before it examines the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate court should remit the matter is discretionary with the appellate court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate court is of the view that it will prolong the litigation. [Para 16] [1130-F-H; 1131-A-C]

2.4 The appellate court appears to have decided against remanding the matter to the Single Judge of the High Court on the ground of absence of reasons in the order passed by the latter because any such remand would have only prolonged the agony of the parties. It is clear that the appellate court was conscious of the fact that the litigation had been prolonged for many years. Therefore, it decided to resolve the matter on merits rather than remitting the same back for a fresh disposal by the

Single Judge of the High Court. In as much as the appellate court adopted that approach it did not commit any mistake to warrant interference under Article 136 of the Constitution. The litigation between the parties having continued for three decades, the discretion vested in the appellate court and was rightly exercised by it. [Para 17] [1131-D-F]

Desh Bandhu Gupta v. N.L. Anand **1994 (1) SCC 131;** *Mahakal Automobiles and Anr. v. Kishan Swaroop Sharma* **2008 (13) SCC 113;** *Ambati Narasaya v. M. Subba Rao* **1989 (Suppl.) 2 SCC 693;** *S.P. Chengalvaraya Naidu v. Jagannath* **1994 (1) SCC 1;** *A.R. Antulay v. R.S. Naik and Anr.* **1988 (2) SCC 602 – referred to.**

Case Law Reference:

1994 (1) SCC 131	Referred to.	Para 6
2008 (13) SCC 113	Referred to.	Para 7
1989 (Suppl.) 2 SCC 693	Referred to.	Para 7
1994 (1) SCC 1	Referred to.	Para 7
1988 (2) SCC 602	Referred to.	Para 7
AIR 1954 SC 349	Referred to.	Para 8
1998 (2) SCC 242	Referred to.	Para 13
1986 (3) SCC 696	Referred to.	Para 13
2007 (10) SCC 712	Referred to.	Para 13
2010 (3) SCC 732	Referred to.	Para 13
2009 (3) SCC 258	Referred to.	Para 13
2008 (5) SCC 539	Referred to.	Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10249 of 2003.

From the Judgment & Order dated 05.10.2001 of the High Court of Punjab & Haryana at Chandigarh in L.P.A. No. 167 of 1989.

R.K. Kappor, Ramraghvendra (for Anis Ahmed Khan) for the Appellants.

Arvind Verma, Arvind Minocha, Veena Minocha, Randhir Singh for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of an order passed by a Division Bench of the High Court of Punjab and Haryana whereby Letters Patent Appeal No.167 of 1989 filed by the appellants has been dismissed with costs. The facts giving rise to the present appeal have been set out at length in the order impugned in this appeal hence call for no repetition except to the extent the same is absolutely necessary. What is striking about the case is that a decree passed in favour of the respondent as far back as on 25th October, 1976 remains to be executed even after the lapse of 34 years during which period the decree holder as also the judgment debtor have both passed away leaving behind the legacy of litigation to the next generation. The chequered history of a bitter fight which has brought the parties to this Court for the second time amply demonstrates that the real troubles of a plaintiff start only after he obtains a decree, thanks to the long winding legal procedure and the ingenuity of the lawyers who often exploit the same to the benefit of one party at the cost of the other.

2. A suit filed by Late Raj Kumari the plaintiff for recovery of a sum of Rs.60,000/- was decreed in her favour with costs by the Trial Court on 25th October, 1976 against Hans Raj, defendant now deceased. In execution of the said decree SCF

No.9, Sector 27-D, Chandigarh was attached and finally sold in a public auction on 17th April, 1978, for a sum of Rs.82,000/- in favour of the decree holder who was permitted by the Executing Court to participate in the auction. The judgment debtor filed his objections challenging the legality of the auction, but while the same were pending consideration, the parties put in a written compromise on 16th June, 1979 which, inter alia, provided that the decree holder would deposit a sum of Rs.35,000/- for payment to the judgment debtor, whereupon the latter shall handover to the decree holder the vacant possession of the property aforementioned that stood attached. The Executing Court recorded the statement of the parties in support of the compromise and adjourned the matter for passing final orders. But before any such order could be made the judgment debtor filed an application with a prayer for setting aside the compromise on the ground that the same was void ab-initio and had been brought about by fraud. Another application filed by him prayed for setting aside of the sale for non-compliance with the provisions of Order XXI Rules 72 and 84 of the C.P.C. The decree holder also moved an application for passing final orders in terms of the compromise stating that he had deposited the bank drafts for a total sum of Rs.35,000/- as the judgment debtor had refused to accept the said amount.

3. The Executing Court finally made an order on 30th August 1979 whereby it confirmed the sale in favour of the decree holder in accordance with the compromise between the parties. Aggrieved, the judgment debtor filed FAO No.502 of 1979 before the High Court of Punjab and Haryana. The appeal failed and the contention urged before the High Court that the compromise entered into between the parties was vitiated by fraud was repelled. The High Court further held that the sale in favour of the decree holder was not in violation of the provisions of Order XXI, Rules 84 and 85 of CPC. A Letters Patent Appeal filed against the order passed by the learned Single Judge also failed and was dismissed on 18th November, 1981. A Special Leave Petition against the said two orders was

dismissed by this Court *in limine* on 5th January, 1982 thereby bringing finality to the question of legality of the sale of the property in favour of the decree holder on the basis of the compromise/adjustment arrived at between the parties.

4. The judgment debtor then filed fresh objections before the Executing Court, *inter alia*, contending that the property bearing SCF No.9, Sector 27-D, Chandigarh, was exempt from attachment and sale, the same being a residential premises and the decree in question being a simple money decree. The decree holder also moved an application for restoration of the execution proceedings which had been adjourned *sine die* and the execution file consigned to record, on account of stay issued by the High Court in the earlier proceedings. The Executing Court formulated the points that arose for determination and answered the same against the judgment debtor in terms of its order dated 25th September, 1984. It held that the confirmation of sale and issue of the sale certificate in favour of the decree holder was legal and valid and that the decree holder was entitled to possession of the property sold in her favour. Resultantly, the Executing Court issued warrants for delivery of possession of the property in question in favour of the decree holder.

5. The delivery of possession was for the third time resisted by the judgment debtor on the ground that there was no decree for possession. The Executing Court dealt with these objections in its order dated 5th October, 1987 and noted that the issues raised by the judgment debtor had already been decided against him by the earlier orders of the Executing Court dated 30th August, 1979 and 25th September, 1984 which orders had attained finality. It also held that application dated 22nd January, 1985 under Order XXI Rule 97 CPC having been filed by the decree holder within the stipulated period of 30 days from the date of resistance to the delivery of possession was maintainable. The above order was assailed by the judgment debtor in Execution First Appeal which was dismissed by a

learned Single Judge of the High Court on 26th September, 1988. A Letters Patent Appeal preferred against the said order also failed and was dismissed on 5th October, 2001. The present appeal assails the correctness of the said order as noticed earlier.

6. Appearing for the appellant Mr. R.K. Kapoor strenuously argued that the Executing Court had committed a serious irregularity in the matter of directing attachment of property of the judgment debtor and issuing a sale proclamation. He contended that since the proclamation of sale was itself fraudulent and in complete violation of the provisions of Rule 66(2) Order XXI all the subsequent proceedings of auction sale, its confirmation and issuance of certificate etc. were a nullity in the light of the judgment of this Court in *Desh Bandhu Gupta v. N.L. Anand* 1994 (1) SCC 131. He further contended that the Executing Court had permitted the decree holder to participate in the auction of the property in question in violation of Order XXI Rule 72-A. He urged that if the decree in favour of the decree holder was a mortgage decree, it was essential for the Court to fix a reserve price which it had not fixed. The order permitting the decree holder to participate in the auction proceedings was, therefore, illegal and without jurisdiction argued Mr. Kapoor. It was further submitted that the decree holder was bound to deposit 25% of the amount offered by him in terms of Order XXI Rule 84(1) CPC which was not deposited and that the transfer of the execution petition pending in the Court of Sub Judge to the Court of Sub Judge, First Class where the execution proceedings arising out of the earlier decree were pending without notice to the judgment debtor was illegal. He also referred to the various interim orders passed by the Executing Court to show that the Court had acted arbitrarily and thereby illegally deprived the judgment debtor of his property.

7. Relying upon the decision of this Court in *Mahakal Automobiles and Anr. v. Kishan Swaroop Sharma* 2008 (13)

SCC 113 it was urged by Mr. Kapoor that notice upon the judgment debtor whose property was being sold was necessary and any sale in the absence of such notice was a nullity. Reliance was also placed on the decisions of this Court in *Ambati Narasaya v. M. Subba Rao* 1989 (Suppl.) 2 SCC 693, *S.P. Chengalvaraya Naidu v. Jagannath* 1994 (1) SCC 1, *A.R. Antulay v. R.S. Naik and Anr.* 1988 (2) SCC 602, in support of the submission that the procedure adopted by the Executing Court was neither just nor fair and not even in accordance with the provisions of the CPC. Mr. Kapoor also made a grievance against the dismissal of the first appeal preferred by the judgment debtor *in limine*, by a non-speaking order. He submitted that although the Division Bench had while disposing of the Letters Patent Appeal by the impugned judgment gone into the merits of the contentions urged by the appellant yet the same did not cure the defect in the order passed by the Single Judge whereby the first appeal filed by the appellant had been dismissed without recording any reasons.

8. The litigation between the parties has a chequered history and has passed through different stages. The first stage led to an order of attachment of the property in question, issue of a sale proclamation, confirmation of the sale in favour of the decree holder by the Executing Court and the grant of sale certificate to her. Except two, each one of the contentions urged by Mr. Kapoor before us relate to the procedure adopted and the order passed by the Executing Court up to the stage of confirmation of the sale in favour of the decree holder. All these contentions were urged by the appellants before the Executing Court who rejected the same and before the High Court who dismissed the appeals filed before it. The view taken by the Executing Court and by the High Court in regard to the issues raised by the appellants has attained finality with the dismissal of the Special Leave Petition filed against the said orders whereby the confirmation of sale in favour of the decree holder as also the grant of sale certificate to her was declared to be

valid. Any attempt to re-agitate the very same questions that stand concluded by the said judgment and orders is therefore futile if not a clear abuse of the process of law. In particular the question whether the decree under execution was a mortgage decree or a simple money decree, was answered in favour of the decree holder and the decree held to be a mortgage decree. Similarly the question whether non deposit of 25% of the bid amount by the decree holder, who was permitted to participate in the auction by the Executing Court rendered the sale in her favour was answered against the appellants herein. Relying upon the decision of this Court in *Manilal Mohanlal Shah & Ors. v. Sardar Syed Ahmed Sayed Mahmad and Anr.* AIR 1954 SC 349, the Executing Court held that where the decree holder was himself the purchaser the requirement of making a deposit of 25% of the bid money was not attracted. So also the challenge to the compromise entered into between the parties on the ground that the same was fraudulent was repelled by the Executing Court and the compromise held to be valid in law. In appeal against the order dated 30.8.1979 passed by the Executing Court, the learned Single Judge of the High Court affirmed the view taken by the Executing Court and declared that a compromise could be recorded even in execution proceedings and that the bald allegations suggesting a fraud were wholly untenable. The dismissal of the Letters Patent Appeal and the special leave petition against the said orders by this Court has placed all these aspects beyond the pale of any further challenge or controversy. It follows that all contentions relating to the validity of the confirmation of sale in favour of the decree holder and the issue of a sale certificate in her favour which stand finally determined against the appellants in terms of the judgments and orders of the Executing Court and the High Court in the first round, stand concluded & cannot be re-agitated. Reliance upon the decisions of this Court cited by Mr. Kapoor, is therefore of no assistance to him.

9. In the second round which started with a fresh set of objections raised by the judgment debtor, the Executing Court

once again examined the matter and rejected the objections by an order dated 25th September, 1984. The Executing Court held that the questions raised by the judgment debtor stood answered by the earlier orders passed by the Executing Court and upheld by the High Court in appeal. The contention that the compromise between the parties extinguished the decree and was a complete adjustment within the meaning of Order XXI Rule 2 was also repelled. The Court held that the decree continued to subsist till the judgment debtor delivered possession of the premises in terms of the compromise. The court accordingly issued warrants for delivery of possession to the decree holder. It is common ground that the view taken by the Executing Court in the said order has also attained finality as no appeal or other proceedings were filed against the same. In the above background, any effort to rekindle the controversy surrounding aspects which stand finally decided must necessarily fail.

10. The third round of proceedings it is noteworthy started with the objections raised by the judgment debtor leading to the passing of an order dated 5th October, 1987 by the Executing Court. The Court formulated as many as 14 issues which the judgment debtor sought to agitate in opposition to the execution of the decree and held that all of them except Issue Nos.7 and 9, stood decided by the Executing Court against the judgment debtor in terms of its orders dated 30th August, 1979 and 25th September, 1984. The Executing Court said:-

> "In the light of the circumstances stated above, I am of the opinion that the contentions forming the subject matter of issue Nos. 1, 2, 3, 4, 5, 6, 8, 10, 11, 12 & 13 have already been gone into and decided against the JD on merits. Orders dated 30.8.1979 and 25.9.84 of Sarvshri B.C. Rajput and Jagroop Singh learned Sub-Judge, Ist Class, respectively in this behalf have become final and binding on the JD. It is thus no more open to me to go into these questions and decide them afresh. I therefore, do not feel it necessary to dilate upon the case law cited quo these issues."

11. As far as issues no.7 and 9 are concerned, the Executing Court decided the same also in favour of the decree holder and held that the application filed by the decree holder was within time and maintainable in law. The said order when assailed before the High Court in FAO No.502 of 1979 was upheld and the appeal dismissed *in limine* by the learned Single Judge of the High Court. Letters Patent Appeal No.167 of 1989 assailing the said dismissal also met the same fate. The Division Bench noted that the questions sought to be raised in the third round of the proceedings had been dealt with and answered against the judgment debtor in terms of the earlier orders passed by the Executing Court and the Appellate Court in appeal. There is, in our opinion, nothing wrong with that view to warrant interference. The High Court has taken pains to recall the history of the litigation, the issues that were raised from time to time and the judgments that determined those issues. It was justified in taking the view that the judgment debtor had successfully prevented delivery of possession of the property to the decree holder for such a long time even after the sale of the property in her favour which was found by all the courts including this Court to be perfectly valid in law. The argument that even after the sale was declared to be legally valid, the decree holder could not demand delivery of possession, as the decree stood fully adjusted and satisfied was also rightly rejected by the Executing Court, in its order dated 25.9.1984 against which the judgment debtor had sought no redress.

12. That brings us to the question whether the Division Bench of the High Court committed a mistake in ignoring the fact that the Single Judge who dismissed the first appeal filed by the judgment debtor had recorded no reasons in support of the order passed by him. It was, according to Mr. Kapoor, necessary for the Single Judge to give reasons in support of the order made by him howsoever brief the same may have

been. The absence of any reason in the order passed by the Single Judge was, argued the learned counsel, sufficient for the Division Bench to set aside the same and remit the matter back for a fresh disposal in accordance with law. In as much as the Division Bench ignored that legal deficiency in the order and proceeded to decide the appeal on merits, it committed a mistake that ought to be corrected by this Court, was the only submission made by Mr. Kapoor that merits consideration.

13. The juristic basis underlying the requirement that Courts and indeed all such authorities, as exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in a long line of decisions rendered by this Court. In *Hindustan Times Limited v. Union of India & Ors.* 1998 (2) SCC 242 the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and induce clarity. In *Arun s/o Mahadeorao Damka v. Addl. Inspector General of Police & Anr.* 1986 (3) SCC 696 the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice, and help the Apex Court to dispose of appeals filed against such orders. In *Union of India & Ors. v. Jai Prakash Singh & Anr.* 2007 (10) SCC 712, reasons were held to be live links between the mind of the decision maker and the controversy in question as also the decision or conclusion arrived at. In *Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors.* 2010 (3) SCC 732, reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness, in the decision making process. In *Ram Phal v. State of Haryana & Ors.* 2009 (3) SCC 258, giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others. In *Director, Horticulture Punjab & Ors. v. Jagjivan Parshad* 2008 (5) SCC 539, the recording of reasons was held to be

indicative of application of mind specially when the order is amenable to further avenues of challenge.

14. It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

15. What then are the safeguards against an arbitrary exercise of power? The first and the most effective check against any such exercise is the well recognized legal principle that orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. Application of mind in turn is best demonstrated by disclosure of the mind. And disclosure is best demonstrated by recording reasons in support of the order or conclusion.

16. Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned

order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation.

17. In the present case the appellate Court appears to have decided against remanding the matter to the Single Judge on the ground of absence of reasons in the order passed by the latter because any such remand would have only prolonged the agony of the parties. From a reading of the impugned order of the appellate Court it is clear that the appellate Court was conscious of the fact that the litigation had been prolonged for many years. It, therefore, decided to resolve the matter on merits rather than remitting the same back for a fresh disposal by the learned Single Judge. In as much as the appellate Court adopted that approach it did not, in our opinion, commit any mistake to warrant our interference under Article 136 of the Constitution. The litigation between the parties having continued for three decades, the discretion vested in the appellate Court and was rightly exercised by it. The submissions made by Mr. Kapoor that the appellate Court ought to have remitted the matter back to the Single Judge must, therefore, fail and is hereby rejected.

18. In the result this appeal fails and dismissed but in the circumstances without any order as to costs.

N.J Appeal dismissed.

UMA SHANKAR SINGH

v.

STATE OF BIHAR AND ANR.

(Special Leave Petition (Crl.) No. 5123 of 2009)

SEPTEMBER 09, 2010

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Code of Criminal Procedure, 1973: s.190(1)(b) – Cognizance of offence by magistrate – Held: Magistrate can apply his mind independently and take cognizance of offence in exercise of his powers u/s.190(1)(b) even if the report of investigating agency in final form exonerates the accused – Penal Code, 1860 – ss.302, 291/34 – Arms Act, 1959 – s.27.

During election process, an offence took place and an FIR came to be lodged under Sections 302, 291/34 IPC and Section 27 of the Arms Act. The matter created a lot of turmoil which resulted in transfer of the investigation to the C.I.D. The informant challenged the same before the High Court. The High Court directed the C.I.D. and the Police, to submit their reports to the concerned magistrate within two months from the date of the order and upon such report, the magistrate was directed to proceed according to law after considering both the reports and the case diary. By virtue of the order of the High Court, the investigation was continued, both by the C.I.D. and the local police, and the reports in final form were filed exonerating the petitioner. However, after examining the materials in the case diary, the magistrate differed with the final report submitted by the investigating agency and took cognizance of offence against the petitioner.

The petitioner filed an application under Section 227 Cr.P.C. before the Session Court for discharge from the

case, which was dismissed and a date was fixed for framing of charge. The High Court dismissed the petition for quashing the order of Session Court. The instant special leave petition was filed challenging the order of the High Court.

Dismissing the special leave petition, the Court

HELD: 1. The law is well-settled that even if the investigating authority is of the view that no case has been made out against an accused, the magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers under Section 190(1)(b) Cr.P.C. That precisely happened in the instant case. The investigation was handed over to the C.I.D. and both the C.I.D. and the local police submitted their reports in final form exonerating the petitioner of the allegations made against him in the F.I.R. However, the magistrate took cognizance of the offence under Section 302/379 IPC and Section 27 of the Arms Act against the petitioner. This was not a case where the magistrate took recourse to any further inquiry but took cognizance on the police report itself, which he was entitled to do under Section 190(1)(b) Cr.P.C. Even otherwise, the charges were framed against the petitioner which had rendered the instant proceedings infructuous. [Paras 15-17] [1140-C-H; 1141-A]

India Carat Pvt. Ltd. v. State of Karnataka & Anr. **(1989) 2 SCC 132;** *Abhinandan Jha v. Dinesh Mishra* **(1967) 3 SCR 668 – relied on.**

Dharampal & Ors. v. State of Haryana & Anr. **(2004) 13 SCC 9 – distinguished.**

Raj Kishore Prasad v. State of Bihar **(1996) 4 SCC 495;** *Ranjit Singh v. State of Punjab* **(1998) 7 SCC 149;** *Kishun Singh & Ors. v. State of Bihar* **(1993) 2 SCC 16;** *Kishori*

Singh & Ors. v. State of Bihar & Anr. **(2004) 13 SCC 11 – referred to.**

Case Law Reference:

(1996) 4 SCC 495	**referred to**	**Para 9**
(1998) 7 SCC 149	**referred to**	**Paras 10,11, 12**
(1993) 2 SCC 16	**referred to**	**Para 11, 13**
(2004) 13 SCC 11	**referred to**	**Para 12**
(1989) 2 SCC 132	**relied on**	**Para 12**
(2004) 13 SCC 9	**distinguished**	**Para 13**
(1967) 3 SCR 668	**relied on**	**Para 15**
(2004) 13 SCC 9	**distinguished**	**Para 13,14,15**

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl) No. 5123 of 2009.

From the Judgment & Order dated 12.05.2009 of the High Court of Judicature at Patna in Cr. Misc. No. 18909 of 2007.

P.S. Mishra, Nagendra Rai, Alok Kumar, Tathagat Harshvardhan, Upendera Mishra, Dhrub Jha, Shantanu Sagar, Smarhar, Md. Shahid Anwar, Gopal Singh, Manish Kumar, Chandan Kumar for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. On 17th February, 2000, one Vijay Singh, brother of Bharat Singh (deceased) and Damodar Singh, who was an independent candidate in the elections to the Bihar Assembly, lodged a First Information Report with Maharajganj Police Station which was recorded as Maharajganj P.S. Case No.14 of 2000. In the said F.I.R. it was indicated that Damodar Singh, the informant's brother was contesting the elections to the Bihar Assembly as an independent candidate.

While the polling of votes was in progress, Bharat Singh was sitting in the Election office when he received information that bogus votes were being cast at a particular booth and upon hearing a bomb explosion at about 11.30 a.m., he proceeded to the place where the incident was taking place. According to the F.I.R. version, the informant reached the place in a jeep while Bharat Singh followed him on a motorcycle. On reaching the place they were informed that a boy had sustained injuries and had been rushed to the Maharajganj State Hospital for treatment.

2. When they were leaving the hospital premises, Uma Shankar Singh who was a candidate of the Samata Party in the Assembly election, and his son Jitendra Swami, accompanied by some unknown persons armed with different weapons, arrived at the place of occurrence and on the orders of Uma Shankar Singh, his son Jitendra Swami pulled down Bharat Singh from his motorcycle, pushed him into his car and drove out to an unknown destination.

3. Initially, the FIR was lodged under Section 364/34 IPC, but after the body of Bharat Singh was found, Sections 302, 291/34 IPC and Section 27 of the Arms Act were also added. The matter created a lot of turmoil which resulted in the investigation being transferred to the CID. The informant, Vijay Singh, becoming unnerved by the said decision of the State Government, challenged the same in Crl. W.J.C. No.288 of 2000, which was disposed of by the High Court on 9th April, 2001, upon observing that the matter appeared to be a fight between two political personalities and when investigation had already been completed by one agency and was also to be completed by the CID, the question would arise as to whether the investigation report under Section 173(2) Cr.P.C. would have to be filed both by the first investigating agency and also by the CID. The High Court directed the CID and the Superintendent of Police, Siwan, to submit their reports to the

concerned Chief Judicial Magistrate within two months from the date of the order and upon such report being submitted, the Chief Judicial Magistrate was directed to proceed according to law after considering both the reports and the case diary.

4. By virtue of the order of the High Court, investigation continued both by the CID and the local police and it was decided to file a report in final form against the Petitioner, though some other accused were charge-sheeted. However, after examining the materials in the case diary, the Chief Judicial Magistrate differed with the Final Report submitted by the investigating agency to take cognizance against Jitendra Swami and some other accused persons.

5. This led the Petitioner to file an application under Section 227 Cr.P.C. for discharge from the case. The said application was taken up for consideration by the First Additional Sessions Judge, Siwan, who by his order dated 9th March, 2007, rejected the petitioner's prayer for discharge under Section 227 Cr.P.C. and fixed a date for framing of charge.

6. The Petitioner thereupon filed Crl. Misc. Case No.18909 of 2007 in the Patna High Court for quashing the order passed by the First Additional District and Sessions Judge, Siwan, on 9th March, 2007, rejecting the Petitioner's prayer for discharge from the case. The High Court dismissed the Crl. Misc. Case vide its order dated 12th May, 2009. This Special Leave Petition was filed on 17th July, 2009, against the said judgment and order of the High Court.

7. On behalf of the Petitioner it was urged that when he was not named as an accused in the charge-sheet filed by the investigating agency, the Magistrate could not have taken cognizance as far as he was concerned and the trial court should have waited till the stage of Section 319 Cr.P.C. if at all the Petitioner was to be arrayed as an accused. Mr. P.S.

Mishra, learned Senior Advocate, reiterated the oft-repeated saying that cognizance is taken of an offence and not the offender. Mr. Mishra submitted that the case was also investigated by the C.I.D. on the directions of the High Court and, although, the alleged offence was triable by a Court of Session, the learned Magistrate erroneously took cognizance thereof.

8. Mr. Mishra urged that one of the modes of taking cognizance of an offence by the Magistrate under Section 190 Cr.P.C. is upon a police report of facts constituting the offence. Mr. Mishra submitted that prior to the enactment of the Code of Criminal Procedure, 1973, which replaced the Code of Criminal Procedure, 1898, if the Magistrate disagreed with the Final Report filed by the investigating agency, he was at liberty to hold a separate enquiry and to take cognizance thereafter. Under the new Code, however, such a procedure was eliminated by virtue of the amended provisions of Section 209 which made it quite clear that when in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate who is of the view that the offence is triable exclusively by the Court of Session, he shall, after complying with the provisions of Sections 207 and 208, as the case may be, commit the accused to the Court of Session. It was urged that the Magistrate was left with no choice to hold an enquiry but to make an order of commitment when the facts disclosed an offence triable by the Court of Session. In other words, if the Final Report under Section 173(2) Cr.P.C. exonerated an accused, there was no scope for the Magistrate to hold an inquiry for the purpose of taking cognizance, but to wait for the stage of Section 319 Cr.P.C. if at all cognizance was to be taken in respect of such accused on material that may have surfaced during the trial.

9. In support of the said proposition reliance was placed on the decision of this Court in *Raj Kishore Prasad vs. State of Bihar* [(1996) 4 SCC 495], wherein this Court when

confronted with a similar question held that in order to apply Section 319 Cr.P.C. against any person other than the accused, it would depend on the evidence recorded in the course of any inquiry or trial and that proceedings before a Magistrate under Section 209 Cr.P.C. are not trial proceedings nor were they ever meant to be.

10. Reference was then made to a decision of a Three Judge Bench of this Court in *Ranjit Singh vs. State of Punjab* [(1998) 7 SCC 149], wherein the Hon'ble Judges took the view that when a case is committed to the Court of Session under Section 209, the Court of Session has no jurisdiction to include a new person as accused before evidence was led on behalf of the prosecution and that there was no power other than the power conferred under Section 319 Cr.P.C. by which the Court of Session could join a new person as accused. It was held that there is no intermediary stage between committal under Section 209 Cr.P.C. and Section 319 Cr.P.C. for the aforesaid purpose.

11. Mr. Mishra submitted that the views expressed in *Ranjit Singh's* case (supra) were contrary to those expressed by this Court in the case of *Kishun Singh & Ors. vs. State of Bihar,* [(1993) 2 SCC 16], where, although, 20 persons had been named in the F.I.R., the Magistrate had committed 18 to the Court of Session under Section 209 Cr.P.C. to stand trial. On an application made under Section 319 Cr.P.C. indicating the involvement of the other two accused as well, a prayer was made that they should also be summoned and arraigned before the court as accused persons along with the 18 other accused already named in the charge-sheet. Despite objections raised on behalf of the said two persons, the Sessions Judge, in exercise of his discretion, added the said persons as accused along with the 18 others. The criminal revision preferred from the order of the learned Sessions Judge was dismissed by the High Court. This Court while granting special leave held that although the stage of Section 319 had not been reached, on the materials available, the Sessions Judge was within his jurisdiction in taking cognizance against the said two persons

under Section 193 of the Code.

12. The same question once again fell for consideration in *Kishori Singh & Ors. vs. State of Bihar & Anr.* [(2004 (13) SCC 11], where the decision rendered by this Court in *Ranjit Singh's* case (supra) was followed, although, another decision in the case of *India Carat Pvt. Ltd. vs. State of Karnataka & Anr.* [(1989) 2 SCC 132], was also cited wherein another Bench of three Judges of this Court had held that despite the police report that no case had been made out against the accused, the Magistrate can take cognizance of the offence under Section 190(1)(b), taking into account the statement of witnesses made under police investigation and issue process.

13. Ultimately, the case of *Dharampal & Ors. vs. State of Haryana & Anr.* [(2004) 13 SCC 9], came up for consideration before a Bench of two Judges when on account of the different views expressed by different Benches of this Court, the case was directed to be heard by a three Judge Bench. After considering the various decisions in connection with the said issue, the three Judge Bench observed that prima facie it did not think that the interpretation reached in *Ranjit Singh's* case (supra) was correct and that the law was clearly enunciated in *Kishun Singh's* case (supra). Further, having regard to the fact that the decision in *Ranjit Singh's* case (supra) was a three-Judge Bench, the learned Judges directed that the matter be placed before the Hon'ble the Chief Justice of India for placing the matter before a larger Bench.

14. Mr. Nagendra Rai, learned Senior Advocate appearing for some of the respondents, on the other hand, submitted that the question referred to the larger Bench in *Dharampal's* case (supra) is not really material for a decision in this case where the fact situation was different. Mr. Rai urged that the law was well-settled that the Magistrate was not bound to accept the Final Report filed by the investigating authorities under Section 173(2) Cr. P.C. and was entitled to issue process against an

accused even though exonerated by the said authorities, without holding any separate enquiry, on the basis of the Police Report itself.

15. There is substance in Mr. Rai's submission that for a decision in the facts of the case, it is not necessary to wait for the outcome of the result of the reference made to a larger Bench in Dharampal's case. The reference is with regard to the Magistrate's power of enquiry if he disagreed with the Final Report submitted by the investigating authorities. The facts of this case are different and are covered by the decision of this Court in the case of *India Carat Pvt. Ltd.* (supra) following the line of cases from *Abhinandan Jha vs. Dinesh Mishra* (1967) 3 SCR 668 onwards. The law is well-settled that even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers under Section 190(1)(b) Cr.P.C.

16. That is precisely what has happened in the present case. In the instant case the investigation had been handed over to the C.I.D. and both the C.I.D. and the local police had submitted their reports in final form exonerating the petitioner of the allegations made against him in the F.I.R. However, the Chief Judicial Magistrate, Siwan, took cognizance of the offence under Section 302/379 IPC and Section 27 of the Arms Act against the petitioner. This is not a case where the Magistrate took recourse to any further inquiry but took cognizance on the police report itself, which he was entitled to do under Section 190(1)(b) Cr.P.C.

17. Even otherwise, the Petitioner thereafter filed an application for discharge before the 1st Additional District and Sessions Judge, Siwan, in Sessions Trial No.281 of 2006, but such prayer under Section 227 Cr.P.C. was dismissed and a

date was fixed for framing of charge. We have been informed that charges have since been framed against the petitioner which has rendered the present proceedings infructuous and the Petitioner's remedy, if any, will no longer be available therein.

18. The Special Leave Petition is, therefore, dismissed in the light of the aforesaid observations.

D.G SLP dimissed.

GE INDIA TECHNOLOGY CENTRE PRIVATE LTD.
v.
COMMISSIONER OF INCOME TAX & ANR.
(Civil Appeal Nos. 7541-7542 of 2010)

SEPTEMBER 09, 2010

[S.H. KAPADIA, CJI AND K.S. PANICKER RADHAKRISHNAN, J.]

Income Tax Act, 1961:

s.195(1) – Payment to Non-resident – Liability to deduct tax at source – Held: The payer is bound to deduct tax at source (TAS) only if the tax is assessable in India – Expression "chargeable under the provisions of the Act" in s.195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India – On facts, software imported by Indian Company – Payment made to non-resident software supplier – Failure on part of Indian Company to deduct tax at source – Tribunal's view that the sum paid to non-resident supplier was not royalty and the same did not give rise to any income taxable in India and, therefore, liability to deduct TAS did not arise – High Court held that the moment there is remittance, an obligation to deduct TAS arises – The view of High Court was not correct in the light of expression "chargeable under the provisions of the Act" in s.195(1) – Since High Court did not go into merits of the case on the question of payment of royalty, the impugned order is set aside and matter remitted to High Court for consideration afresh – Circular No. 728 dated October 30, 1995 issued by CBDT – Interpretation of statutes.

***Interpretation of statutes**:*

While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the

machinery Sections – The Act is to be read as an integrated Code – Income Tax Act, 1961.

While interpreting a section one has to give weightage to every word used in that section.

The question which has arisen for consideration in the instant appeals is whether the amount paid by an Indian company to a non-resident software supplier constitute royalty which is deemed to accrue or arise in India and thus the Indian Company is liable to deduct tax at source under Section 195 of the Income Tax Act, 1961.

Allowing the appeal and remitting the matter to the High Court, the Court

HELD: 1. Section 195 of the Income Tax Act, 1961 imposes a statutory obligation on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the I.T. Act, to deduct income tax at the rates in force unless he is liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the I.T. Act to which the requirement of tax deduction at source applies. A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the I.T. Act. Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct tax at source (TAS) in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income

chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". CBDT had also clarified by Circular No. 728 dated October 30, 1995 that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. [Para 7] [1150-H; 1151-A-H; 1152-A-C]

Vijay Ship Breaking Corporation and Others v. CIT **314 ITR 309 – relied on.**

Transmission Corporation of A.P. Ltd. v. C.I.T. **239 ITR 587 (SC) – distinguished.**

CIT v. Cooper Engineering **68 ITR 457;** *Czechoslovak Ocean Shipping International Joint Stock Company v. ITO* **81 ITR 162(Calcutta) – referred to.**

Circular No. 728 dated October 30, 1995 issued by CBDT **– referred to.**

2. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII, one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. Section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194EE and 194F inter alia provide for deduction of tax in respect of "any amount" referred to in the specified provisions. None of these provisions has the expression "sum chargeable under the provisions of the Act", which is an expression used only in Section 195(1). It follows, therefore, that the obligation to deduct TAS

arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section 195 has to be read in conformity with the charging provisions, i.e., Sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in Section 195(1). The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. While interpreting a Section one has to give weightage to every word used in that section. The interpretation suggested by the Department that under Section 195, the moment there is remittance the obligation to deduct TAS arises cannot be accepted as it would then mean that, on mere payment, income would be said to arise or accrue in India. Such interpretation would obliterate expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated Code. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 195 uses the word 'payer' and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He

cannot be declared to be an assessee-in-default. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the I.T. Act. This provision ensures effective compliance of Section 195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will definitely claim deduction under the I.T. Act for such remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. [Para 9] [1153-F-H; 1154-A-H; 1156-F-H; 1157-A-B]

C.I.T. v. Eli Lilly & Co. (India) (P.) Ltd. **312 ITR 225 – referred to.**

3. In the present case, on facts, the ITO (TDS) had taken the view that since the sale of the concerned software, included a license to use the same, the payment made by appellant(s) to foreign Suppliers constituted "royalty" which was deemed to accrue or arise in India and, therefore, TAS was liable to be deducted under Section 195(1) of the Act. The said finding of the ITO(TDS) was upheld by the CIT(A). However, in second appeal, the ITAT held that such sum paid by the appellant(s) to the foreign software Supplier was not a "royalty" and that the same did not give rise to any "income" taxable in India

and, therefore, the appellant(s) was not liable to deduct TAS. However, the High Court did not go into the merits of the case and it went straight to conclude that the moment there is remittance an obligation to deduct TAS arises, which view stands hereby overruled. The impugned judgment of the High Court is set aside and the matter is remitted to the High Court for deciding whether on facts and circumstances of the case, the ITAT was justified in holding that the amount(s) paid by the appellant(s) to the foreign software suppliers was not "royalty" and the same did not give rise to any "income" taxable in India and, therefore, the appellant(s) was not liable to deduct any tax at source. [Paras 10-12] [1158-H; 1159-A-E]

Case Law Reference:

239 ITR 587 (SC)	**distinguished**	**Para 4, 7, 10**
68 ITR 457	**referred to**	**Para 7**
81 ITR 162(Cal)	**referred to**	**Para 7**
314 ITR 309	**relied on**	**Para 8**
312 ITR 225	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7541-7542 of 2010.

From the Judgment & Order dated 24.09.2009 of the High Court of Karnataka in Income Tax Appeal Nos. 1268 & 1269 of 2006.

WITH

C.A. Nos. 7543-7544, 7545-7548, 7549-7758, 7759-7764, 7765-7767, 7768, 7769, 7770, 7771-7772, 7773, 7774, 7775-7776, 7777, 7778 of 2010.

Vivek Tankha, ASG, Harish N. Salve, F.S. Nariman, S. Ganesh, M.S. Syali, V. Giri, R.P. Bhatt, Anuradha Dutt, B. Vijayalakshmi Menon, Pawan Sharma, Kuber Dewan Subhash Sharma, Siddharth Aggarwal, Senthil Jagadeesan, Atul Y. Chitale, Suchitra Atul Chitale, Sunaina Dutta, Satyen Sethi, Mahua Kalra, Husnal Syali, Sumit K. Singh, Arta Trana Parda, Pd., Rameshwar Prasad Goyal, Mukesh Bhutani, H. Raghavendra Rao, Arijit Prasad, Yashaj Singh Deora, T. Suryanayarayana, Sarva Mitter (for Milter & Mitter Co.) M.P. Vinod, Ajay K. Jain, Rustom B. Hathikhanawala, Anitha Shenoy, A.S. Bhasme, Brajesh Pandey, Vikas Malhotra, Rishabh Sancheti, Vaibhav Srivastava, Pratul Shandilya, Sumeer Sodhi, Kumaran D., B. Balaram Das, Abhinav Ashwain, Aunil Agarwal, Shashank Singh, N. Ganpathy for the appearing parties.

The Judgment of the Court was delivered by

S.H. KAPADIA, CJI. 1. Leave granted.

2. The short question which arises for determination in this batch of cases is – whether the High Court was right in holding that the moment there is remittance the obligation to deduct tax at source (TAS) arises? Whether merely on account of such remittance to the non-resident abroad by an Indian company per se, could it be said that income chargeable to tax under the Income Tax Act, 1961 (for short "I.T. Act") arises in India?

Facts in the leading case of Sonata Information Technology Ltd.

3. Appellant(s) are the distributors of imported pre-packaged shrink wrapped standardized software from Microsoft and other Suppliers outside India. During the relevant assessment year(s) appellant(s) made payments to the said software Suppliers which according to the appellant(s) represented the purchase price of the abovementioned software. The ITO(TDS) held that since the sale of software

included a license to use the same, payments made by the appellant(s) to the foreign Suppliers constituted royalty, which was deemed to accrue or arise in India. Therefore, TAS was liable to be deducted under Section 195 of the I.T. Act. The said finding of the ITO(TDS) was upheld by the Commissioner (A). In second appeal, the ITAT, however, held that the amount paid by appellant(s) to the foreign software Suppliers was not "royalty" and the same did not give rise to any income taxable in India, and therefore, the appellant(s) was not liable to deduct TAS.

4. The Department appealed to the Karnataka High Court. Before the High Court, the Department for the first time raised the contention that unless the payer makes an application to the ITO(TDS) under Section 195(2) and has obtained a permission for non-deduction of the TAS, it was not permissible for the payer to contend that the payment made to the non-resident did not give rise to "income" taxable in India and that, therefore, there was no need to deduct any TAS. This argument of the Department was accepted by the High Court vide the impugned judgment. For reaching this conclusion, the High Court placed strong reliance on the judgment of this Court in *Transmission Corporation of A.P. Ltd. Vs. C.I.T.* [239 ITR 587(SC)]. Aggrieved by the said decision, the appellant(s) has come to this Court by way of civil appeal(s).

Analysis of Section 195

5. At the outset, we quote hereinbelow the relevant provisions of Section 195, as it stood at the relevant time.

> "**195.** (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue

> of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :
>
> (2) Where the person responsible for paying any such sum chargeable under this Act (other than interest on securities and salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.
>
> (3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorizing him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section(1)."

6. At this stage we may also quote hereinbelow Section 195 (6) as inserted by Finance Act, 2008 w.e.f. 1.4.2008.

> "**195(6)** The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board."

7. Under Section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the I.T. Act in

the case of non-residents only and not in the case of residents. Failure to deduct the tax under this Section may disentitle the payer to any allowance apart from prosecution under Section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) *chargeable* under the provisions of the I.T. Act, to deduct income tax at the rates in force unless he is liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the I.T. Act to which the aforestated requirement of tax deduction at source applies. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the I.T. Act read with Rule 30 of the I.T. Rules 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the I.T. Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. The most important expression in Section 195(1) consists of the words "**chargeable under the provisions of the Act**". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the I.T. Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act. It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to

deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 that the CBDT has clarified that the tax deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act. In *CIT Vs. Cooper Engineering* [68 ITR 457] it was pointed out that if the payment made by the resident to the non-resident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application under Section 18(3B) (now Section 195(2) of the I.T. Act). The application of Section 195(2) pre-supposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO(TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO(TDS) that the question of making an order under Section 195(2) will arise. In fact, at one point of time, there was a provision in the I.T. Act to obtain a NOC from the Department that no tax was due. That certificate was required to be given to RBI for making remittance. It was held in the case of *Czechoslovak Ocean Shipping International Joint Stock Company Vs. ITO* [81 ITR 162(Calcutta)] that an application for NOC cannot be said to be an application under Section 195(2) of the Act. While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5,

9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions. Reference to ITO(TDS) under Section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non-resident. In our view, Sections 195(2) and 195(3) are safeguards. The said provisions are of practical importance. This reasoning of ours is based on the decision of this Court in *Transmission Corporation* (supra) in which this Court has observed that the provision of Section 195(2) is a safeguard. From this it follows that where a person responsible for deduction is fairly certain then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof.

Submissions and findings thereon

8. If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in Section 195(1). The said expression in Section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted. [See : *Vijay Ship Breaking Corporation and Others Vs. CIT* 314 ITR 309]

9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. For example, Section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194EE and 194F inter alia provide for deduction of tax in respect of "any amount" referred to in the

specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the ITO(TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, Section 195 has to be read in conformity with the charging provisions, i.e., Sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in Section 195(1). The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated Code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of *C.I.T. Vs. Eli Lilly & Co. (India) (P.) Ltd.* [312 ITR 225] the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the I.T. Act. It is true

that the judgment in *Eli Lilly* (supra) was confined to Section 192 of the I.T. Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the I.T. Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention

is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO(TDS) of payments made to non-residents. In other words, according to the Department Section 195(2) is a provision by which payer is required to inform the Department of the remittances he makes to the non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India. We find no merit in these contentions. As stated hereinabove, Section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, Section 195 uses the word 'payer' and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide Finance Act, 1988 w.e.f. 1.4.89, payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the I.T. Act. This provision ensures effective compliance of Section 195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will

definitely claim deduction under the I.T. Act for such remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. Similarly, vide Finance Act, 2008, w.e.f. 1.4.2008 sub-Section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1.4.2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage.

Applicability of the judgment in the case of Transmission Corporation (supra)

10. In *Transmission Corporation* case (supra) a non-resident had entered into a *composite* contract with the resident party making the payments. The said composite contract not only comprised supply of plant, machinery and equipment in India, but also comprised the installation and commissioning of the same in India. It was admitted that the erection and commissioning of plant and machinery in India gave rise to income taxable in India. It was, therefore, clear even to the payer that payments required to be made by him to the non-resident included an element of income which was exigilble to tax in India. The only issue raised in that case was whether TDS was applicable only to pure income payments and not to composite payments which had an element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In *Transmission Corporation* case (supra) it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount, on the footing

that only a portion of the payment made represented "income chargeable to tax in India", then it was necessary for him to make an application under Section 195(2) of the Act to the ITO(TDS) and obtain his permission for deducting TAS at lesser amount. Thus, it was held by this Court that if the payer had a doubt as to the amount to be deducted as TAS he could approach the ITO(TDS) to compute the amount which was liable to be deducted at source. In our view, Section 195(2) is based on the "principle of proportionality". The said sub-Section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. It is in this context that the Supreme Court stated, "*If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such 'sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS".* If one reads the observation of the Supreme Court, the words "such sum" clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this Court in *Transmission Corporation* case (supra) which is put in italics has been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of Section 195(1) which in clear terms lays down that tax at source is deductible only from "sums chargeable" under the provisions of the I.T. Act, i.e., chargeable under Sections 4, 5 and 9 of the I.T. Act.

11. Before concluding we may clarify that in the present case on facts the ITO (TDS) had taken the view that since the sale of the concerned software, included a license to use the

same, the payment made by appellant(s) to foreign Suppliers constituted "royalty" which was deemed to accrue or arise in India and, therefore, TAS was liable to be deducted under Section 195(1) of the Act. The said finding of the ITO(TDS) was upheld by the CIT(A). However, in second appeal, the ITAT held that such sum paid by the appellant(s) to the foreign software Supplier was not a "royalty" and that the same did not give rise to any "income" taxable in India and, therefore, the appellant(s) was not liable to deduct TAS. However, the High Court did not go into the merits of the case and it went straight to conclude that the moment there is remittance an obligation to deduct TAS arises, which view stands hereby overruled.

12. Since the High Court did not go into the merits of the case on the question of payment of royalty, we hereby set aside the impugned judgment of the High Court and remit these cases to the High Court for de novo consideration of the cases on merits. The question which the High Court will answer is – whether on facts and circumstances of the case the ITAT was justified in holding that the amount(s) paid by the appellant(s) to the foreign software Suppliers was not "royalty" and that the same did not give rise to any "income" taxable in India and, therefore, the appellant(s) was not liable to deduct any tax at source?

13. Subject to what is stated hereinabove, we set aside the impugned judgment(s) and remit these cases to the High Court to answer the question framed hereinabove. Accordingly, the appeal(s) filed by the appellant(s) stands allowed with no order as to costs.

D.G Appeal allowed.

DHARAMPAL SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 1479 of 2008)

SEPTEMBER 09, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 18, 35 and 54 — Punishment for contravention in relation to opium poppy and opium – Factum of 'conscious possession' – Held: Under s. 18, possession has to be conscious possession – Initial burden of proof of possession, lies on prosecution and once it is discharged legal burden shifts on accused – Once possession is established accused, who claims that it was not a conscious possession, has to establish it because it is within his special knowledge – Possession is a mental state and s.35 gives statutory recognition to culpable mental state – Once possession is established, court can presume that accused had culpable mental state and have committed the offence – On facts, Conviction and sentence of accused and co-accused u/s. 18 by High Court, does not call for interference – Vehicle driven by accused and occupied by co-accused, from which opium was recovered was not a public transport vehicle – Circumstances lead to conclusion that accused were in conscious possession – Circumstances appearing against them were put to them in their statement u/s. 313 Cr.P.C. – Mere absence of independent witness at the time of search and seizure would not render the prosecution case unreliable – Code of Criminal Procedure, 1973 – s. 313.

The Station House Officer-PW3 along with other police personnel intercepted the car driven by the appellant 'DS'. The appellant-'MS' was sitting by the side of 'DS' on the front seat. A gunny bag containing opium,

weighing 65 kilograms was found in the dicky of the car. The sample of 100 grams was taken, kept in a sealed cover and sent to the Chemical Examiner for examination. It was found to be opium. The appellants were charge-sheeted under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1983. The trial court acquitted the appellants of the charge levelled against them since the prosecution failed to prove the compliance of Section 50 of the Act. The High Court held that the provisions of Section 50 of the Act was not applicable and set aside the order of acquittal. The appellants were convicted for the offence under Section 18 of the Act and sentenced to undergo rigorous imprisonment for a period of 10 years each. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1 As regard the factum of 'conscious possession', appellant-'DS' was found driving the car whereas appellant-'MS' was travelling with him and from the dicky of the car 65 kilograms of opium was recovered. The vehicle driven by the appellant 'DS' and occupied by the appellant 'MS' is not a public transport vehicle. To bring the offence within the mischief of Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 possession has to be conscious possession. The initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on accused. The standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused. The expression possession is not capable of precise and completely

logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles. [Para 9] [1170-G-H; 1171-A-E]

1.2. From a plain reading of Section 54 of the Act, it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, it is found that the appellants have not been able to account for satisfactorily the possession of opium. Once possession is established the court can presume that the accused had culpable mental state and have committed the offence. [Para 9] [1172-C-E]

1.3. As part of fair trial, Section 313 Cr.P.C. requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible

to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice. [Para 12] [1174-G-H; 1175-A-B]

1.4. On consideration of the facts of the instant case, it is found that the prosecution intends to prove that the appellants were in possession of the opium by disclosing that illicit article was recovered from the dicky of the vehicle driven and occupied by them. Possession is a mental state and what has been unfolded by the prosecution is that on search of dicky of the car opium was recovered. The said circumstances lead to the conclusion that the appellants were in conscious possession. Thus, the circumstances appearing against the appellants in the evidence have been reproduced and on fact found that the circumstances appearing against them were put to them in their statement under Section 313 Cr.P.C. It cannot be said that appellants were not told to explain the circumstances appearing against them in the evidence. In any of the view it has not occasioned failure of justice. [Paras 13 and 14] [1175-C-G]

Avtar Singh and Ors. v. State of Punjab **2002 (7) SCC 419;** *State of Punjab vs. Hari Singh and Ors.* **2009(4) SCC 200, distinguished.**

Sorabkhan Gandhkhan Pathan and Anr. vs.State of Gujarat **2004 (13) SCC 608;** *Madan Lal and Anr. vs. State of H.P.* **2003 (7) SCC 465, referred to.**

2. The plea that the article recovered from the appellants is not opium and, therefore, their conviction is illegal, in the light of evidence of DW.6, Malkhana Clerk of the Court of Chief Judicial Magistrate, who in his evidence stated that as per record 111 kilograms of opium was sent to Ghazipur and from the report received it was observed

that the said consignment did not contain any alkaloid, was neither raised before the trial court or the High Court and though this plea is surprising. The counsel for the appellant conveniently left the evidence of DW 6 in the cross-examination, wherein he clearly deposed that he cannot tell as to which case the opium related. Otherwise also 100 grams opium was sent to the Chemical Examiner who found that to be opium. DW 6 had in mind a case in which 111 kilograms of opium was sent. Therefore, the report referred to by DW.6 is not remotely connected with the instant case. [Para 15] [1175-G-H; 1176-A-D]

3. The case of the prosecution cannot be rejected only on the ground that independent witnesses was not examined, in case on appraisal of the evidence on record the court finds the case of prosecution to be trustworthy. It has come in the evidence of the prosecution witnesses that an attempt was made to join person from public at the time of search but none was available. In the face of it mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable. [Para 16] [1176-E-G]

Case Law Reference:

2004 (13) SCC 608	**Referred to.**	**Para 8, 10**
2003 (7) SCC 465	**Referred to.**	**Para 9**
2002 (7) SCC 419	**Distinguished.**	**Para 10**
2009(4) SCC 200	**Distinguished.**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1479 of 2008.

From the Judgment & Order dated 22.01.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 686-DBA of 1997

WITH

Crl. A.No. 1470 of 2008

Nagendra Rai, Pt. Parmanand Katara, Rishi Malhotra, Prem Malhotra for the Appellant.

Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellants have preferred these appeals separately, aggrieved by the judgment and order dated 22nd January, 2008 passed by the Punjab and Haryana High Court in Criminal Appeal No.686-DBA of 1997, whereby while reversing the judgment of acquittal dated 7th May, 1997 passed by the Sessions Judge, Faridkot in Sessions Case No.73 of 1994 (Sessions Trial No.71 of 1994) convicted the appellants for the offence under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act') and sentenced them to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of Rs.1 lac each and in default to undergo further rigorous imprisonment for a period of one year each.

2. According to the prosecution, on 4th June,1994 PW.3, Jagmohan Singh, Station House Officer of Police Station, Mehna along with Assistant Sub-Inspector of Police, Ranjit Singh and other police personnel were on a routine picket duty near the passage leading to the various colonies from Ajitwal. While they were on duty a white Maruti Car, bearing No.PID 6096 was seen coming from the side of village Kokri Kalan through an unmetalled road and when signalled by Jagmohan Singh, it stopped. On enquiry the person driving the car disclosed his name as appellant Dharampal Singh whereas the other person sitting by his side on the front seat disclosed his name as appellant Major Singh. According to the prosecution, the Station House Officer apprised them that they intend to search their car and whether

they wish to be searched in the presence of a Magistrate or a Gazetted Officer. Both of them expressed their desire to be searched by a Gazetted Police Officer and accordingly on his wireless message Narinderpal Singh, Superintendent of Police, Moga along with security personnel reached there. According to the prosecution an attempt was made to join independent persons to witness to the search but none were available. Hence, the car was searched by Jagmohan Singh in the presence of the Superintendent of Police and in the dicky of the car a gunny bag containing opium, wrapped in a glazed paper was found. Total weight of the opium found was 65 kilograms and from that sample of 100 grams was taken and kept in a sealed cover. The sample so taken was sent to the Chemical Examiner, who found the same to be opium. After completion of the investigation charge-sheet was submitted under Section 18 of the Act and ultimately the appellants were put on trial for commission of the offence punishable under the aforesaid Section.

3. The prosecution in support of its case altogether examined seven witnesses and the report of the Chemical Examiner was tendered as evidence. In the statement under Section 313 of the Code of Criminal Procedure they pleaded false implication and examined six defence witnesses. The trial court on appreciation of evidence came to the conclusion that the prosecution had failed to prove, the compliance of Section 50 of the Act and accordingly acquitted both the appellants of the charge levelled against them. In this connection the trial court had observed as follows:

> "In this case, there is non compliance of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, which has been held to be a mandatory. In this case, admittedly no consent memo was prepared. In case State of Punjab vs. Labh Singh reported as 1997(1) Recent Criminal Reports 565 where there was no evidence that the accused was informed in writing of his right to be searched before a Gazetted Officer or a Magistrate, and

the accused had been acquitted by the Court, the Hon'ble Supreme Court refused to interfere in the order of acquittal. In case State of Punjab-appellant Vs. Kulwant Singh, reported as 1994(1) Recent Criminal Report 303 in para No.57 at page 320, it was held by our own Hon'ble High Court that the non compliance of the provisions of Section 50 of the Act would per se result in vitiating the trial and conviction and it would amount to taking away the most valuable and substantive right of the suspected person in establishing his innocence and rendering the recovery of the Narcotic Drugs and Psychotropic Substances is illegal qua the possession of the accused. This shows that the non compliance of the provisions of Section 50 is fatal to the case of the prosecution."

4. Aggrieved by the order of acquittal, State preferred appeal and the High Court by the impugned judgment has set aside the order of acquittal and convicted the appellants as above. The High Court has found that since the recovery was effected from the dicky of the car and not from the person of the appellants the provisions of Section 50 of the Act were not applicable and as such the question of violation thereof did not arise at all. The High Court further held that they were in possession of 65 Kilograms of opium. The finding of the High Court in this regard reads as follows:

"It is proved from the cogent, convincing, reliable and unimpeachable evidence of Jagmohan Singh, Inspector, Station House Officer, P.S. Mehna, PW-3, the Investigating Officer of this case, and Narinder Pal Singh, Superintendent of Police, PW-2, that Dharampal Singh, accused, was driving Car No.PID 6096 and Major Singh, accused, was sitting by his side, on the front seat, at the relevant time, when the recovery of 65 K.gms of opium, wrapped in a glazed paper, from a gunny bag, lying in the dicky of the same, was effected. The Car, in question, belonged to the brother of Dharampal Singh, accused, as per the

registration certificate, referred to above. Since no enmity against the prosecution witnesses, was either alleged or proved, it could not be imagined that such a big haul of opium, could be planted, against the accused, by them. Since, the recovery of opium, was effected from the dicky of the Car, aforesaid, being driven by Dharampal Singh, accused, by the side of whom, on the front seat, Major Singh, accused was sitting, it can be safely held that both of them were found in possession of the same (opium)."

5. The High Court further taking into account the provisions of Sections 35 and 54 of the Act came to the conclusion that they were in conscious possession of opium and accordingly convicted and sentenced the appellants as above.

6. Mr. Nagendra Rai, learned Senior Counsel appears on behalf of the appellant in Criminal Appeal No.1479 of 2008 whereas the appellant in Criminal Appeal No.1470 of 2008 is represented by Pandit Parmanand Katara, learned Senior Counsel. They concede that in facts of the present case, Section 50 of the Act is not attracted, the ground on which the trial court had acquitted the appellants but they assail the conviction of the appellants on the ground mentioned hereinafter.

7. Mr. Rai, submits that for the conviction under Section 18 of the Act the possession has to be a conscious possession and merely the fact that the opium was found in the dicky of the car, which the appellant was driving itself, shall not establish conscious possession. In support of his submission he has placed reliance on a judgment of this Court in the case of *Avtar Singh and others vs. State of Punjab, 2002 (7) SCC 419,* and our attention has been drawn to the following passage from paragraph 6 of the judgment which reads as follows:

"Possession is the core ingredient to be established before the accused in the instant case are subjected to the punishment under Section 15. If the accused are found to be in possession of poppy straw which is a narcotic drug

within the meaning of clause (xiv) of Section 2, it is for them to account for such possession satisfactorily; if not, the presumption under Section 54 comes into play. We need not go into the aspect whether the possession must be conscious possession. Perhaps taking a cue from the decision of this Court in Inder Sain v. State of Punjab arising under the Opium Act, the learned trial Judge charged the accused of having conscious possession of poppy husk. Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW 4, the Head Constable, it is seen that Appellant 3 (Accused 4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused 1 and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW 2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word "possession" no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants — one of whom was driving the vehicle and the other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from the evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of the goods whether or not he was

the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods."

8. Another decision on which reliance is placed is the decision of this Court in the case of *Sorabkhan Gandhkhan Pathan and another vs. State of Gujarat, 2004 (13) SCC 608,* wherein it has been held as follows:

"7. However, we notice that so far as Accused 1, Appellant 1 herein is concerned, the contraband in question has been seized from his possession and, in our opinion, the prosecution has established the case against the said accused and the courts below have rightly convicted the said appellant. Whereas in regard to Appellant 2, it is the prosecution case itself that he was travelling in the autorickshaw, along with three other persons. The prosecution has not produced any material whatsoever to establish that either this appellant had the knowledge that Appellant 1 was carrying the contraband or was, in any manner, conniving with the said accused in carrying the contraband. In the absence of any such material, to convict the second appellant only on the ground that he was found in the autorickshaw, in our opinion, is not justified. As a matter of fact, the courts below have rightly acquitted the other two accused on similar ground and, in our opinion, the said benefit ought to have gone to Accused 2 also. For the reasons stated, we find the prosecution has failed to establish its case against Appellant 2. Therefore, this appeal, so far as he is concerned, succeeds and the same is allowed. The said Appellant 2, if in custody, shall be released forthwith, if not wanted in any other case. However, the appeal of the first appellant is dismissed."

9. We do not find any substance in this submission of the learned counsel. Appellant, Dharmpal Singh was found driving the car whereas appellant, Major Singh was travelling with him and from the dicky of the car 65 Kilograms of opium was

recovered. The vehicle driven by the appellant, Dharampal Singh and occupied by the appellant, Major Singh is not a public transport vehicle. It is trite that to bring the offence within the mischief of Section 18 of the Act possession has to be conscious possession. The initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the accused plea is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles. It reads as follows :

> *"54. Presumption from possession of illicit articles.* – In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of –
>
> (a) any narcotic drug or psychotropic substance or controlled substance;
>
> (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;
>
> (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or
>
> (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured,
>
> for the possession of which he fails to account satisfactorily."

From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium. Once possession is established the Court can presume that the accused had culpable mental state and have committed the offence. In somewhat similar facts this Court had the occasion to consider this question in the case of *Madan Lal and another vs. State of H.P.,2003 (7) SCC 465*, wherein it has been held as follows:

> "26. Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.
>
> 27. In the factual scenario of the present case, not only possession but conscious possession has been

established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

10. Now, referring to the decision of this Court in the case of *Avtar Singh (supra),* the same is clearly distinguishable. In the said case, according to the prosecution itself, the vehicle loaded with bags of poppy husk was a truck and when it was stopped one person sitting in the cabin and another person sitting in the back of the truck fled away. The accused in the said case were not the only occupants and in the said background this Court held that they cannot be presumed to be in the possession of the goods and it is quite probable that one of those who fled away could have been the custodian thereof. However, in the present case the vehicle in question is not a transport vehicle and, therefore, the test applied in the case of public transport vehicles in which several persons travel cannot be applied in the facts of the present case. Similarly, in the case of *Sorabkhan Gandhkhan Pathan(supra)* the contraband was recovered from an autorickshaw and in the absence of specific case that the accused had knowledge of carrying the contraband, only on the ground that he was travelling in an autorickshaw, possession cannot be inferred. For the reasons aforesaid this case is of no assistance to the appellants.

11. Mr. Rai, then submits that circumstance that the appellants were in conscious possession of the opium was not put to them while being examined under Section 313 of the Code of Criminal Procedure and hence the conviction of the appellants is vitiated on this ground alone. He points out that this is very valuable right and its breach is sufficient to hold appellants' conviction to be bad in law. In support of the contention reference has been made to paragraph 9 and 18 of the judgment of this Court in the case of *State of Punjab vs. Hari Singh and others, 2009(4) SCC 200,* same reads as follows:

"9. Stand of the accused persons before the High Court was that there was no evidence to show any conscious possession which is a sine qua non for recording conviction

under Section 15 of the Act. Additionally, it was submitted that no question regarding possession was put to any of them in their examination under Section 313 of the Code of Criminal Procedure, 1973 (in short "the Code").

18. When the accused was examined under Section 313 CrPC, the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this Court in Avtar Singh v. State of Punjab. The effect of such omission vitally affects the prosecution case."

12. We are not at all impressed by this submission of Mr. Rai. One of the circumstances appearing in the evidence put to the appellants while being examined under Section 313 of the Code of Criminal Procedure, and its answer read as follows:

"Q. It is in evidence against you that in the presence of S.P. Narinderpal Singh, Jagmohan Singh Inspector searched the dicky of the car and recovered gunny bag containing opium from the dicky. On weighing the opium came to be 65 Kilograms 100 grams of opium was taken out as sample and the remaining opium was put in five tin boxes which were sealed with the seal of NPS of S.P. Narinderpal Singh and JS of Inspector Jagmohan singh. Box boxes containing opium Ex.P2 to Ex.P6 along its sample parcel were taken into possession vide memo Ex.PB impression of the seal was also prepared which are Ex.P7 and Ex.P8 and both the seals after use were handed over to ASI Ranjit Singh. What have you got to say about it?

A. It is incorrect."

As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put entire prosecution evidence and elicit answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating

the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice.

13. Bearing in mind the aforesaid principle when we consider the facts of the present case we find that the prosecution intends to prove that the appellants were in possession of the opium by disclosing that illicit article was recovered from the dicky of the vehicle driven and occupied by them. Possession is a mental state and what has been unfolded by the prosecution is that on search of dicky of the car opium was recovered. Circumstances aforesaid lead to the conclusion that the appellants were in conscious possession. Therefore, it cannot be said that appellants were not told to explain the circumstances appearing against them in the evidence.

14. Now, referring to the decision of this Court in *Hari Singh (supra)* relied on by the appellants, the same is clearly distinguishable. In the said case no question regarding possession was put to the accused in the examination under Section 313 of the Code of Criminal Procedure, which would be evident from paragraph 9 of the judgment quoted above and in the background thereof the Court held such omission to be vital affecting the case of the prosecution. In the case in hand we have in extenso reproduced the circumstances appearing against the appellants in the evidence and on fact found that the circumstances appearing against them were put to them in their statement under Section 313 of the Code of Criminal Procedure. In any of the view it has not occasioned failure of justice.

15. Pandit Katara while adopting the submission of Mr. Rai submits that the article recovered from the appellants is not opium and, therefore, their conviction is illegal. Aforesaid submission is founded in the light of evidence of DW.6, Swaran Kumar, Malkhana Clerk of the Court of Chief Judicial Magistrate,

who in his evidence has stated that as per record 111 Kilograms of opium was sent to Ghazipur and from the report received it has been observed that the said consignment did not contain any alkaloid. No such plea was raised either before the Trial Court or the High Court and though this plea surprised us, we have examined the same. We have no doubt in mind that in case report pertains to the case in hand, the appellants cannot be held guilty of possessing the opium and have to be acquitted. But, it is not so. Pandit Katara has conveniently left the evidence of this witness in the cross-examination, wherein he has clearly deposed that he cannot tell as to which case the opium related. Otherwise also in the present case 100 grams opium was sent to the Chemical Examiner who found that to be opium. This witness had in mind a case in which 111 Kilograms of opium was sent. Therefore, the report referred to by DW.6 Sarwan Kumar is not remotely connected with the present case.

16. Pandit Katara had further submitted that no independent witness of search and seizure had been examined and on this ground alone the search and seizure is rendered illegal. He submits that rigours of Section 100 of the Code of Criminal Procedure are applicable and there being no independent witness, the case of the prosecution deserves to be rejected. We do not find any substance in the submission of Mr. Katara. The case of the prosecution cannot be rejected only on the ground that independent witnesses have not been examined, in case on appraisal of the evidence on record the court finds the case of prosecution to be trustworthy. It has come in the evidence of the prosecution witnesses that an attempt was made to join person from public at the time of search but none was available. In the face of it mere absence of independent witness at the time of search and seizure will not render the case of the prosecution unreliable.

17. We do not find any merit in these appeals and they are dismissed accordingly.

N.J Appeals dismissed.