PILLAYAR P.K.V.K.N. TRUST THRU RAMANATHAN
v.
KARPAGA N.N.U.S. REP. BY SECRETARY & ORS.
(Civil Appeal Nos. 7305-7306 of 2010)

SEPTEMBER 1, 2010

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Urban Development – Town planning – Trust acquiring certain land – Dividing of the land into plots – Approval of layout plan for the land – Trust selling off the plots except forty plots – On revalidation of the plan, the forty plots shown as reserved for public purpose – A subsequent layout plan, which cancelled the previous plan, demarcated the forty plots as residential area – Denial to make construction on two of the forty plots by Municipal Corporation on the ground that the plots were reserved for public purpose – Later in subsequent plan the forty plots shown as reserved for public purpose – The same being questioned, the State de-reserved the area earmarked for public purpose – Order of de-reservation set-aside by High Court – On appeal, held: Order of the High Court is erroneous – Challenge to the order of de-reservation was not correct – Madurai City Municipal Corporation Act, 1971 – s. 250(2) – Tamil Nadu Town and Country Planning Act, 1971 – ss. 37 and 38.

Appellant-Trust acquired certain land to the extent of 76.12 acres. It divided the same into 910 plots and prepared a layout plan for the entire extent of the land. The plan contained provisions for roads which area was to the extent of 21 acres. This layout plan was approved by Town Panchayat in the year 1972 in P.R.No. 21/72. The Trust sold the plots, retaining 40 plots for its own use. After merger of the Town Panchayat with the City Municipal Corporation, the original plan (21/72) was revalidated as Plan No. 1/75 wherein the 40 plots were

shown as reserved for school. Thereafter in 1979-80, the local Planning Authority prepared a detailed development plan which also included the lands covered by the layout plan of the Trust and the same was approved as Plan No. 12/80. In this plan the 40 plots were demarcated as residential area. It was later informed to the Municipal Corporation that Plan No. 1/75 was to be treated as cancelled and Plan No. 12/80 alone would be valid.

The Municipal Corporation granted approval to the Trust for construction on one of the plots. But when the Trust sought approval for construction on other two of the plots, it was denied on the ground that the area was reserved for public purpose i.e. for school building. The denial of approval was held to be illegal by the High Court in a writ proceeding initiated by the Trust. The High Court observed that the approval in respect of the area comprising of the 40 plots could be denied by Municipal Corporation only if the area would be classified as 'reserved for public purposes' within a period of three months from the date of the judgment. No action was taken, as per rules, to covert the area 'reserved for public purposes'. When the Trust applied for approval of construction on other plots, the same was again denied on the ground that the area was reserved for construction of the school. The representation of the Trust, questioning the Plan No. 9/92, was accepted by the State Government. The State, accordingly passed G.O. Ms. No. 244 dated 23.9.1994, whereby it granted permission to de-reserve 2.5 acres of land earmarked for the school in the plan No. 1/75 and held that the same would be residential area subject to the condition that all the roads in the layout area were handed over to the Municipal Corporation. The Trust had pointed out that it had already surrendered all the roads to the Panchayat by executing a gift deed.

The order of de-reservation passed by the State Government vide G.O. Ms. No. 244 dated 23.9.1994 was challenged. The High Court took notice of the facts that in the earlier writ petition filed by the appellant-Trustee, the High Court had not dealt with the development Plan No. 9/92, and thus the G.O. Ms. 244 dated 23.3.1994 was illegal and vitiated by *malafides* and was in excess of powers of the Government; and that the Municipal Corporation had made a demand u/s. 250(4) of Madurai City Municipal Corporation Act from the appellant and the said demand was quashed by the High Court. Therefore, the instant appeals were filed by the appellant-Trust.

Allowing the appeals, the Court

HELD: 1. The High Court was wrong in deducing that on the basis of the reading of the judgment passed in the earlier writ petition, G.O.No. 244 dated 23.3.1994 was illegal, vitiated by *malafides* and was in excess of powers of the Government. The said order also could not be faulted as being in violation of principles of natural justice. It is true that a reference to the High Court judgment is made in the order dated 23.9.1994 which was impugned before the High Court. However, that is not the only thing on which the Government has relied upon. In fact, the judgment of the High Court was studied by the Director of Town and Country Planning, who recommended the case for de-reservation, subject to the conditions that trustees may be required to hand-over all the roads to the Municipal Corporation. There is no reason to doubt the correctness of this recommendation made by the Director, who was aware of the earlier position. He was aware that this layout was part of 21/72 plan and it was duly approved by the Town Panchayat and it then continued to be so, vide plan No.12/80 to the exclusion of the plan of 1975. It is presumed that the

Director did consult the earlier correspondence on the subject. [Paras 13 and 14] [14-B-F]

2. Even if it is presumed that the 40 plots were included under the plan of 1992, yet since the land was not acquired either by agreement or by acquisition, they would be deemed to have been released from reservation. In view of the admitted position that the land is not acquired by agreement till the date of the judgment of the High Court, the deeming clause as provided u/s. 38 of Tamil Nadu Town and Country Planning Act, 1971 would certainly come into force and, therefore, the concerned land would certainly be deemed to have been released. [Paras 14 and 15] [15-A-C]

Raju S. Jethmalani and Ors. vs. State of Maharashtra and Ors. **2005(11) SCC 222;** *Bangalore Medical Trust vs. B.S. Muddappa and Ors.***1991 (4) SCC 54;** *Balakrishna H. Sawant and Ors. vs. Sangli Miraj and Kupwad City Municipal Corporation and Ors.* **2005 (3) SCC 61, distinguished.**

3. Reliance on Section 250(2) of Madurai City Municipal Corporation Act, 1971 by the High Court was completely uncalled for in the instant controversy. In the instant case, the Writ Petition was filed before the High Court challenging the G.O.Ms. 244 dated 23.9.1994. In fact, in the three questions which the High Court had posed, Section 250 did not find place. Section 250 speaks about the obligation on the part of the owner to make a street while disposing of the lands as building sites. Sub-Section (2) on which a heavy reliance was placed by the High Court, speaks about the owner's liability to reserve 10% of the lay-out for the common purpose in addition to the area provided for laying out streets. It is nobody's case that the area of the 40 plots, in all, comes to 10% of the total area besides the area which was reserved for the streets. The High Court completely ignored the fact that

the appellant-trust had already parted with more than 21 acres of its land while getting the approval from the Town Panchayat for the layout. There is clear correspondence on the record to the effect that the appellant-Trust had not only parted with 21 acres, but had also effected a gift deed in respect of that land. It is nobody's case and indeed the High Court has also not found that the 40 plots would be the aforementioned 10% of the total lay-out area. There is absolutely no basis for the High Court to invite the applicability of Section 250(2) by making reference to 10% of the area. Therefore, the factual background, on which the provision is tried to be made applicable, itself, is not established and the finding to that effect is incorrect. The question as regards applicability of s. 250 had been decided by High Court in the writ petition filed by the Trust, and as such there was no question of invoking Section 250. This decision was also affirmed in appeal by the High Court. [Paras 18 and 19] [18-D-H; 19-A-E]

4. The High Court has also erroneously compared the provisions of Section 37 and 38 of the Tamil Nadu Town and Country Planning Act and Section 250 of the Madurai Corporation Act. There is no question of any such comparison. There was no necessity to consider as to whether Section 250 of the Madurai Corporation Act repealed the provisions of Tamil Nadu Town and Country Planning Act, 1971 for the simple reason that such question could never have fallen for consideration. Section 250 was not applicable to the controversy at all. It operates into an entirely different field and the factual basis for inviting that Section was also not available in the circumstances of the instant case. [Para 20] [19-F-H]

5. It cannot be contemplated that once the land, even if it was reserved for public purpose like construction of school in the plan of 1992 and got released, because it

was not acquired for more than three years in terms of Section 38 of Tamil Nadu Town and Country Planning Act, could be then taken away from the owner on the plea u/s. 250 of the Madurai Corporation Act. [Para 21] [20-A-B]

6. The High Court went on to record its comments on the judgment of the High Court passed in the earlier writ petition which was filed by the Trust. The original writ petitioner in the instant case was a party to that writ petition and to the judgment whereby specific permission was granted for the construction in plot Nos. 276 and 269 which was part of the 40 plots. [Para 23] [20-G]

7. The High Court gave the direction that the plots covered in LP/MR 1/75 cannot be used for any purpose other than public purpose mentioned therein with the exception of the plot Nos. 276 and 369. This was a completely incorrect direction particularly because way back in 1982, plan No.1/75 was treated as cancelled and there was no revival of that plan. Morever, respondent No.1 has also filed a suit in the Court of Additional District Munsif, in his capacity as a resident of Karpaga Nagar Colony, wherein he had sought for an injunction restraining the Trust from selling or using the property for any purpose other than the purpose for which it was reserved in LP MR 1/75. Therefore, the judgment of the High Court cannot be affirmed. The Writ Petition filed by the respondent is directed to be dismissed with costs of Rs.50,000/-. [Paras 25, 26 and 27] [21-D-H]

Case Law Reference:

2005 (11) SCC 222	**distinguished.**	**Para 16**
1991 (4) SCC 54	**distinguished.**	**Para 16**
2005 (3) SCC 61	**distinguished.**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7305-7306 of 2010.

From the Judgment & Order dated 27.4.2007 of the High Court of Judicature at Madras in W.P. No. 5051 & 19015 of 1996.

K. Ramamoorthy, N. Shoba, Sriram J. Thalapathy for the Appellant.

Dayan Krishnan, Gautam Narayan, Nikhil Menon, Nikhil Nayyar, S. Thananjayan, T. Harish Kumar for the Respondents.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

2. The appellant–a religious Trust challenges the judgment of the Division Bench of the High Court whereby the High Court allowed the Writ Petition filed by the respondent No.1 herein. The respondent No.1 claims to be the representative body of the residents of the area called Karpaga Nagar. The High Court while allowing the Writ Petition issued the following direction:

> "We allow the writ petitions and direct that the plots covered in LP/MR 1/75 cannot be used for any purpose other than the public purposes mentioned in such LP/MR 1/75."

The High Court, however, did not include two plots, namely, plot Nos. 276 and 369, meaning thereby that those plots could be used for any other purpose.

3. Some factual background would be necessary before we approach the controversy. The appellant is a Trust formed in the year 1924 to look after religious and secular activities of Pillayarpatti Koil situated at Pillayarpatti and for the welfare of Nagarathar community. The Trust acquired properties in Tallakulam village in Madurai District including lands in S. No. 92, 94, 120 to 126, 130 to 133, 176/1 and 178. These

properties were sub-divided into 910 plots and they are named as Karpaga Nagar. The Trust thereafter prepared a detailed layout plan for the entire extent of 76.12 acres in all, in which the provision was made for 60 feet, 50 feet and 40 feet roads. The road area was to the extent of about 21 acres. This layout plan was submitted to Tallakulam Town Panchayat which was the appropriate authority in the year 1972. This layout plan was approved by Tallakulam Town Panchayat vide its order dated 19.5.1972 in P.R. No. 21 of 1972 under Rule 3 of the Tamil Nadu Panchayats Building Rules, 1970. Pursuant thereto, majority of the plots were sold by the Trust retaining about 40 plots for its use. The said Tallakulam Town Panchayat along with other Town Panchayats merged with Madurai City Municipal Corporation on 30.1.1974 and, therefore, the laws applicable to Madurai Corporation were made applicable to Tallakulam. The Madurai Corporation insisted to revalidate the plan. The Trust again applied for revalidation of the original plan in 21/72. Plan No.1/75 showed 40 plots as reserved for school. The appellants herein claimed that as per the savings clause the Corporation was bound by all rights and liabilities created by the erstwhile Town Panchayat before the date of merger.

4. Thereafter, in the year 1979-80, the Local Planning Authority of Madurai prepared a detailed development plan which also included the lands covered by the appellant's layout plan. This detailed development plan was approved as DTP (MR) 12/80. In this plan the area relating to the 40 plots which were retained by the appellant Trust, was demarcated and shown as residential area. Finding that they were contrary to plan No.1 of 75, clarification was sought and it is claimed that the Deputy Director, Regional Town & Country Planning, by his letter ROC No. 4589/82 dated 30.8.1982 informed the Corporation of Madurai that plan No.1/75 may be treated as cancelled and plan No.12/80 alone would be valid.

5. Thereafter when the Trust proposed to make some constructions in plot No.342, Madurai Corporation granted its

approval by order No. K.3/PR 533/82. However, when the fresh application was submitted for putting up construction in plot No. 276 and 369, the Corporation by its order dated 16.12.1986, rejected the application on the ground that this area was reserved for public purpose of putting up school building. Thereafter, the appellant filed a Writ Petition No. 1565 of 1987 for quashing the order of rejection and for a direction to the Madurai Corporation for grant of approval for putting up the construction. In this, the plea was taken by the Corporation that the detailed development plan bearing No.12/80 was sought to be modified and hence the plan could not be approved. The High Court by its order dated 21.11.1991 allowed this petition and held that the rejection of the plan was illegal. The High Court restored the applications in respect of plot Nos. 276 and 369 and directed Madurai Corporation to pass orders expeditiously. It was further stated that if the orders were not passed within three months of the said date, the application for sanction of construction would be deemed to have been granted. It was, however, made clear by the High Court that the applications could be rejected only if this area comprising of 40 plots was in the meantime classified as 'reserved for the public purposes' in the detailed development plan.

6. It seems nothing was done for inclusion of this area into the detailed development plan as per the procedure laid down under Section 25, 27, 29 and 33 of the Tamil Nadu Town & Country Planning Act, 1971 read with Rule 13,14 and 16 of the Preparation, Publication and Sanction of Detailed Development Plan Rules. The appellant thereafter applied for approval of plan in respect of four other plots bearing No.326, 331, 336 and 340 of the layout plan. However, by its order dated 27.4.1993, the Corporation rejected the said application on the ground that the plots were forming part of the area reserved for construction of a school and hence the application for construction could not be allowed. Quoting all these facts, the appellant made a representation to the Director, Town and Country Planning No.807 Annasalai, Madras dated 15.6.1993

and pointed out that the stance taken by the Corporation was not correct and that this new plan No. 9 of 92 would be completely illegal and against law. The appellant reminded the concerned authority that the plans were approved in the year 1972 itself by Tallakulam Town Panchayat by its order dated 19.5.1972 and the rights of the respective parties had been crystallized at that time itself and it would not be just to disturb it after a lapse of 20 years by introducing new modifications in the detailed development plan and, therefore, the stand taken by the Corporation that the said area was reserved for school purpose, was clearly in contravention of plan 12/80. In that representation the Trust gave the whole history which has been stated above by us. It was pointed out that the whole area was reserved for residential purpose under the approved plan and on that strength, several plots were sold to several persons and they would also be affected if the modified plan No. 9/92 is approved as it is. A prayer, therefore, was made that this petition to the proposed detailed plan No. 9 of 92 was liable to be considered in favour of the Trust on the basis of the detailed development plan No. 12 of 80, so that the Trust could utilize 40 plots for constructions. It seems that this representation was accepted by the State Government which passed G.O.Ms. No.244 dated 23.9.1994. In this order it was suggested that the Government accepted the recommendation by the Director, Town and Country Planning and the permission was accorded to de-reserve 2.5 acres of land earmarked for school in the approved layout LP/MR 1/75 in T.S. No.92/94 etc. and the same would be deemed to be residential area in Madurai Corporation subject to the condition that all the roads in the layout area should be handed over to the Madurai Corporation by Pillayarpatti Karpaga Vinayagar Koil Nagarthar Trust.

7. It appears that immediately after this order was passed, the appellant Trust pointed out that it had already surrendered before Tallakulam Panchayat all the roads in the Karpaga Nagar layout by executing a gift deed dated 11.5.1972. A copy of the aforesaid gift deed was also sent by the Trust. It was thereafter

informed by the Trustee on 28.2.1995 that the aforementioned gift deed was also registered and the roads were handed over to the Madurai Corporation.

8. It seems that this order of de-reservation passed by the State Government came to be challenged before the Madras High Court and by the impugned judgment, the Madras High Court set aside that order and directed that reserved area shown in the earlier plan LP/MR 1/75 cannot be used for any other purpose other than public purpose. The High Court, however, made an exception in case plots 276 and 369, perhaps because the earlier orders of the High Court were finalized in Writ Petition 1565 of 1987 to which reference has already been made earlier.

9. It is this judgment which has been challenged before us by the appellant Trust. Shri K. Ramamoorthy, learned Senior Counsel appearing on behalf of the appellant Trust, pointed out the earlier history starting right from 1972 and pointed out that out of that total 76.12 acres owned by the Trust, the Trust had already parted with 21.62 acres of land which was reserved for public purpose by way of a gift deed dated 11.5.1972 which was later reiterated in favour of the Corporation also. The learned Senior Counsel pointed out that it is only out of the remaining land that the Trust created as many as 832 plots out of which 40 plots were retained by the Trust. He then pointed out that after the whole plan was approved by the Tallakulam Town Panchayat on the basis of the Tamil Nadu District Municipalities Act, 1920 and Tamil Nadu Panchayat Act, 1958 as also under TN Panchayat Building Rules, 1970 framed by the Government by virtue of Section 178 of the Madras Panchayat Act, 1958. He then pointed out that the petitioners were the residents of the same plots and they had purchased the plots from the Trust and they were residing on the same plots. He also pointed out that on the merger (by taking recourse to Section 3 of Madras Corporation Act) of Tallakulam Panchayat in Madurai City Municipal Corporation on

30.1.1974, the matter went into the regime of the corporation. It was further pointed out that in the year 1975, the Trust applied for granting permission for layout which in fact was already granted by the Town Panchayat. The learned Senior Counsel further pointed out that in the year 1979-80, detailed draft plan was prepared by Madurai Local Planning Authority under the Town & Country Planning Act, 1971 wherein the plots retained by the temple were shown as residential area. He also invited our attention to the communication dated 30.8.1982 on the consent by the Deputy Director of Town Planning to Commissioner, Municipal Corporation, Madurai to the effect that the earlier lay out plan bearing No. 1 of 75 stood cancelled and the Commissioner was directed to proceed as per the approved scheme plan bearing No.12 of 80 wherein 40 plots were earmarked as residential area. The learned Senior Counsel also invited our attention to the earlier Writ Petition No.1565 of 1987 dated 21.11.1991. The learned Senior Counsel invited our attention to the further representations made by the Trust to the Government and the ultimate order passed by the Government. The learned Senior Counsel contended in this backdrop that it was absolutely incorrect on the part of the High Court to have revived the earlier plan of 1975. Learned Senior Counsel also pointed out that there was no *locus standi* to the respondents (petitioners before the High Court) as in fact they had themselves granted permission in respect of plot No.342, which is one of the 40 plots reserved for the Trust. It was further pointed that that for all these years nothing has happened nor has the area been acquired by the government and, therefore, in fact the whole area has become de-reserved as per Section 38 of the Town Planning Act.

10. As against this, Shri Dayan Krishnan, learned Counsel appearing on behalf of the original writ petitioners and the respondents herein contended that the very look of the impugned order dated 23.9.1994 would suggest that it has been passed under a misnomer and is a result of misunderstanding the High Court's judgment in W.P. No.1565/

87. According to the learned Counsel, the order gives an impression as if there is a direction contained in that judgment to de-reserve the concerned area of 40 plots. According to the learned Counsel, such direction was never given by the High Court. He further pointed out that in the absence of the amenities like school etc., the citizens would suffer. He also pointed out that no basic amenities like roads etc. were provided though the Corporation was collecting road costs from the plot owners as and when they applied for permission for construction.

11. It is on these rival claims that we have to see as to whether the High Court was justified in allowing the petition as it did. The High Court formulated the following points:

(1) Whether the challenged order G.O.Ms.244 dated 23.9.94 was vitiated by *mala fides* and in excess of the powers of the first respondent in violation of principles of natural justice?

(2) Whether the modification issued under Section 27 of the Town and Country Planning Act reserving disputed 40 plots for the public purpose under detailed development plan had become null and void in the absence of any final orders passed within three years from the date of publication under Section 38 of the Town and Planning Act?

(3) What is the effect of the approval of the earlier plan P.R. No.21 of 72?

12. It also took notice of the fact that when Madurai Corporation had demanded Rs.80,69,784/- under Section 250 (4) of Madurai City Municipal Corporation Act from the present appellant, the said demand notice was quashed as per order in W.P. No.8962 of 1988. The High Court also made reference to the order passed in W.P. No.1565 of 1987 and found that in that judgment the High Court had not dealt with the

development plan No. 9 of 92. The High Court then came to the conclusion that G.O.Ms. 244 dated 23.3.1994 was illegal, vitiated by *mala fides* and was in excess of powers of the Government.

13. In our opinion, this deduction on the part of the High Court on the basis of the reading of the judgment in W.P. No.1565 of 1987 is wholly incorrect. There is nothing to suggest that the G.O.Ms. 244 was hit by *mala fides* or was in excess of the power of the Government. This finding has no basis. We also do not understand as to how the said order could be faulted as being in violation of principles of natural justice. It is absolutely true that a reference to the High Court judgment is made in the impugned order dated 23.9.1994. However, that is not the only thing on which the Government has relied upon. In fact, the judgment of the High Court was studied by the Director of Town and Country Planning who recommended the case for de-reservation subject to the conditions that trustees may be required to hand over all the roads in Madurai Corporation. There is no reason for us to doubt the correctness of this recommendation made by the Director, Town & Country Planning, who was aware of the earlier position. He was aware that this layout was part of 9/72 plan and it was duly approved by the Tallakulam Town Panchayat and it then continued to be so vide plan No.12/80 to the exclusion of the plan of 1975.

14. We also presume that the Director did consult the earlier correspondence on the subject and, therefore, the High Court was completely in error in deducing that the order was in excess of the power of the Government or was hit by *mala fides* or was in violation of the principles of natural justice. In our opinion, the deductions reached by the High Court in paragraph 11.5 are baseless. In the latter part of its judgment, the High Court has taken stock of the whole Act right up to Section 38. We have nothing to say about it excepting that the reference to all the provisions of the Act was not at all necessary. The High Court then referred to the argument made

that admittedly 40 plots were private land and, therefore, even if it is presumed that it was included under the plan of 1992, yet since the land was not acquired either by agreement or by acquisition, they would be deemed to have been released from reservation.

15. The High Court has undoubtedly posed this question up to paragraph 16 but has chosen not to answer it till last. We, therefore, put the same question to the Counsel for the respondent as also to the Counsel for the Government and both the Counsel fairly conceded that the land is still not acquired.

16. Section 38 of The Tamil Nadu Town & Country Planning Act, 1971 runs as under:-

> 38. **Release of land:-** If within three years from the date of the publication of the notice in the Tamil Nadu Government Gazette under section2 6 or section 27- (a) no declaration as provided in sub-section (2) of section 37 is published in respect of any land reserved, allotted or designated for any purpose specified in a regional plan, master plan, detailed development plan or new town development plan covered by such notice; or
>
> (b) such land is not acquired by agreement,
>
> such land shall be deemed to be released from such reservation, allotment or designation.

In view of the admitted position that the land is not acquired by agreement till the date of the judgment of the High Court, the deeming clause would certainly come into force and, therefore, the concerned land would certainly be deemed to have been released. The High Court has also referred to the reported decision in *Raju S. Jethmalani & Ors. Vs. State of Maharashtra & Ors.* [2005 (11) SCC 222], where this Court has clearly held that the owner of the special land cannot be prohibited from using it since it is the private property and

Government cannot deprive the persons from using their private property and, therefore, the acquisition of the property is a must before any such person is restrained from using the land. The High Court has again extensively referred to the earlier two decisions of this Court in *Bangalore Medical Trust Vs. B.S. Muddappa & Ors.* [1991 (4) SCC 54] and *Balakrishna H. Sawant & Ors. Vs. Sangli Miraj & Kupwad City Municipal Corporation & Ors.* [2005 (3) SCC 61]. However, we do not find any answer in these judgments. The respondents had specifically raised these questions in view of the fact that the concerned property has not so far been acquired. Therefore, it is clear that Section 38 will come in the way of the Government, and the appellant Trust could not have been stopped from using the property on the spacious ground that the said property was reserved for construction of school way back in the year 1975 and thereafter in 1992.

17. However, the High Court seems to have proceeded on the basis of Section 250 of The Madurai City Municipal Corporation Act, 1971. Section 250 runs as under:-

> "250. *Owners Obligation To Make a Street When Disposing of Lands as Building Sites:*
>
> (1) If the owner of any land utilizes, sells, leases or otherwise disposes of such land or any portion or portions of the same as sites for the construction of buildings, he shall save in such cases as the site or sites may abut on an existing public or private street, layout and make a street or streets giving access to the site or sites and connecting with an existing public or private street.
>
> (2) In regard to the laying out or making of any such street or streets, the provisions of Section 251 shall apply, subject to the conditions that the owner shall remit a sum not exceeding 50 per cent of the estimated cost of lay-out improvements in the land

and that the owner shall also reserve not exceeding 10 per cent of the lay-out for the common purpose in addition to the area provided for laying out streets. If any owner contravenes any of the conditions specified above, he shall be liable for prosecution.

(3) If in any case, the provisions of sub-Sections (1) and (2) have not been complied with, the Commissioner may, by notice, require the defaulting owner to layout and make a street or streets on such land and in such manner and within such time as may be specified in the notice.

(4) If such street or streets are not laid out and made in the manner and within the time specified in the notice, the Commissioner may lay-out and make the street or streets, and the expenses incurred shall be recovered from the defaulting owner.

(5) The Commissioner may in his discretion, issue the notice referred to in sub-Section (3) or recover the expenses referred to in sub-Section (4) to or from the owners of any buildings or lands abutting on the street or streets concerned but any such owner shall be entitled to recover all reasonable expenses incurred by him or all expenses paid by him, as the case may be, from the defaulting owner referred to in sub-Section (3)."

Relying on this Section and, more particularly, sub-Sections (1) and (2), the High Court was of the view that before the usurp of the land within the Municipal Corporation for a layout, 10% of such land was bound to be reserved for common purposes. The High Court firstly came to the conclusion that the Trust itself sought the approval of the layout plan from the Corporation after Tallakulam Town Panchayat merged with the Madurai Corporation. The High Court made a reference to the

earlier plan being P.R. No. 21/1972 approved by the Tallakulam Town Panchayat, wherein the aforementioned 40 plots were not shown as reserved for the public purpose. It refuted the submission made by the appellant Trust to the effect that such plan which has crystallized the rights of the Trust in respect of its property, was bound to be honoured after the Tallakulam Town Panchayat became a part of the Madurai Corporation by its merger. The High Court observed in para 19 of its judgment:-

"19. ……. To the extent any alienation or construction had been made by virtue or Tallakulam Town Panchayat P.R. 21/1972, such acts are of course required to be protected."

18. In our opinion, the reference to Section 250 (2) was completely uncalled for in this controversy. This was a Writ Petition for challenging the G.O.Ms. 244 dated 23.9.1994. In fact, in the three questions which the High Court had posed, Section 250 did not find place. Section 250 speaks about the obligation on the part of owner to make a street while disposing of the lands as building sites. Sub-Section (2) on which a heavy reliance was placed by the High Court, speaks about the owner's liability to reserve 10% of the lay-out for the common purpose in addition to the area provided for laying out streets. It is nobody's case that the area of these 40 plots, in all, comes to 10% of the total area besides the area which was reserved for the streets. The High Court completely ignored the fact that the appellant trust had already parted with more than 21 acres of its land while getting the approval from the Tallakulam Town Panchayat for this layout. There is clear correspondence on the record to the effect that the appellant Trust had not only parted with 21 acres, but had also effected a gift deed in respect of that land. It is nobody's case and indeed the High Court has also not found that these 40 plots would be the aforementioned 10% of the total lay out area. There is absolutely no basis for the High Court to invite the applicability of the Section 250(2) by making reference to 10% of the area. Therefore, the factual

background, on which the provision is tried to be made applicable, itself, is not established and the finding to that effect is incorrect.

19. In this behalf it is to be seen that earlier also this question under Section 250 had cropped up in between the Madurai Corporation and the Trust. The Madurai Corporation had sought the payment of 50% of the sum of Rs. 80,69,784/- being the total cost for laying roads in the area. The Trust had approached the High Court by way of a Writ Petition whereby the Learned Single Judge of the Madras High Court held that the roads shown in the lay out plan had already been handed over to the Tallakulam Town Panchayat and ultimately it was found that the roads were laid and it is only thereafter that Tallakulum Panchayat got merged with the Madurai Corporation and as such there was no question of invoking Section 250 of the Madurai City Municipal Corporation Act. This decision was also affirmed in appeal filed before the Madras High Court. The High Court just had quoted this issue by saying that the question regarding the land to be kept apart for the common use had not fallen for consideration in that appeal. We do not think that is the position. We have already shown that this question could not have come via Section 250 which was only inapplicable to the factual situation.

20. The High Court has also erroneously gone and compared the provisions of Section 37 and 38 of the Tamil Nadu Town and Country Planning Act and Section 250 of the Madurai Corporation Act. There is no question of any such comparison. There was no necessity to consider as to whether Section 250 of the Madurai Corporation Act repealed the provisions of Tamil Nadu Town and Country Planning Act, 1971 for the simple reason that such question could never have fallen for consideration. We have already shown that Section 250 was not applicable to the controversy at all. It operates into an entirely different field and the factual basis for inviting that Section was also not available in the circumstances of the case.

21. It cannot be contemplated that once the land, even if it was reserved for public purpose like construction of school in the plan of 1992 and got released because it was not acquired for more than three years in terms of Section 38 of Tamil Nadu Town and Country Planning Act, could be then taken away from the owner on the spacious plea under Section 250 of the Madurai Corporation Act.

22. Besides all this, it is clear that on 19.5.1972, the Tallakulam Town Panchayat had approved the plan submitted by the temple for 76.12 acres thereby 910 plots were shown in the plan and 40 plots were retained and the balance plots appear to have been sold. However, in the year 1972, when the Tamil Nadu Town & Country Planning Act, 1971 came into force, as Act No.25 of 1972, the whole area became part of the Madurai Corporation w.e.f. 30.1.74. It was then liable to be seen that after the plan of 1975 was prepared, that plan was specifically referred in the communication dated 18.6.82 whereby the Commissioner, Madurai Corporation sought clarifications from the Deputy Director, Regional Town and Country Planning about the effect of DDP on the layout in LP 1/75 and on 30.8.82, the Deputy Director, Regional Town & Country Planning had specifically conveyed that the approved layout plan 1 of 75 required modifications and it should be treated cancelled and that the Corporation may act as per the approved plan No.12/80. This specific position was completely ignored by the High Court. The High Court merely went on to record its comments on the judgment of the Madras High Court in W.P. No.1565/87.

23. We have nothing to say about those comments. However, the fact of the matter is that the respondent herein and the original Writ Petitioner was a party to that Writ Petition and to the judgment whereby specific permission was granted for the construction in plot Nos. 276 and 269 which was part of the aforementioned 40 plots.

24. Further an application was filed as WMP 3338/92 for

extension of time to take appropriate decision in terms of the direction of the High Court which had given three months' time. It is specifically pointed out that the application for sanction could be rejected only in case the detailed development for this area, the two plots came under the classification 'reserved for public purpose'. Even giving three months' time, such step could not be taken and indeed it could not have been taken in view of the earlier factual scenario, more particularly, because of the decision dated 30.8.82 whereby the approved plan 12/80 was preferred to plan No.1/75. Though we need not go into the further question as to whether the decision in W.P.No.1565/87 would be *res judicata* as even otherwise it is clear that the State Government had taken a right stance in passing the order dated 23.9.94 vide G.O.Ms. 244.

25. The High Court in the last, has given the direction that the plots covered in LP/MR 1/75 cannot be used for any purpose other than public purpose mentioned therein with the exception of the plot Nos. 276 and 369. In our opinion, this was a completely incorrect direction particularly because way back in 1982, plan No.1/75 was treated as cancelled and there was no revival of that plan.

26. Last but not the least, respondent No.1 herein, Karpaga Nagar Nala Urimai Sangam represented by Shri A. Shamugavel had filed an Original Suit No.1106/86 in the Court of Additional District Munsif Court, Madurai Town in his capacity as a resident of Karpaga Nagar Colony wherein he had sought for an injunction restraining the Trust from selling or using the property for any purpose than the purpose for which it was reserved in LP MR 1/75.

27. For all these reasons, we cannot affirm the judgment of the High Court. It is set aside and the Writ Petition filed by the respondent is directed to be dismissed with costs of Rs.50,000/-.

K.K.T. Appeals allowed.

M/S. INDIA METERS LTD.

v.

STATE OF TAMIL NADU

(Civil Appeal Nos. 1032-1033 of 2003)

SEPTEMBER 7, 2010

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Sales tax – Freight and insurance charges incurred by the dealer – Levy of Sales tax on – Held: Freight and insurance charges incurred by the dealer form part of the sale price – Therefore, the same would fall within scope of 'turnover' and sales tax is leviable on it – Tamil Nadu General Sales Tax Act,1959 – ss. 2(n) and (r) – Tamil Nadu General Sales Tax Rules,1959 – r. 6 (c) – Central Sales Tax Act, 1956 .

Words and Phrases – 'Sale' and 'Turnover' – Meaning of, in the context of ss. 2(n) and (r) respectively of Tamil Nadu General Sales Tax Act, 1959.

The appellant-assessee did not include the freight charges in its taxable turnover. On inspection it was found that the assessee had collected freight charges and insurance charges separately under the debit notes, but the same had not been shown in the monthly returns. The Assessing authority assessed 50% of that amount, as freight charges, and levied tax on that amount of the freight charged by the assessee forming part of the sale price. Assessee's appeal against the order succeeded. Further appeal by the Revenue was allowed by the Tamil Nadu Special Taxation Tribunal. The assessee filed a writ petition against the order of the Special Tribunal. The High Court upheld the order of the Special Tribunal. Therefore, the instant appeals were filed.

Dismissing the appeals, the Court

HELD: 1. The amount of freight and insurance charges incurred by the dealer forms part of the sale price. In the instant case, there was specific contract entered into by and between the parties and according to the relevant clause of the contract, the ownership of the goods would remain with the supplier till they are delivered at the destination station. Thus, the High Court was justified in affirming the judgment of the Special Tribunal. [Paras 41, 42 and 43] [37-E-G]

2. In the instant case, the obligation to pay the freight was clearly on the appellant as there was no sale at all, unless the goods were delivered at the premises of the buyer and in order to so deliver, the assessee necessarily had to incur freight charges. [Para 14] [29-B]

3. It is true that Rule 6(c) of the Tamil Nadu General Sales Tax Rules, 1959 permits deduction of the cost on freight while determining the taxable turnover. However, that provision must be read in the context of definition of "turnover" as also the definition of "sale" in Sections 2(r) and 2(n) respectively of the Tamil Nadu General Sales Tax Act. The turnover of an assessee/dealer would include the aggregate amount for which goods are bought or sold. It is, therefore, the amount for which the goods are bought or sold, which form part of the turnover, and a thing can be said to be sold only when the transaction falls within the scope of the definition of "sale". When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, these expenditures incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of "turnover". [Paras 18 and 20] [30-C-D; G-H; 31-A]

Dyer Meakin Breweries Ltd. v. *State of Kerala* **(1970) 3 SCC 253;***Hindustan Sugar Mills v. State of Rajasthan and Ors.* **(1978) 4 SCC 271;***Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore and Ors.* **(1980) 1 SCC 71;** *Cement Marketing Co. of India Ltd. v. Commissioner of Commercial Taxes, Karnataka* **1980 (Supp) SCC 373;** *TVL Ramco Cement Distribution Co. (P) Ltd. etc. etc. v. State of Tamil Nadu etc. etc.* **(1993) 1 SCC 192;** *Bihar State Electricity Board and Anr. v. Usha Martin Industries and Anr.* **(1997) 5 SCC 289;** *Black Diamond Beverages and Anr. v. Commercial Tax Officer, Central Section,Assessment Wingh, Calcutta and Ors.* **(1998) 1 SCC 458;** *Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd.* **(2002) 3 SCC 547;** *State of A.P. v. A.P. Paper Mills Ltd.* **(2005) 1 SCC 719, relied on.**

*Hyderabad Asbestos Cement Products Ltd.v. State of Andhra Pradesh***(1969) 24 STC 487 : (1969) 1 SCWR 560;** *E.I.D. Parry (I) Ltd. v. Assistant Commissioner of Commercial Taxes and Anr.* **(2000) 2 SCC 321, referred to.**

Paprika Ltd. and Anr. v. Board of Trade **(1944) All E.R. 372;** *Love* v. *Norman Wright (Builders) Ltd*. **(1944) 1 All E.R. 618, referred to.**

Case Law Reference:

(1969) 24 STC 487	**Referred to.**	**Para 13**
(2000) 2 SCC 321	**Referred to.**	**Para 17**
(1944) All E.R. 372	**Referred to.**	**Para 23**
(1944) 1 All E.R. 618	**Referred to.**	**Para 24**
(1970) 3 SCC 253	**Relied on.**	**Para 25**
(1978) 4 SCC 271	**Relied on.**	**Para 31**
(1980) 1 SCC 71	**Relied on.**	**Para 34**

1980 (Supp) SCC 373	**Relied on.**	**Para 35**
(1993) 1 SCC 192	**Relied on.**	**Para 36**
(1997) 5 SCC 289	**Relied on.**	**Para 37**
(1998) 1 SCC 458	**Relied on.**	**Para 38**
(2002) 3 SCC 547	**Relied on.**	**Para 39**
(2005) 1 SCC 719	**Relied on.**	**Para 40**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1032-1033 of 2003.

From the Judgment & Order dated 20.11.2001 of the High Court of Judicature at Madras in W.P. No. 21298 of 2001 and T.C. No. 980 of 1993.

K.K. Mani, Ankit Swarup, Mayur R. Shah for the Appellant.

R. Nedumaran, Vimal Dubey for the Respondent.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. These appeals are directed against the judgment and order dated 20.11.2001 passed by the High Court of Judicature at Madras in Writ Petition No. 21298 of 2001 and Tax Case No. 980 of 1993.

2. The appellant is a company incorporated under the provisions of the Companies Act. The appellant manufactures electric meters and supplies it to the Electricity Boards. The appellant is also a dealer registered under the provisions of the Tamil Nadu General Sales Tax Act, 1959 as well as the Central Sales Tax Act, 1956.

3. Brief facts which are necessary to dispose of these appeals are recapitulated as under:

The Deputy Commercial Tax Officer, Group-VIII, the

Assessing Officer, Enforcement South passed two separate orders under the Tamil Nadu General Sales Tax Act (hereinafter referred to as TNGST Act) and Central Sales Tax Act (hereinafter referred to as CST Act) on 30.6.1989 holding that the freight and insurance charges were liable to be taxed and the same are to be included in the turnover and thus a sum of Rs.7,97,864/- was sought to be included towards the taxable turnover for the assessment year 1986-87 under the TNGST Act taxable at 10% and a sum of Rs.8,48,265/- relating to the same period under the CST Act.

4. The appellant preferred appeals under TNGST Act as well as CST Act before the Appellate Assistant Commissioner (CT), Kancheepuram, Tamil Nadu. The Appellate Assistant Commissioner remanded the matters to the Appellate Assistant Commissioner for passing fresh orders of assessment.

5. The appellant had filed two appeals before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madras and the appeals were registered as T.A. Nos. 766 of 1991 and 767 of 1991. Both the appeals were allowed by the said Tribunal.

6. The respondent aggrieved by the judgment of the said Appellate Tribunal filed two Revision Petitions before the High Court, which were registered as Tax Cases Nos. 979 of 1993 and 980 of 1993. Consequent upon the constitution of the Tamil Nadu Taxation Special Tribunal, under the TNGST Act, the Revision Petitions were referred to the said Tribunal.

7. The Tamil Nadu Taxation Special Tribunal, Chennai, by order dated 19th September, 2000 held that the freight charges formed part of sale price and the matter was remanded to the Assessing Authority to work out the actual freight charges. Consequently, the order of the Appellate Assistant Commissioner (CT), Kancheepuram was restored and with the result the Revision Petitions filed by the respondent were allowed.

8. The appellant filed a Writ Petition in the High Court of Madras against the order of the Tamil Nadu Taxation Special Tribunal. It was urged in the High Court that the clause in the contract dealing with payment, provided that "payment for 100 per cent value of each consignment together with full excise duty and sales tax will be made in Central Payment, Madras, immediately on receipt of certified copies of acknowledgement of delivery challans from the Chief Store Keepers of the systems concerned, subject to purchase order terms."

9. According to the clause provided in the contract the transfer of title to the goods was to take place only on delivery of goods at the customer's place and that the customer's obligation to pay would arise only after the delivery had been so affected. The contract also provided in the clause dealing with the price that it was payable per unit ex-factory delivery. It provided for the payment of excise duty and statutory levies, in addition to such ex-factory price, as also the fact that the ex-factory price mentioned was exclusive of sales tax.

10. The clause dealing with Sales Tax in clause 3 (b) further provided that "appropriate Sales Tax, if any, found leviable in accordance with the provisions of the relevant Sales Tax Act in force will be paid over and above the price of goods accepted in this order". The clause also provided that Sales Tax and excise duty will be payable only on ex-factory price.

11. The appellant, initially, did not include the freight charges in its taxable turnover. The original assessment was made without taking the freight charges into account for the year 1986-87. There was an inspection on 27.2.1987 in which the inspecting officer had found that the assessee had collected freight charges and insurance charges separately under the debit notes for a total sum of Rs.16,96,530/- but the same had not been shown in the monthly returns. The assessing authority, therefore, determined 50% of that amount of Rs.16,96,530/- as freight charges, after making allowance for the insurance amount and levied tax on that amount of the freight, charged

by the assessee forming part of the sale price. The assessee's appeal against that order having succeeded, a further appeal was preferred by the Revenue, which came to be allowed by the Tamil Nadu Special Taxation Tribunal. The assessee is now before us questioning the correctness of that order of the Tribunal.

12. The appellant claims that since the contract separates the ex-factory price and the insurance and freight charges, and, under Rule 6(c) of the Tamil Nadu General Sales Tax Rules, the freight when specified and charges for by the dealer separately, without including the same in the price of the dealer, the freight charged here could not have been treated as part of the sale price and subjected to tax.

13. Counsel for the appellant relied on a judgment of this Court in the case of *Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh* (1969) 24 STC 487 : (1969) 1 SCWR 560. In that decision, rendered by a Bench of three learned Judges of this Court, it was held that the assessee therein had only received as price the amount of the catalogue price less the freight charges, which the buyer had paid and, therefore, what was taxable was only the price actually received. That decision was rendered in the background of the facts found which showed that the assessee had despatched the goods to the stockist with the stipulation "date of delivery" shall mean the date of railway receipt. The Court having found that the agreement on the part of the buyer/stockist to pay the freight charges and such freight charges been deducted from the catalogue price, the freight charges did not form part of the price of the goods sold. This judgment was explained by a later two Judge Bench of this Court in the case of *Hindustan Sugar Mills v. State of Rajasthan & Ors.* (1978) 4 SCC 271. This Court in the later part of the judgment extracted the following statement in the case of *Hyderabad Asbestos Cement Products Ltd.* (supra).

"…….In our judgment, under the terms of the contract, there

is no obligation on the company to pay the freight, and under the terms of the contract the price received by the company for the sale of goods is the invoice amount less the freight".

14. In the instant case, the obligation to pay the freight was clearly on the appellant as there was no sale at all, unless the goods were delivered at the premises of the buyer and in order to so deliver, the assessee necessarily had to incur freight charges.

15. The transfer of title to the goods as provided in clause 10 read with clause 6 of the agreement was to be at the place of delivery in the premises of the buyer. Though the contract mentioned the price of the electric meters as ex-factory price, the delivery was not at the factory gate. The specification of what the price would be at the factory gate, therefore, does not in the context of the term subject to which the sale was agreed to be effected, render it the point or the location at which the sale can be said to have been completed. Had the sale been completed at the factory gate, the expenses incurred thereafter by way of freight charges would then be capable of being regarded as expenditure which was in the nature of a post-sale expenditure and, if paid by the seller, regarded as an amount paid by such seller on behalf of the buyer.

16. Both the aforementioned cases emphasise the fact that expenses incurred by a seller on freight would be part of the sale price, as until the transfer of title to the goods takes place that being the only way made in which sale could have taken place prior to the introduction of clause 29A of Article 366 of the Constitution.

17. The learned counsel also drew our attention to the decision of this Court in the case of *E.I.D. Parry (I) Ltd. v. Assistant Commissioner of Commercial Taxes & Another* (2000) 2 SCC 321. The question considered therein was the includability of transport subsidy given by the sugar

manufacturer to the cane growers, who, under the terms of the contract were required to supply the sugarcane at the factory. The subsidy so given was held by the Court to be part of the price as that amount had been given by the manufacturer, no doubt, to secure the supply of the goods from the grower/seller. The Court in that case did not consider Rule 6(c), framed under the Tamil Nadu General Sales Tax Act, as there was no occasion to refer to the same.

18. It is no doubt true that Rule 6(c) of the Rules permits deduction of the cost on freight while determining the taxable turnover. However, that provision must be read in the context of definition of "turnover" as also the definition of "sale" in Sections 2(r) and 2(n) respectively of the Act. "Turnover" is defined in the Act, inter alia, to mean "the aggregate amount for which goods are bought or sold or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n)".

19. "Sale" is defined in Section 2(n), inter alia, as meaning "every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration". The definition goes on to include a number of other transactions also within that definition of "sale". The turnover of an assessee/dealer would include the aggregate amount for which goods are bought or sold. It is, therefore, the amount for which the goods are bought or sold, which form part of the turnover, and a thing can be said to be sold only when the transaction falls within the scope of the definition of "sale".

20. When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for

which the goods are sold by the seller to the buyer and would fall within the scope of "turnover".

21. The learned counsel for the State of Tamil Nadu submitted that freight and insurance charges are included in the sale price of the goods. Even if freight and insurance charges are shown separately in the Bill and added to the price of the goods, the character of payment would remain the same. Since freight and insurance charges represent expenditure incurred by the dealer in making the goods available to the purchaser at the place of sale, they would constitute an addition to the cost of the goods to the dealer and would clearly be a component of the price to the purchaser. The amount of freight and insurance charges would be payable by the purchaser not under any statutory or other liability but as part of the consideration for the sale of the goods and would therefore, form part of the sale price.

22. In order to crystallize the legal position, we would like to refer important English and Indian cases.

ENGLISH CASES:

23. In *Paprika Ltd. & Another v. Board of Trade* (1944) All E.R. 372, the court observed as under:

> "Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands but it does not cease to be the price which the buyer has to pay even the price is expressed as 'x' plus purchase tax."

24. In this case, the learned Judge also quoted with approval what Goddard, L.J., said in *Love* v. *Norman Wright (Builders) Ltd*. (1944) 1 All E.R. 618:-

> "Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price

> of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or not."

and summed up the position in the following words :

> "So far as the purchaser is concerned, he pays for the goods what the seller demands, namely, the price even though it may include tax. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover."

INDIAN CASES:

25. In *Dyer Meakin Breweries Ltd*. v. *State of Kerala* (1970) 3 SCC 253, Chief Justice, Shah (as His Lordship then was), speaking for the court observed that expenditure incurred for freight and packing and delivery charges prior to the sale and for transporting the goods from the factories to the warehouse of the company is not admissible under Rule 9 (f) of the Kerala General Sales Tax Rules, 1963.

26. According to the facts of this case, Dyer Meakin Breweries Ltd. is registered as a dealer in "Indian made foreign liquor" under the Kerala General Sales Tax Act, 1963. The company has a place of business at Ernakulam, Kerala. The liquor sold by the company is manufactured or produced in distilleries or breweries at different places in the State of U.P. and Haryana. Liquor is transported for sale by the company from its breweries and distilleries to its place of business at Ernakulam. It is the practice of the company to maintain a uniform "ex-factory price" in respect of each brand of liquor sold

at different centers after adding to the ex-factory price the appropriate amount attributable to freight and other charges.

27. In proceedings for assessment of sales tax for 1963-64 the company claimed under Rule 9(f) of the Kerala General Sales Tax Rules, 1963, Rs.59,188.99 as an admissible deduction in respect of charges for "freight and handling charges" collected from the customers, in the computation of the taxable turnover. The Sales Tax Officer rejected the claim, and the order was confirmed by the Appellate Assistant Commissioner and by the Sales Tax Tribunal. A revision application filed before the High Court of Kerala was summarily dismissed. The company has appealed to this Court with special leave.

28. Rule 9 (f) of the Kerala General Sales Tax Rules, 1963, provides:

> "In determining the taxable turnover, the amount specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of the dealer....
>
> x x x
>
> (f) all amounts falling under the following two heads, when specified and charged for by the dealer separately, without including them in the price of goods sold;
>
> (i) freight,
>
> (ii) charges for packing and delivery."

29. The company claims that the amount spent by it for freight and for "handling charges" of goods from the factories to the warehouse at Ernakulam is liable to be excluded from the taxable turnover and the taxing authorities and the High Court were in error in refusing to allow the deduction.

30. This court while interpreting Rule 9 (f) of the Kerala General Sales Tax Rules, 1963 observed that it is not intended to exclude from the taxable turnover any component of the price, expenditure, incurred by the dealer which he had to incur before sale and to make the goods available to the intending customer at the place of sale.

31. This court had an occasion to deal with identical issues in the case of *Hindustan Sugar Mills* (supra). P.N. Bhagwati, J. (as His Lordship then was), clearly held that by reason of the provisions of the Control Order which governed the transactions of sale of cement entered into by the assessee with the purchasers in both the appeals before us, the amount of freight formed part of the 'sale price'.

32. In this judgment, the court comprehensively explained the entire principle of law by giving an example in para 8 of the judgment which reads as under:-

> "8. Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill, but it is included in the price charged by him. The 'sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer, as it would go to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the 'sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchaser. There is no other manner of liability, statutory or otherwise, under which the purchases would be liable to pay the amount of excise duty to the dealer.

And, on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the 'sale price'. So also, the amount of sales tax payable by a dealer, whether included in the price or added to it as a separate item as is usually the case, forms part of the 'sale price'. It is payable by the purchaser to the dealer as part of the consideration for the sale of the goods and hence falls within the first part of the definition."

33. This judgment has been followed in a large number of subsequent judgments in other cases by this Court.

34. In *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore & Others* (1980) 1 SCC 71 similar question arose for consideration. In this case, while following the case of *Hindustan Sugar Mills* (supra) this court came to the clear conclusion that the amount of freight formed part of the sale price within the meaning of the first part of the definition of the term contained in Section 2 (p) of the Rajasthan Sales Tax Act, 1954.

35. In *Cement Marketing Co. of India Ltd. v. Commissioner of Commercial Taxes, Karnataka* 1980 (Supp) SCC 373 this court observed as under:

"This question is no longer res integra and it stands concluded by a recent decision given by this Court in Hindustan Sugar Mills v. State of Rajasthan (1978) 4 SCC 271. It has been held by this Court in that case that by reason of the provisions of the Cement Control Order which governed the transactions of sale of cement entered into by the assessee with the purchasers, the amount of freight formed part of the "sale price" within the meaning of the first part of the definition of that term in Section 2(h) of the Central Sales Tax Act, 1956 and was includible in the turnover of the assessee. This decision completely covers

the present case and hence we must hold that the High Court was right in taking the view that the amount of freight formed part of the sale price and was rightly included in the taxable turnover of the appellant."

36. In *TVL Ramco Cement Distribution Co. (P) Ltd. etc. etc. v. State of Tamil Nadu etc. etc.* (1993) 1 SCC 192 this court while following the ratio in the case of *Hindustan Sugar Mills* (supra) observed as under:

"(i) that the freight charges should be included in arriving at the taxable turnover for purposes of Central Sales Tax and Tamil Nadu Sales Tax; and

(ii) that packing charges and excise duty thereon should also be included in arriving at the taxable turnover for purposes of both Central Sales Tax and Tamil Nadu Sales Tax."

37. In *Bihar State Electricity Board & Another v. Usha Martin Industries & Another* (1997) 5 SCC 289 this court relied on the judgment of this Court in the case of *Hindustan Sugar Mills* (supra) and reiterated legal position that sale price would be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of goods.

38. In the case of *Black Diamond Beverages and Anr. v. Commercial Tax Officer, Central Section, Assessment Wingh, Calcutta & Others* (1998) 1 SCC 458 this court observed that freight and handling charges would be included in the sale price.

39. In *Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd.* (2002) 3 SCC 547 this court observed as under:

"… … …The sale price realised by the respondent has to be regarded as the entire price inclusive of excise duty because it is the respondent who has, by necessary

implication, taken on the liability to pay all taxes on the goods sold and has not sought to realise any sum in addition to the price obtained by it from the purchaser. The purchaser was under no obligation to pay any amount in excess of what had already been paid as the price of the scrap."

40. In *State of A.P. v. A.P. Paper Mills Ltd.* (2005) 1 SCC 719 the short question arose for consideration was whether the transportation charges and agent's commission paid by the respondent – M/s. A.P. Paper Mills Ltd. to the agent together with the cost of raw material constitute "turnover" under Section 2(s) and is liable to sales tax under Section 6-A of the Andhra Pradesh General Sales Tax Act, 1957. This court relied on *Hindustan Sugar Mills* (supra) and came to the conclusion that the transportation charges and agent's commission would be inclusive in "turnover" under Section 2(s) and is liable to Sales Tax under Section 6(a) of the Andhra Pradesh General Sales Tax Act, 1957.

41. When we apply the ratio of the judgments of the English Courts and of our Courts, the conclusion becomes obvious that the amount of freight and insurance charges incurred by the dealer forms part of the sale price.

42. We may reiterate that in this case, there was specific contract entered into by and between the parties and according to the relevant clause of the contract, the ownership of the goods will remain with the supplier till they are delivered at the destination station.

43. In view of the clear clause of the contract, no other view is possible. In our considered view, the High Court was totally justified in affirming the judgment of the Tribunal. No interference is called for. These appeals being devoid of any merit are dismissed with costs.

K.K.T. Appeals dismissed.

M. CHANDRA
v.
M. THANGAMUTHU & ANR.
(Civil Appeal No. 7284 of 2008)

SEPTEMBER 7, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Election laws*: Election on a seat reserved for Scheduled Caste – Challenged on the ground that the returned candidate was a Christian and not belonging to the Hindu Pallan Community – High Court shifting the burden on the returned candidate to prove that she had renounced Christianity and was practicing Hindu faith; and holding the election as void on the ground that returned candidate failed to discharge the burden placed on her – Propriety of – Held: In an election petition, the burden lies on the election petitioner to prove the charges made against the returned candidate – High Court erred in shifting the burden of proof on the returned candidate – Election petitioner failed to disprove the evidence adduced by the returned candidate – Birth records, entries in the telephone application and voters list not relevant for proving that the returned candidate was professing Christianity – Though the returned candidate did not produce the original conversion certificate, there was no reason to disbelieve the duplicate that she had submitted, as the petitioner failed to provide a reasoned rebuttal to the evidence adduced by the returned candidate to prove her case – There was nothing to show that the community certificate was issued illegally or in contravention of the valid procedure – The evidence produced by election petitioner was contradictory and smacked of political rivalry – The order of High Court set aside – Constitution (Scheduled Castes) Order, 1950 – Constitution of India, 1950 – Article 341 – Evidence – Burden to prove.*

Constitution (Scheduled Castes) Order, 1950:

Paras 2 and 3 – 'Profess' a religion – Held: If a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion, he will be taken as professing the other religion – In order to claim the benefits of reservation under the Presidential Order, a person must establish that the caste to which he belongs is notified in the Presidential Order and he is not professing a different religion – Constitution of India, 1950 – Article 341.

Conversion of religion – Held: To prove conversion from one religion to another, two elements to be satisfied are that there has to be a conversion and acceptance into the community to which the person converted – Evidence.

Evidence: Secondary evidence – A party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible – However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form – The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original – The exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party – Election laws.

The appellant was declared elected in the election to the legislative assembly on a seat reserved for the members of Scheduled Castes. The election petitioner-respondent no.1 questioned the election of the appellant before the High Court on the ground that the appellant belonged to Christian Pallan Community and had made false declarations relating to her community status and school education in her nomination papers. The High

Court placed the burden on the appellant to prove that she renounced Christianity and held that the appellant did not satisfactorily discharge the burden of proof placed on her. It declared the election of the appellant as void on the ground that the circumstances in which the community certificate was granted was highly suspicious, as it was issued within two days of the receipt of the application. It further held that the original conversion certificate was not produced by the appellant and only a duplicate copy was produced and, therefore, her claim for conversion cannot be accepted.

In the instant appeal, it was contended for the appellant that her father was a Christian, but, her mother separated from her father and never practiced Christian faith and continued to follow Hindu religion and the appellant was brought up as a Hindu; and that she had undergone rituals of conversion to Hinduism in Arya Samaj Mandir in 1994, and a conversion certificate was issued and was collected by her uncle which was, however, lost and, therefore, a duplicate certificate was obtained and submitted.

Allowing the appeal, the Court

HELD: 1. "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be Scheduled Castes for the purpose of the Constitution. Under the said provision, the Constitution (Scheduled Castes) Order was issued in 1950. It sets out the caste, races and tribes in each State of India and provides under para 2, that a person belonging to any of the castes specified therein be deemed to be a Scheduled Caste for the purpose of the Constitution. Para 3 contains a proviso to the effect that notwithstanding anything contained in para 2, no person who professes a religion different from the Hindu, Sikh or Budhist religion shall be deemed to be

a member of a Scheduled Caste. Reading para 2 and 3 of the Presidential Order would show that if a person belongs to a caste which is notified in the Schedule to the Presidential Order, he/she would have the status of a Scheduled Caste, provided he/she professes Hinduism or one of the other religions specified in paragraph 3 of the Order. It is not in dispute that Hindu Pallan Community is notified under the Presidential Order as Scheduled Caste. [Paras 15, 17, 21] [59-F; 60-H; 61-A-C; 63-D]

Punjab Rao v. D.P. Mesh Ram and others **(1965) 1 SLR.849, relied on.**

Perumal Nadar v.Ponnuswamy **(1970) 1 SCC 605;** *Gangapal v. Returning Officer* **(1975) 1 SCC 589;** *Chandra Shekhar Rao v. V. Jagapathi Rao* **1993 Supp. (2) SCC 229;** *Harikrishna Lal v. Babulal Marandi* **(2003) 8 SCC 613;** ***Razik Ram v. Jaswant Singh*** **(1975) 4 SCC 769;** *Gajanan Krishnaji Bapat v. Dattaji Raghobaji Megha* **(1995) 5 SCC 347;** *Regu Mahesh v. Rajendra Pratap Bhany Dev* **(2004) 1 SCC 46;** *Jeet Mohinder v. Harminder Singh* **(1999) 9 SCC 386;** *Raghunathi & Anr. v. Raju Ramappa Shetty* **(1991) Supp. (2) SCC 267;** *Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors.* **(2006) 6 SCC 94;** *Duggi Veera Venkata Gopala Satyanarayana v. Sakala Veera Raghavaiah & Anr.* **(1987) 1 SCC 254;** *Sri Venkataramana Devaru & Ors. v. State of Mysore & Ors.* **AIR 1958 SC 255;** *Gajanan Krishnaji Bapat & Anr. v. Dattaji Raghobaji Meghe & Ors.* **(1995) 5 SCC 347;** *Abubakar Abdul Inamdar (dead) by LRs & Ors. v. Harun Abdul Inamdar & Ors.* **AIR 1996 SC 112;** *Gulabrao Balawantrao Shinde & Ors. v. Chhabubai Balawantrao Shinde & Ors.* **(2003) 1 SCC 212;** *Bondar Singh & Ors. v. Nihal Singh & Ors.* **(2003) 4 SCC 161;** *S. Swvigaradoss v. Zonal Manager, F.C.I.* **(1996) 3 SCC 100;** *Punjabrao v. D.P. Meshram* **(1965) 1 SCR 849;** *Karwade v. Shambhakar* **AIR 1958 Bom 296;** *Kothapalli Narasayya v.*

Jammana Jogi **AIR 1976 SC 937;** *S. Anbalagan v. B. Devarajan and others* **(1984) 2 SCC 112;** *C.M. Arumugam v. S. Rajgopal and Others* **(1976) 1 SCC 863, referred to.**

2. A declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. If a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion, he will be taken as professing the other religion. In the face of such an open declaration, it would be idle to enquire further as to whether the conversion to another religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion. Where, therefore, a person says, on the contrary, that he has ceased to be a Hindu, he cannot derive any benefit from that Order. In order to claim the benefits of reservation under the Presidential Order, a person must establish that the caste to which he belongs is notified in the Presidential Order and he is not professing a religion different from the Hindu, the Sikh or the Budhist. [Paras 19, 20] [62-F; 63-A-C]

3. Hinduism is not a religion with one God or one Holy Scripture. The practices of Hindus vary from region to region, place to place. The Gods worshipped, the customs, traditions, practice, rituals etc, they all differ, yet all these people are Hindus. The determination of the religious acceptance of a person must not be made on his name or his birth. When a person intends to profess Hinduism, he does all that is required by the practices of Hinduism in the region or by the caste to which he belongs, and he is accepted as a Hindu by all persons around him. It is a settled principle of law that to prove a conversion from one religion to another, two elements need to be satisfied. First, there has to be a conversion

and second acceptance into the community to which the person converted. The appellant not only in her pleadings but also in her evidence stated that her father separated from her mother and her mother continued to profess Hindu religion and the Hindu Pallan Community accepted her as such. The pleadings and the evidence adduced in support of the same was required to be read conjointly. The hyper-technical approach need not be adopted when an election petition is filed on the grounds of corruption, inciting people on the ground of particular religion etc. The High Court while deciding the lis between the parties shifted the burden of proof on the appellant to prove that she is not a Christian but a person practicing Hindu faith and the community has accepted her as a person belonging to Hindu Pallan Community. This reasoning of the High Court runs counter to the settled legal principles. In an election petition the burden of proof lies on the person who accuses that the elected person who had the support of the majority of the electorates still does not deserve to represent them in the State Assembly. In the instant case, the election petitioner did not produce any acceptable evidence to disprove the evidence adduced by the appellant and her witnesses. Therefore, issue of parentage which was sought to be projected as a factor which would prove that the appellant is a Christian and brought up as a Christian cannot be accepted. [Paras 27, 28, 29, 35, 47] [69-D-H; 70-A-B; 74-B-F; 81-D-H; 82-A-F]

Kailash Sonkar v. Mayadevi **(1984) 2 SCC 91;** *Ganpat v. Returning Officer* **(1975) 1 SCC 589, relied on.**

4. As regards the discrepancy pointed out by the election petitioner in the school record, the same was properly explained by the appellant and, this by itself cannot be a ground to hold that the appellant was ineligible to contest from the reserved constituency. In so

far as issuance of community certificate to the appellant, the evidence of PW6 working as Tahsildar amply demonstrated that due procedure was followed while issuing the Community Certificate. The High Court did not properly appreciate evidence of PW6 while doubting the genuineness of the Community Certificate produced by the appellant. Reliance placed on the birth records, entries in the telephone application and voters list cannot be the sole ground for proving that the appellant is professing Christianity. [Paras 48, 49, 50] [83-G-H; 84-A-B; F]

Kumari Madhuri Patil & Anr. v. Addl. Commissioner, Tribal Development & Ors. **(1994) 6 SCC 241;** *GM, Indian Bank v. R. Rani & Anr.* **(2007) 12 SCC 796;** *R. Palanimuthu v. Returning Officer & Ors.* **(1984) Supp. SCC 77;** *John Valiamattom & Anr. v. Union of India* **(2003) 6 SCC 611;** *Meera Kanwaria v. Sunitha & Ors.* (2006) 1 SCC 344; *Desh Raj v. Bodh Raj* **(2008) 2 SCC 186, distinguished.**

5. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. The exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party. In the instant case, it was the specific case of the appellant that in the year 1994, that is, much before the Assembly elections which was held in the year 2006, she had undergone all the rituals in Arya Samaj only for the purpose of

reaffirmation of Hindu faith and the conversion certificate issued by Arya Samaj was received and acknowledged by her uncle who had accompanied her. It was also her specific case that she did not take back the certificate from her uncle, since she was of the view the same may not be required for her purpose. It was only when the election petition was filed, it order to prove her case of reaffirmation of her faith in Hinduism, she came to know that her uncle has lost the certificate, which necessitated her to obtain a duplicate copy of conversion certificate from Arya Samaj, Madurai. That part of her evidence was not even challenged by the petitioner. In fact the contents of the documents would clearly establish that it was issued for the second time on the request made by the appellant, after she was told by her uncle that the original certificate received by him in the year 1994 is lost by him. A perusal of the conversion certificate would amply demonstrate that the appellant successfully proved her claim of re-affirmation of Hindu faith by undergoing rituals of conversion in the Arya Samaj, Madurai. [Para 30] [71-E-H; 72-A-E]

Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju and Ors. **AIR 2006 SC 543, distinguished.**

6.1. It is a settled legal position that an election petition must clearly and unambiguously set out all the material facts which the petitioner is to rely upon during the trial, and it must reveal a clear and complete picture of the circumstances and should disclose a definite cause of action. In the absence of the above, an election petition can be summarily dismissed. For an election result to be annulled, there must be positive evidence to prove illegality of the election. Therefore, the burden of proof shall lie on the petitioner filing the election petition. An election petition challenging the election of a returned candidate on the grounds of corrupt practices is not a

criminal proceeding; but it is no less than a criminal proceeding with regard to the proof required to be furnished to the court by the petitioner. Though, in the instant case, the charges are not those of corrupt practices, they are not any lesser in terms of seriousness; hence the burden of proof is on the election petitioner to prove beyond reasonable doubt the charges he has made. This is done so that the purity of the election process is maintained. [Paras 52, 54, 55] [85-G-H; 86-A-B; D-G]

J. Chandrashekara Rao v. V. Jagapati Rao **1993 Supp (2) SCC 229, relied on.**

V.S Achutanandan v. P.J Francis **(1999) 2 SCR 99, referred to.**

6.2. The testimony of the witnesses for the election petitioner does not qualify the test laid down in the Evidence Act, to make the evidence admissible. It does not inspire any confidence. The evidence is clearly hearsay. The opinion of the High Court was heavily relied on the fact that the burden of proof was shifted to the appellant to prove that she had indeed renounced Christianity. The reasoning of the High Court was not correct. The burden of proof lay squarely on the election petitioner to show that the appellant indeed practiced and professed Christianity. In any event, the evidence put forward by the appellant was consistent and reliable as it relied on the testimony of people who have actually visited the house of the appellant or attended her wedding or been in close proximity with her and her husband's family. Even assuming that the High Court was justified in shifting the burden of proof on the appellant, she, by adducing cogent and reliable evidence, had discharged the same. Her testimony was consistent with the documentary evidence produced by her. Though the appellant did not produce the original conversion

certificate, there was no reason to disbelieve the duplicate that she had submitted, as the petitioner has failed to provide a reasoned rebuttal to the evidence adduced by the appellant to prove her case. There was nothing on record to show that the community certificate was issued illegally or in contravention of the valid procedure. The election petitioner should have examined the person in charge while the certificate was being issued to bring to light any alleged malpractice in the issuance of the said certificate. The validity of the issuance of the community certificate is presumed unless shown otherwise by the respondent no.1, who clearly failed to do so. It is also baffling to note that the conversion certificate from the Arya Samaj was not examined in detail by the respondents inspite of the High Court making a strong observation in this regard. No proof by way of documents or oral evidence was provided to show how the certificate was granted and what procedure was followed. The evidence produced is, contradictory and smacks of political rivalry. [Paras 56, 57, 58] [86-H; 87-A-H; 88-A-D]

Case Law Reference:

(1965) 1 SLR.849	relied on	Para 8
(1970) 1 SCC 605	referred to	Para 8
(1975) 1 SCC 589	referred to	Para 8
1993 Supp. (2) SCC 229	referred to	Para 9
(2003) 8 SCC 613	referred to	Para 9
(1975) 4 SCC 769	referred to	Para 9
(1995) 5 SCC 347	referred to	Para 9
(2004) 1 SCC 46	referred to	Para 9
(1999) 9 SCC 386	referred to	Para 9

(1991) Supp. (2) SCC 267	referred to	Para 10
(2006) 6 SCC 94	referred to	Para 10
(1987) 1 SCC 254	referred to	Para 11
AIR 1958 SC 255	referred to	Para 11
(1995) 5 SCC 347	referred to	Para 11
AIR 1996 SC 112	referred to	Para 11
(2003) 1 SCC 212	referred to	Para 11
(2003) 4 SCC 161	referred to	Para 11
1975 (1) SCC 589	referred to	Para 13
(1996) 3 SCC 100	referred to	Para 16
(1965) 1 SCR 849	referred to	Para 18
AIR 1958 Bom 296	referred to	Para 19
1970 (1) SCC 605	referred to	Para 21
(1975) 1 SCC 589	referred to	Para 22
AIR 1976 SC 937	referred to	Para 23
(1984) 2 SCC 112	referred to	Para 24
(1984) 2 SCC 91	referred to	Para 25
(1976) 1 SCC 863	referred to	Para 26
(1970) 1 SCC 605	referred to	Para 30
AIR 2006 SC 543	distinguished	Para 31
(1984) 2 SCC 91	relied on	Para 47
(1994) 6 SCC 241	distinguished	Para 49
(2007) 12 SCC 796	distinguished	Para 49
(1984) Supp. SCC 77	distinguished	Para 49

(2003) 6 SCC 611	**distinguished**	**Para 49**
(2006) 1 SCC 344	**distinguished**	**Para 49**
(2008) 2 SCC 186	**distinguished**	**Para 49**
(1999) 2 SCR 99	**referred to**	**Para 53**
1993 Supp (2) SCC 229	**relied on**	**Para 55**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7284 of 2008.

From the Judgment & Order dated 02.12.2008 of the High Court of Judicature at Madras in Election Petition No. 7 of 2006.

K. Ramamoorthy, Gurukrishna Kumar, Subramonium Prasad, Jay Kishor Singh, N. Sundareshan, K. Dhanasekaran, Srikala Gurukrishan Kumar, U.M. Ravichandran, G. Ananda Selvam, K. Mail Sawhney, R. Satish Kumar, S. Nanda Kumar, Satish Kumar, Achin Goel, P.V. Yogeswaran, Jaimon Andrews for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J.

Facts :

1. In the election to Tamil Nadu Legislature Assembly held in May 2006, Rajapalayam constituency was reserved for members of the Scheduled Castes. Appellant, respondent No. 1, and eleven others had contested the elections. The appellant was declared elected. Respondent No. 1 filed election petition inter alia questioning the election of the appellant. The election petition having been allowed by the High Court of Madras, this appeal is filed by the appellant.

2. The Nominations for the Rajapalyam assembly constituency were scrutinized on 21.04.2006 and after scrutiny

of the nominations, there were 13 candidates in the fray including the appellant and the respondent no.1. The appellant contested as a candidate from the AIADMK party and was allotted the "two leaves" symbol. The respondent no.1 contested the election as an independent candidate and was allotted the "Finger Ring" symbol. The election for the said constituency was held on 08.05.2006. The result of the election was declared on 11.05.2006 and the appellant was declared as the successful candidate in the elections having secured the highest number of votes.

3. The respondent no.1 [Election Petitioner] challenged the result of the election by filing election petition under Section 81 read with Section 5(a), 100 (1)(a) and 125-A of the Representation of the Peoples Act, 1951. His prayer was for declaration of the election of the returned candidate as void and to declare the candidate with the next highest number of votes as the successful candidate.

Contention of the Election Petitioner :

4. The contention is that, the Rajapalayam assembly constituency is a reserved constituency and only candidates belonging to the Scheduled Caste are eligible to contest the elections from such constituency. According to the petitioner, the respondent No.1 (appellant in this appeal) filed her nomination papers claiming herself to be a member of a Scheduled Caste by filing false declaration and suppressing material facts. According to him, the appellant professes Christianity and her actual name is Glory Chandra and she is born to Christian parents. He claims that the husband of the appellant is Soosaimanickam and he too professes Christianity. He alleges that she studied in CSI High School, Batlagundu and not in Government High School, Devathanampatty as claimed in her nomination paper and as per school records, she belongs to Christian Pallan community. He also claims that the community certificate issued by the Tahsildar, Rajapalayam was procured by her, by exercising

political clout and suppressing material facts and the said certificate was issued to the appellant within two days of the receipt of the application. He further asserts that even after the alleged conversion of the respondent, the voters list published for the year 1999, showed her name to be Glory Chandra. He also places reliance on the fact, that, the husband of the appellant made an application dated 27.4.1998, to the Bharat Sanchar Nigam Limited for a new phone connection, where his name is stated as Soosaimanickam. The petitioner also relies on the entries in original Birth Register of 1997, pertaining to the births in Erumalainaickenpatti Village and they refer to the birth of a girl child to the respondent, whose then name is referred as Glory Chandra and the child's father's name is referred as Soosaimanickam and their religion referred to as Christianity. Therefore, it is asserted that the respondent No. 1 is Christian by birth and continues to profess Christianity and therefore could not have contested from a reserved constituency.

Contention of the contesting respondent/appellant:

5. The respondent states that she was born to a Christian father and Hindu mother. Her father subsequently remarried. Her father deserted her and her mother when she was a child. She was brought up by her mother at her sister's house and claims to have severed all ties with her father. She claims that she was converted to Hinduism in the Arya Samaj in the year 1994. On 23.01.1995 she married one Murugan (who had converted to Hinduism in the year 1975) who belonged to Pallan caste. The respondent has stated that her marriage with Murugan took place as per the custom and practice in the Hindu Pallan Community at her husband's house in the presence of village Nattamai, who took the Tali and gave it to her husband to tie it around the neck of the respondent and at the time of marriage, a sum of Rs. 250/- was given by the respondent's husband's family to the community known as Devendrakula Velalar Samooham. She claims that her community members are the

members of Devendrakula Velalar Samooham. She obtained a community certificate in 1997, certifying the fact that she belonged to the Hindu Pallan community. She specifically states that she did not find it necessary to inform the electorate of her conversion as she was born and brought up as a Hindu and practiced Hinduism. She states that she used to worship Hindu gods since childhood in the village temples and the nearby Kamatchiamman temple. When she attained puberty, the requisite ceremonies were performed according to Hindu customs. She also contested and won the Panchayat Ward no.3 election held in the year 2001. In the said elections no one filed any objection to the nomination filed by her. She clarifies that a daughter was born to her on 20.6.1997 and not the date mentioned in the Birth Register for the year 1997. She also denies that she intentionally did not file the Birth Certificate of her two daughters so as to reveal her religion. She also asserts that it is her brother Sudhakar Gnanaraj who had studied in Government High School, Devathanampatty, which is a co-educational institution and he assumed that the respondent being her sister, would have studied in the same school, and therefore, mentioned the same in the declaration filed along with the nomination papers, and the appellant came to Virudhunagar only on the morning of 20.4.2006 which was the last day for submitting the nomination papers and everything was done in a hurry. Her brother Sudhakar Gnanaraj informed her that he prepared the nomination papers and it is enough if she signs, and she signed the declaration in a hurry because she had no reason to suspect that any mistake would have occurred. She further states that it was an inadvertent error that had crept in and does not help the election petitioner in any manner. She also claims that the averments in the election petition are false and have been brought about by the defeated candidate at the instigation of the rival DMK party. In sum and substance she would assert that she belongs to scheduled caste and has been accepted by the community as such.

6. The High Court had framed six issues for its consideration and decision. They are:-

- Whether the First respondent/Returned candidate suppressed the material fact that she belongs to Indian Christian Pallan Community as per her school records.
- Whether the First respondent/Returned candidate made a false declaration relating to her community status and school education in her nomination as belonging to scheduled caste.
- Whether the First respondent/Returned candidate converted herself to Hinduism in 1994 through the Arya Samaj, Madurai and whether the same was accepted by the Hindu Pallan Community.
- Whether the Election petitioner is entitled for a declaration that the election of the First respondent/ Returned candidate is void on the ground that she was not qualified to contest the election in the Reserved Constituency.
- Whether the Election petitioner is entitled for a further declaration as duly elected as a member of the Tamil Nadu Legislative Assembly from No. 209, Rajapalayam (SC) Assembly Constituency, Tamil Nadu in the election held on 8.5.2006.
- To what other reliefs the petitioner is entitled to.

Findings of the High Court :

7. The High Court has observed that in the normal circumstance the burden of proof in an election petition lay on the petitioner, but, in view of the admission of the respondent, the appellant herein, that she was a Christian before converting to Hinduism in the year 1994, the burden of proof is shifted and

it is for the appellant to show that she had renounced Christianity. The High Court after appreciating the evidence, both oral and documentary adduced by the respondent/Election petitioner is of the view that the circumstances in which the community certificate was granted was highly suspicious, as it was issued within two days of the receipt of the application. The court has further stated that it was likely that the appellant used her political influence to get the certificate issued in her favour. The High Court also has taken strong exception to the fact that the original conversion certificate was not produced by the appellant and only a duplicate copy of the same was produced. Though in her testimony, the appellant had stated that the original conversion certificate was issued in the evening on 27.08.1994 and it was received by her uncle Santhakumar from Arya Samaj, Madurai and remained in his custody. The Certificate was not delivered to her and after the filing of the election petition, she asked her uncle Santhakumar to hand over the certificate to her. Thereafter, being informed by her uncle about the loss of the original certificate, she requested him to obtain a duplicate copy of the certificate and accordingly Santhakumar obtained Ex.R.13-duplicate copy of conversion certificate. Agreeing with most of the contentions of the election petitioner, the High Court has come to the conclusion that the burden of proof placed on appellant was not discharged satisfactorily. In conclusion, the Court has held that the appellant belongs to Pallan Christian Community and she could not have contested the Assembly elections from reserved constituency and, therefore, declared her election as void. However with regard to declaring the next candidate as successful, the High Court has stated that the election law in this country does not recognize such a recourse to be adopted.

Submissions of the learned counsel for the appellant:

8. The learned counsel Sri Guru Krishna Kumar would submit, that, a person belonging to a caste enlisted in the Constitution (Scheduled Castes) Order, 1950, would be treated

as a person belonging to such caste if he professes Hinduism. It is contended that the High Court has wrongly placed the burden of proof on the appellant contrary to the settled law. The appellant having been issued a community certificate in due course in accordance with law which remains in tact, it was not open to the High Court to ignore the same. It is further submitted that the impugned order is liable to be set aside for ignoring relevant evidence and for wrongly construing the evidence contrary to settled principles and is as such perverse. It is also contended that the Arya Samaj ceremony that the appellant went through is a reiteration of the appellant that she would continue to profess the Hindu faith. While elaborating these contentions, the learned counsel would submit that the Constitution (Scheduled Castes) Order, 1950, sets out the castes, races and tribes in each State of India and provides that a person belonging to any of the castes specified therein be deemed to be a schedule caste for the purpose of the constitution. Paragraph 3 contains a proviso to the effect that notwithstanding anything contained in para 2, no person who professes a religion different from the Hindu, Sikh or Buddhist religion shall be deemed to be a member of the scheduled caste and a combined reading of paras 2 and 3 of the Presidential Order would show that if a person belongs to a caste which is notified in the schedule to the presidential order, he/she would have status of a Schedule Caste, provided he/she professes Hinduism or one of the other religions specified in paragraph 3 of the order. It is further contended that the expression 'Profess' occurring in paragraph 3 of the Presidential order has been considered by a Constitution Bench in the case of *Punjab Rao Vs. D.P. Mesh Ram and others* (1965) 1 SLR.849. Therefore, the sine qua-non for a person to be treated a Scheduled Caste is that he must practice the Hindu religion. Reliance is also placed on the decision of this court in the case of *Perumal Nadar Vs. Ponnuswamy* (1970) 1 SCC 605 and *Gangapal Vs. Returning Officer* (1975) 1 SCC 589.

9. While elaborating the contention that the High Court has wrongly placed the burden of proof on the appellant contrary to the well established legal principles, the learned counsel would submit, that, the burden of proof is on the election petitioner in an election petition and it is his duty to establish his case beyond reasonable doubt. However, the High Court in its impugned order has erred in holding that it is on the appellant to prove the allegation and assertions made by the election petitioner and since the appellant failed to prove the negative, the prayer made in the election petition requires to be granted. In aid of this submission, the learned counsel relies on the decision of this Court in the case of *J. Chandra Shekhar Rao Vs. V. Jagapathi Rao* 1993 Supp. (2) SCC 229, *Harikrishna Lal Vs. Babulal Marandi* (2003) 8 SCC 613, *Razik Ram Vs. Jaswant Singh* (1975) 4 SCC 769, *Gajanan Krishnaji Bapat Vs. Dattaji Raghobaji Megha* (1995) 5 SCC 347, *Regu Mahesh Vs. Rajendra Pratap Bhany Dev* (2004) 1 SCC 46 and *Jeet Mohinder Vs. Harminder Singh* (1999) 9 SCC 386.

10. The learned counsel also contends that the appellant having been issued with a Community Certificate in due course in accordance with law, which is not yet cancelled by any competent authority, it was not open to the High Court to ignore the same. It is also submitted that the judgment and order passed by the High Court requires to be set aside for ignoring relevant evidence, and for wrongly construing the evidence on record contrary to settled principles. It is submitted that the High Court was not justified in disbelieving the certificate issued by Arya Samaj and further ought not to have come to the conclusion that the appellant failed to prove that there was conversion from Christianity to Hindu faith. It is also contended that it is settled law that once the parties have been permitted to produce evidence in support of their respective cases and if it is not their grievance that any evidence was shut out, the question of burden of proof looses significance and remains only academic. In aid of his submission, our attention was invited to the decision of this Court in the case of *Raghunathi*

& Anr. Vs. Raju Ramappa Shetty (1991) Supp. (2) SCC 267; *Standard Chartered Bank Vs. Andhra Bank Financial Services Ltd. & Ors.* (2006) 6 SCC 94.

Submission of the learned counsel for Respondent No. 1:-

11. The learned Senior Counsel Sri K. Rama Moorthy, appearing for Respondent no. 1 would submit that the name of the appellant is Glory Chandra and her name itself suggests that she is Christian and professes Christian faith and this is further fortified by the fact that she is born to Christian parents. It is further submitted that the appellant studied in CSI High School, Batlagundu and as per her school records, she belongs to Christian religion and this fact was suppressed by the appellant in the nomination papers filed by her. It is further submitted that the parents of the appellant are professing Christianity and the appellant was brought up as a Christian and further the marriage of the appellant was as per the Christian religion and the husband of the appellant is a member of a Church called Thuya Sahaya Annai Alayam. The learned Senior Counsel submitted that the appellant does not belong to Scheduled Caste, but by using her political clout has procured community certificate from Tahsildar, Rajapalayam, as if she belongs to Scheduled Caste Community. It is also submitted that in the absence of specific pleadings, in written statement on an issue, no evidence can be looked into in relation thereto. Our attention was invited to the decisions of this Court in the case of *Duggi Veera Venkata Gopala Satyanarayana Vs. Sakala Veera Raghavaiah & Anr.* (1987) 1 SCC 254; *Sri Venkataramana Devaru & Ors. Vs. State of Mysore & Ors.* AIR 1958 SC 255; *Gajanan Krishnaji Bapat & Anr. Vs. Dattaji Raghobaji Meghe & Ors.* (1995) 5 SCC 347; *Abubakar Abdul Inamdar (dead) by LRs & Ors. Vs. Harun Abdul Inamdar & Ors.* AIR 1996 SC 112, *Gulabrao Balawantrao Shinde & Ors. Vs. Chhabubai Balawantrao Shinde & Ors.* (2003) 1 SCC 212 and *Bondar Singh & Ors. Vs. Nihal Singh & Ors.* (2003) 4 SCC 161.

Submission of the learned counsel for Respondent No. 2.

12. Shri R. Balasubramaniam, the learned Senior Counsel for Respondent No. 2, submitted that the election petitioner by specific pleadings in the election petition has discharged his initial burden that the appellant was born to Christian parents and her parents continues to profess Christian faith and even her school records would reveal that she belongs to Indian Christian Pallan Community and further that she was born and brought up as Christian and till date she professed Christianity and these assertions are not denied by the appellant and in fact that there are specific admissions that she was born and brought up as a Christian, since she was born to Christian parents and it is only in the year 1994, she converted herself to Hindu faith/Hinduism and if she was a Hindu throughout, then there was no reason for her to have gone through yet another ritual for her reaffirmation of Hindu faith in Arya Samaj and it is also contended that the intention of the convertee would be a relevant factor in deciding the truth or otherwise of the conversion, though the appellant pleaded that her ancestors were Hindus belonging to Pallan Community, there was conversion in to Christianity due to various reasons, but later she renounced Christianity and converted Hinduism and in the absence of supporting evidence to those pleadings, it must be held that the appellant is the first time convertee from Christianity into Hinduism. It is further contended that even the husband of the appellant was a Christian and continues to profess Christianity and it is only in the year 1975 he claims to have changed his religion to Hinduism. It is also contended that the appellant though claims she has converted into Hinduism through Arya Samaj, Madurai, she has failed to prove her conversion by leading cogent and acceptable evidence and therefore the High Court was justified in disbelieving her evidence. It was also contended that the appellant failed to prove that her marriage was as per Hindu religion. The learned Senior Counsel vehemently contends, that, there are two stages

in appellant's life, namely, prior to conversion and after conversion. According to him, that in the reply filed in the election petition, there is no pleading that she was Hindu by birth and that till conversion she was professing Hinduism and that there is no pleading that at any stage she was professing Hinduism and or living Hindu way of life or believing in Hindu faith. Therefore, submits that the High Court was justified in allowing the election petition filed by Election petitioner.

Definition of Scheduled Caste :

13. We may begin to discuss this issue firstly by referring to weighty observations made by this Court in the case of *Ganpat vs. Returning Officer,* 1975 (1) SCC 589. "The monstrous course of untouchability has got to be eradicated. It has got be eradicated not merely by making constitutional provisions or laws but also by eradicating it from the minds and hearts of men. For that it is even more important that members of communities who are untouchables should assert their self-respect and fight for their dignity than that members of the other communities should forget about it.

14. In order to bring the lower castes on par with the upper castes, there are special provisions in the Constitution to ensure that equal opportunity was not just in word but also in deed.

15. "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purpose of the Constitution. For easy reference the said provision is extracted:

> "341. Scheduled Castes. – (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes which shall for the purposes of this Constitution be deemed to

> be Scheduled Castes in relation to that State or Union territory, as the case may be.
>
> (2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

16. Article 341(1) of the Constitution was considered by this Court in the case of *S. Swvigaradoss vs. Zonal Manager, F.C.I.* (1996) 3 SCC 100. In that case, this Court held as under:-

> "Article 341(1) empowers the President of India to specify, in consultation with the Governor of the State, with respect to the State or Union Territory, or for a part of the State, District or region by public notification specify castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be "Scheduled Castes" in relation to the State or Union Territory as the case may be. Clause (2) of Article 341 empowers Parliament by law to include in or exclude from the list of Scheduled Castes specified in the notification issued under Clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification. In other words, the constitutional mandate is that it is the President who is empowered, in consultation with the Governor of the State, to specify by a public notification the caste, race or tribe or parts or groups within castes, races or tribes which shall for the purposes of the Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory."

17. Under these provisions, the Constitution (Scheduled Castes) Order was issued in 1950. It sets out the caste, races

and tribes in each State of India and provides under para 2, that a person belonging to any of the caste specified therein be deemed to be a Scheduled Caste for the purpose of the Constitution. Para 3 contains a proviso to the effect that notwithstanding anything contained in para 2, no person who professes a religion different from the Hindu, Sikh or Budhist religion shall be deemed to be a member of a Scheduled Caste. Reading para 2 and 3 of the Presidential Order would show that if a person belongs to a caste which is notified in the Schedule to the Presidential Order he/she would have the status of a Scheduled Caste, provided he/she professes Hinduism or one of the other religions specified in paragraph 3 of the Order.

18. The text of the Order is reproduced below :

"In exercise of the powers conferred by clause (1) of article 341 of the Constitution of India, the President, after consultation with the Governors and Rajpramukhs of the States concerned, is pleased to make the following Order namely:

1. This order may be called the Constitution (Scheduled Castes) Order, 1950.

2. Subject to the provisions of this Order, the castes, races or tribes or parts, or groups within, castes or tribes specified in (Parts to (XXII) of the Scheduled to this Order shall, in relation to the States to which those Parts respectively related, be deemed to be Scheduled Castes so far as regards member thereof resident in localities specified in relation to them in those Parts of what Schedule.

3. Notwithstanding anything contained in paragraph 2, no person who professes a religion different from the Hindu, the Sikh or the Buddhists religion shall be deemed to be a member of a Scheduled Caste.

4. Any reference in this Order to a State or to a district or other territorial division thereof shall be construed as a reference to the State, district or other territorial division as constituted on the 1st day of May, 1976."

19. Prior to amendment, Clause (3) of the Constitution (Scheduled Castes) Order , 1950 came up for consideration before this court in the case of *Punjabrao v. D.P. Meshram,* [(1965) 1 SCR 849], wherein this court has observed, "what Clause (3) of the Constitution (Scheduled Castes) Order, 1950, contemplates is that for a person to be treated as one belonging to a Scheduled Caste within the meaning of that, he must be one who professes either Hindu or Sikh religion. The High Court, following its earlier decision in *Karwade v. Shambhakar* [AIR1958Bom296] has observed, that the meaning of the phrase "professes a religion" in the aforementioned provision is "to enter publicly into a religious state" and that for this purpose a mere declaration by person that he has ceased to belong to a particular religion and embraced another religion would not be sufficient. The meanings of the word "profess" have been given thus in Webster's New Word Dictionary : "to avow publicly; to make an open declaration of; ..... to declare one's belief in : as, to profess Christ. To accept into a religious order." The meanings given in the Shorter Oxford Dictionary are more or less the same. It seems to us that the meaning "to declare one's belief in : as to profess Christ" is one which we have to bear in mind while construing the aforesaid order because it is this which bears upon religious belief and consequently also upon a change in religious belief. It would thus follow that a declaration of one's belief must necessarily mean a declaration in such a way that it would be known to those whom it may interest. Therefore, if a public declaration is made by a person that he has ceased to belong to his old religion and has accepted another religion he will be taken as professing the other religion. In the face of such an open declaration it would be idle to enquire further as to whether the conversion to another

religion was efficacious. The word "profess" in the Presidential Order appears to have been used in the sense of an open declaration or practice by a person of the Hindu (or the Sikh) religion. Where, therefore, a person says, on the contrary, that he has ceased to be a Hindu he cannot derive any benefit from that Order".

20. The way we understand the order 1950, and the observation made by this court is, in order to claim the benefits of reservation under the Presidential Order, a person must establish that the caste to which he belongs is notified in the Presidential Order and he is not professing a religion different from the Hindu, the Sikh or the Budhist.

Conversion of Religion – Burden of Proof :

21. It is not in dispute that Hindu Pallan Community is notified under the Presidential Order as Scheduled Caste. The appellant claims that though her father was a Christian, her mother continued to profess the customs of Hindu Pallan Community. It is her further case that her father deserted her mother when she was still a child and her mother brought her up as Hindu and her community accepted her and her mother as Hindu. Now the question is whether the appellant is professing and practicing Hinduism. The appellant claims that though her father is a Christian, her mother continues to profess Hindu religion and it is her further case that she was born and brought up as a Hindu by her mother and she continues to profess Hindu faith and in order to reaffirm her faith in Hinduism, she has undergone rituals in Arya Samaj Madurai, and in proof of it she has produced the duplicate copy of the certificate. At the time of hearing of this appeal a lot of debate was generated by both the sides pwith regard to certificate of conversion issued by the Arya Samaj. The appellant in support her view in her evidence has stated the various rituals she followed in the Arya Samaj to reaffirm her faith in Hindu faith, the reason why she is not in a position to produce the original certificate issued

and the necessity for production of duplicate certificate. Since this forms the fulcrum of the case, the learned counsel for the respondents pointed out so called various discrepancies in the certificate and to say the least, the length, breadth, borders, dates, signature in the certificate. We will refer to these, when we discuss the veracity of the certificate produced by the appellant to reaffirm her faith in Hindu religion which she claims has professed right from her childhood. Before we do that, it is desirable to notice certain observation made by this court in the case of *Perumal Nadar v. Ponnuswami,* [1970 (1) SCC 605. This court observed :

> **"6.** A person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. But a bona fide intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention may be sufficient evidence of conversion. No formal ceremony of purification or expiation is necessary to effectuate conversion.
>
> **8.** In *Goona Durgaprasada Rao v. Goona Sudarasanaswami Mockett,* J., observed that no gesture or declaration may change a man's religion, but when on the facts it appears that a man did change his religion and was accepted by his co-religionists as having changed his religion and lived and died in that religion, absence of some formality cannot negative what is an actual fact. Krishnaswami Ayyangar, J., observed that a Hindu who had converted himself to the Christian faith returned to Hinduism and contracted a second marriage during the life-time of his first wife and remained and died a Hindu having been accepted as such by the community and co-religionists without +demur. Absence of evidence of rituals relating to conversion cannot justify the Court in treating him as having remained a Christian."

22. In the case of *Ganpat v. Returning Officer,* (1975) 1 SCC 589, it was observed:

> "11. In this connection it is necessary to remember that Hinduism is a very broad based religion. In fact some people take the view that it is not a religion at all on the ground that there is no one founder and no one sacred book for the Hindus. This, of course, is a very narrow view merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism through the ages has absorbed or accommodated many different practices, religious as well as secular, and also different faiths. One of the witnesses has described that he considered Buddha as the eleventh Avtar…… Hinduism is so tolerant and Hindu religious practices so varied and eclectic that one would find it difficult to say whether one is practising or professing Hindu religion or not."

23. In *Kothapalli Narasayya vs. Jammana Jogi* AIR 1976 SC 937, it is stated:-

"These cases show that the consistent view taken in this country from the time *Administrator-General of Madras v. Anandachari* was decided, that is, since 1886, has been that on reconversion to Hinduism, a person can once again become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the caste accept him as a member. There is no reason either on principle or on authority which should compel us to disregard this view which has prevailed for almost a century and lay down a different rule on the subject. If a person who has embraced another religion can be reconverted to Hinduism, there is no rational principle why he should not be able to come back to his caste, if the other members of the caste are prepared to readmit him as a member. It stands to reason that he should be able to come back to the fold to which he once belonged,

provided of course the community is willing to take him within the fold.... A Mahar or a Koli or a Mala would not be recognised as anything but a Mahar or a Koli or a Mala after reconversion to Hinduism and he would suffer from the same social and economic disabilities from which he suffered before he was converted to another religion. It is, therefore, obvious that the object and purpose of the Constitution (Scheduled Castes) Order, 1950 would be advanced rather than retarded by taking the view that on reconversion to Hinduism, a person can once again become a member of the Scheduled Caste to which he belonged prior to his conversion. We accordingly agree with the view taken by the High Court that on reconversion to Hinduism, the first respondent could once again revert to his original Adi Dravida caste if he was accepted as such by the other members of the caste."

24. In *S. Anbalagan vs. B. Devarajan and others* (1984) 2 SCC 112, it is observed:-

> "These precedents, particularly those from South India, clearly establish that no particular ceremony is prescribed for reconversion to Hinduism of a person who had earlier embraced another religion. Unless the practice of the caste makes it necessary, no expiatory rites need be performed and, ordinarily, he regains his caste unless the community does not accept him. In fact, it may not be accurate to say that he regains his caste; it may be more accurate to say that he never lost his caste in the first instance when he embraced another religion. The practice of caste however irrational it may appear to our reason and however repugnant it may appear to our moral and social sense, is so deep-rooted in the Indian people that its mark does not seem to disappear on conversion to a different religion. If it disappears, it disappears only to reappear on reconversion. The mark of caste does not seem to really disappear even after some generations after conversion."

25. In *Kailash Sonkar vs. Smt. Maya Devi* [(1984) 2 SCC

91], this court speaking through FAZAL ALI, J. made the following observation.

> "In our opinion, there is one aspect which does not appear to have been dealt with by any of the cases discussed by us. Suppose, A, a member of the scheduled caste, is converted to Christianity and marries a Christian girl and a daughter is born to him who, according to the tenets of Christian religion, is baptised and educated. After she has attained the age of discretion she decides of her own volition to re-embrace Hinduism, should in such a case revival of the caste depend on the views of the members of the community of the caste concerned or would it automatically revive on her reconversion if the same is genuine and followed by the necessary rites and ceremonies? In other words, is it not open for B (the daughter) to say that because she was born of Christian parents their religion cannot be thrust on her when after attaining the age of discretion and gaining some knowledge of the world affairs, she decides to revert to her old religion. It was not her fault that she was born of Christian parents and baptised at a time when she was still a minor and knew nothing about the religion. Therefore, should the revival of the caste depend on the whim or will of the members of the community of her original caste or she would lose her caste for ever merely because fortunately or unfortunately she was born in a Christian family? With due respect, our confirmed opinion is that although the views of the members of the community would be an important factor, their views should not be allowed to (sic) a complete loss of the caste to which B belonged. Indeed, if too much stress is laid on the views of the members of the community the same may lead to dangerous exploitation.
>
> But from that it does not necessarily follow as an invariable rule that whenever a person renounces Hinduism and

> embraces another religious faith, he automatically ceases to be a member of the caste in which he was born and to which he belonged prior to his conversion…. If the structure of the caste is such that its members must necessarily belong to Hindu religion, a member, who ceases to be a Hindu, would go out of the caste, because no non-Hindu can be in the caste according to its rules and regulations. Where, on the other hand, having regard to its structure, as it has evolved over the years, a caste may consist not only of persons professing Hindu religion but also persons professing some other religion as well, conversion from Hinduism to that other religion may not involve loss of caste, because even persons professing such other religion can be members of the caste.... This is indeed not an infrequent phenomenon in South India where, in some of the castes, even after conversion to Christianity, a person is regarded as continuing to belong to the caste."

26. In *C.M. Arumugam vs. S. Rajgopal and Others* (1976) 1 SCC 863; the following observation is made by this Court.

> "These cases show that the consistent view taken in this country from the time Administrator-General of Madras v. Anandachari was decided, that is, since 1886, has been that on reconversion to Hinduism, a person can once again, become a member of the caste in which he was born and to which he belonged before conversion to another religion, if the members of the caste accept him as a member. There is no reason either on principle or on authority which should compel us to disregard this view which has prevailed for almost a century and lay down a different rule on the subject. If a person who has embraced another religion can be reconverted to Hinduism, there is no rational principle why he should not be able to come back to his caste, if the other members of the caste are prepared to readmit him as a member. It stands to reason that he should be able to come back to the fold to which

he once belonged, provided of course the community is willing to take him within the fold. It is the orthodox Hindu society still dominated to a large extent, particularly in rural areas, by medievalistic outlook and status-oriented approach which attaches social and economic disabilities to a person belonging to a scheduled caste and that is why certain favoured treatment is given to him by the Constitution. Once such a person ceases to be a Hindu and becomes a Christian, the social and economic disabilities arising because of Hindu religion cease and hence it is no longer necessary to give him protection and for this reason he is deemed not to belong to a scheduled caste. But when he is reconverted to Hinduism, the social and economic disabilities once again revive and become attached to him because these are disabilities inflicted by Hinduism."

27. We must remember, as observed by this Court in *Ganpat*'s case, Hinduism is not a religion with one God or one Holy Scripture. The practices of Hindus vary from region to region, place to place. The Gods worshipped, the customs, Traditions, Practice, rituals etc, they all differ, yet all these people are Hindus. The determination of the religious acceptance of a person must be not be made on his name or his birth. When a person intends to profess Hinduism, and he does all that is required by the practices of Hinduism in the region or by the caste to which he belongs, and he is accepted as a Hindu by all persons around him.

28. Hinduism appears to be very complex religion. It is like a centre of gravity doll which always regain its upright position however much it may be upset. Hinduism does not have a single founder, a single book, a singe church or even a single way of life. Hinduism is not the caste system and its hierarchies, though the system is a part of its social arrangement, based on the division of labour. Hinduism does not preach or uphold untouchability, though the Hindu Society has practiced it, firstly

due to reasons of public health and later, due to prejudices. (copied in tits and bits from the book facets of Hinduism by Sri Swami Harshananda).

29. It is a settled principle of law that to prove a conversion from one religion to another, two elements need to be satisfied. First, there has to be a conversion and second acceptance into the community to which the person converted. It is obvious that the need of a conversion cannot be altogether done away with.

30. The appellant had examined herself as RW3. In her examination in chief, she has categorically stated, that as a Hindu, in her household they are celebrating festivals like Pongal, Vinayaka-Chaturthi etc. She has also stated that since her birth she has been living as a Hindu and following Hindu customs and tradition and her relatives are also treating her as Hindu and all her relatives are Hindus. She has also stated that she has not gone to any Church and she does not know about Christianity and that form of worship. In her constituency people knew her only as Chandra and not as Glory Chandra. She has also stated that she contested in the elections held for Rajapalyam Panchayat Union Council from reserved constituency and nobody raised any objection. It has also come in her evidence that she wanted to reaffirm her faith in Hinduism and therefore she approached Arya Samaj, Madurai and after making her go through all the rituals, the Arya Samaj, Madurai issued a certificate of reconversion to Hinduism bearing Serial No. E56 dated 27.8.1994 (Ex. R13) and the same was received by her uncle Santnakumar and it is only when the election petition was filed, on her enquiry she was told that the original certificate that was received by him has been lost and therefore she requested him to obtain duplicate copy of the certificate. It has also come in her evidence that her marriage was performed as per Hindu customs and her husband is Murugan, who also belongs to Hindu Pallan Community. She asserts that she lived as Hindu and continue to live as Hindu by following Hindu Customs and Traditions. She has faced a lengthy cross

examination. The learned senior counsel Sri Ramamurthy has taken us through the entire evidence. We are afraid that whether anything worthwhile has been brought on record to discredit the veracity of the evidence of the appellant and in fact whatever suggestion that was put to falsify the conversion certificate issued by Arya Samaj, Madurai, the witness has denied all those suggestions. The learned counsel for the appellant contended that it is well settled that there is no requirement in law of producing any clinching evidence on any formal ceremony of conversion to Hinduism. Our attention in drawn to the observations made by this Court in Perumal Nadar vs. Ponnuswamy (1970) 1 SCC 605; Per contra, the learned senior counsel for respondents 1 and 2 would contend that the appellant has not proved her claim of reconversion to Hinduism by producing primary evidence viz., the original conversion certificate issued by Arya Samaj. The High Court while considering this issue has noticed that the appellant failed to produce the original certificate issued by Arya Samaj, Madurai and further has not examined Santnakumar, who was supposed to have received and retained the original certificate issued by the Arya Samaj and the original records have not been summoned from Arya Samaj and no steps have been taken to summon the responsible person from Arya Samaj to prove that the appellant underwent conversion. Therefore, the claim made by her about her reconversion cannot be accepted. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely

unable to produce the original through no fault of that party. In the instant case, it is the specific case of the appellant that in the year 1994 that is much before the Assembly elections which was held in the year 2006, she had undergone all the rituals in Arya Samaj only for the purpose of reaffirmation of Hindu faith and the conversion certificate issued by Arya Samaj was received and acknowledged by her uncle Santnakumar who had accompanied her. It is also her specific case that she did not take back the certificate from her uncle, since she was of the view the same may not be required for her purpose. It is only when the election petition was filed, it order to proof her case of reaffirmation of her faith in Hinduism, she came to know that her uncle has lost the certificate, which necessitated her to obtain a duplicate copy of conversion certificate from Arya Samaj, Madurai. This part of her evidence is not even challenged by the petitioner. In fact the contents of the documents would clearly establish that it was issued for the second time on the request made by the appellant, after she was told by her uncle Santnakumar that the original certificate received by him in the year 1994 is lost by him. In our view, a perusal of the conversion certificate (Ex. R13) would amply demonstrate that the appellant has successfully proved her claim of re-affirmation of Hindu faith by undergoing rituals of conversion in the Arya Samaj, Madurai.

31. The High Court has placed reliance on the decision of this court in the case of *Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju and Ors.* (AIR 2006 SC 543), to place the burden of proof on the appellant itself. The relevant portion of the judgment reads:-

> "15. Learned senior counsel for the appellant made a strenuous attempt to contend that the learned Judge of the High Court had wrongly placed the burden of proof in the case. We cannot agree. The trial judge has rightly proceeded on the basis that the initial burden was on the election petitioner to establish his plea that the appellant

did not belong to a Scheduled Tribe. Though in a prior statement, an assertion in one's own interest, may not be evidence, a prior statement, adverse to one's interest would be evidence. In fact, it would be the best evidence the opposite party can rely upon. Therefore, in the present case, where the appellant is pleading that he is a Konda Dora, the statement in the series of documents, pre-constitution and post constitution, executed by his ancestors and members of his family including himself describing themselves as 'Kshatriyas', would operate as admissions against the interest of the appellant in the present case. These admissions also strengthened the admission of the appellant that in his school leaving certificate also, he is described as a 'Kshatriya' and his paternal uncle's son is also described as a 'Kshatriya' in his school leaving certificate and that uncle's son was also held to be a 'Kshatriya' on an enquiry made in that behalf. Therefore, in our view, the trial judge was correct in holding that the election petitioner had discharged the initial burden placed on him and the burden shifted to the appellant to establish that he belonged to the 'Konda Dora' Tribe."

32. On a careful perusal of the judgment, it is possible to distinguish the present case on the basis of the facts and circumstances. In the above mentioned case, which the High Court has relied upon, there was no conversion from one religion to another. The question was whether the person belongs to Kshatriya Caste or a Scheduled Tribe. The question relates to caste within a religion as opposed to the present case, where there has been conversion from one religion to another. Therefore the reasoning given by the High Court to reverse and discharge the burden of proof is erroneous and the burden of proof should lie on the election petitioner to prove that the appellant still professes Christianity.

33. We, therefore express our disapproval to the findings of the High Court on this issue.

34. The appellant, in support of her case, has examined Sengaiah alias Chinna Sangaiah-RW4, Rasu-RW5, Govindan-RW6, Paulraj-RW7, and RW10-Surulimuthu.

35. Mr. Sengaiah (RW 4) belongs to the same village as the appellant. He has deposed that he knows the appellant as she was born and brought up in his village. It has also come in his evidence that the family deity of the appellant is Palichiamman. She also used to worship Hindu Gods from her childhood in the village temples and the nearby Kamatchiamman temple. A ceremony was also performed on the appellant reaching puberty according to their caste customs and this was attended by his wife. The witness also states that the appellant's betrothal ceremony also took place as per the customs of the Hindu Pallan community. This was attended by him. However he did not attend the marriage of the appellant. But he further deposes that the appellant used to attend several family functions organized by him. In the cross-examination he has admitted the suggestion that the marriage between Santhoshpackiam (appellant's mother) and Navakumar (appellant's father) was performed as per Christian religion. In our view, the only admission made by this witness in his evidence would not tilt the balance in favour of the election petitioner. It is the case of the appellant also that her father was a Christian and her mother was a Hindu. May be at the instance of her father, marriage could have been performed in a Church. As we have already observed, the appellant not only in her pleadings but also in her evidence states that her father separated from her mother and her mother continued to profess Hindu religion and the Hindu Pallan Community accepted her as such.

36. Mr. Rasu was examined as RW 5. He was the poojari in the Sundaranatchiamman temple situated in the Ayyankollakondan village. He knew the husband of the appellant as he was the native of the same village. He clarifies that he had the knowledge that the parties to the marriage were

professing Christianity and later converted to Hinduism. He deposes that the marriage of the appellant took place in front of her husband's house as per Hindu customs. On the day of the marriage, the appellant and her husband came to the temple carrying garlands and pooja to the deity was conducted by RW 5. After this, the plate of garlands was returned and the bride and the bridegroom proceeded towards the marriage pandal near the house of the appellant's husband where the marriage was performed. He also deposes that the appellant and her husband worship the Sundaranatchiamman deity. He had signed the marriage certificate along with one Mr. Govindan who had signed in his capacity as the Village Nattamai. He also claims that before filing her nomination papers for the Assembly elections in May 2006, the appellant and her husband came to the Sundaranatchiamman temple and worshipped the deity. This witness is cross-examined by the election petitioner, but nothing useful is elicited. Therefore, his evidence goes unchallenged.

37. Mr. Govindan was examined as RW 6. He states that he attended the marriage of the appellant. He went on to describe the rituals and the ceremonies that took place during the course of the marriage. He also mentions that he invited the appellant to his house for his daughter's puberty ceremony on account of her being a member of the community. Though he was subjected to lengthy cross-examination, the election petitioner could not elicit which discredit his evidence.

38. Mr. S. Paulraj was examined as RW 7. In his evidence he states that he belongs to Hindu Pallan Community. He also asserts that the appellant also belongs to Hindu Pallan Community. He has stated that he had attended the betrothal ceremony of the appellant which was performed at her maternal uncle Surulimuthu's house as per Hindu rites and customs. He also stated that he had gone to the new house of the appellant. According to him, at the entrance of her house at Thendral Nagar, Rajapalayam, there is a picture of Lord Vinayaga printed

on a tile affixed on the wall. Her pooja room also also contains pictures of many Hindu gods. He also stated that RW 4 - Sengaiah did not attend the marriage of the appellant and it is his wife and daughter who attended the marriage. The only admission by him in the cross-examination was Santhoshpackiam married Navakumar and their marriage took place in CSI School, Erumalainaickenpatti Village. In our view, this so called admission would not assist the election petitioner to prove that the appellant is a Christian and is continuing to follow Christian faith.

39. Mr. Surulimuthu, the maternal uncle of the appellant was examined as RW 10. He confirms that the marriage of the parents of the appellant was performed as per Christianity. He has confirmed that the appellant's father left the appellant, her mother and her two younger brothers to marry another woman. He has also stated that the appellant, her mother and her younger brothers were taken care of by his father and lived in their household. He has stated that from childhood the appellant practiced Hinduism, visited temples, etc. He states that his family deity is Palichiamman and the community deity is Kaliamman. He also goes on to state that the appellant worships Palichiamman, Vinayagar and Kamatchiamman in the village. He stated that it was he who took the appellant to the Arya Samaj to change her name to Chandra. He also conducted the marriage of the appellant in Ayyankollakondan village as per the customs and traditions prevailing in Hindu Pallan Community. This witness in the cross-examination has again stated that the marriage of the appellant's parents was performed as per Christianity. The admission of this witness is put against the appellant by contending that the appellant in her evidence has made a false statement, that the marriage of her parents was performed as per Hindu customs. In our view, at the time of the marriage of her parents, appellant was not even born and not even conceived in the womb of her mother to overhear the conversation which was possible only in our Hindu mythology. Her statement that she has heard from her

mother and her relatives and this admission, if we may so, cannot be put against the appellant that she is making false assertion.

40. Election petitioner has examined himself as PW 1. In support of his allegations and assertions made in the election petition he has examined T.P. Paulaswamy-PW2, Rajaiya-PW3, Rajendran-PW4, Mrs. D. Jaymanorama-PW5 and Arumugan-PW6. T.P Paulaswamy-PW2 is the Village Secretary of DMK Party in Ganapathy Sundaranatchiyapuram. Paulaswamy in his cross examination states that the father-in-law of the appellant is a member of Christian church. He also goes on to state that the name of the appellant clearly indicates that she professes Christianity. But later rather inexplicably, he states "I do not know as to which religion the first respondent no.1 and her family members are professing. At the instance of the election petitioner, I have come as a witness today." He further states that he does not know the mother of the appellant and has not visited the residence of the appellant. He further states that he has never been to the residence of Murugan (husband of the appellant) and does not know the father-in-law of the appellant. He does however concede that Murugan works for Harijan Welfare Department of the Government. He further states that he has not visited the church where Murugan's father (appellant's father-in-law) was the Head of the church. He also confesses he has no document to prove that Murugan's father belonged to any church. It must be noted that in the testimony of Paulaswamy, he claims that Murugan is a Christian, but has admitted that he contested in the bye election from Ward No. 3 in Rajapalayam Panchayat Union Council which was reserved for candidates belonging to the Scheduled Castes, which fell vacant when Murugan resigned from that seat. It is not clear to us how Murugan contested from this seat, if it was reserved for Scheduled Castes, if, as Paulaswamy says, he was a Christian. This is a clear contradiction in his testimony. He clearly specifies in his deposition that he was unhappy that the second respondent lost in the election.

41. Rajaiya-PW3, in his evidence admits that he is a member of the DMK Party. He has stated that the appellant contested the election in the name of Glory Chandra. He has further stated that the name of the appellant's husband is Soosaimanickam and he was invited to the wedding of the appellant. He attended the reception which according to him took place in a church near the appellant's husband's house. First he testifies that the father-in-law of the appellant was a 'Nattamai' of the church (village head) and then states that he does not know exactly about the religious practice according to which the marriage of the appellant took place. According to him, the name of the mother of the appellant is Mrs. Baikkam who is a Christian Pallan. But then he states that he has not seen any certificate which shows her to be a Christian. Prior to the appellant coming to his village for her marriage, he had no knowledge about the appellant. Before that he had no knowledge about her schooling or the place or manner of living of the appellant or her parents. He does not have any proof to state that the appellant professes Christianity. He further asserts that in the region, conversion from Hinduism to Christianity and vice versa happens frequently. He further stated that he knew no details about Mr. Navakumar (appellant's father).

42. Another important evidence which the Election petitioner has taken aid of is the birth register of the children of the appellant for the year 1997, where the name of the father of the child has been described as Soosaimanickam and the name of the mother has been described as Glory and the religion shows Christianity. All the relevant entries were listed in Ex. P 10. In his testimony, Mr. M.K Rajendran, PW4, Deputy Tahsildar, Periyakulam, Theni District clearly states that none of the entries in the Ex. P 10 register have been entered on the reporting of births by the parents. This is a very important admission on the part of the witness as this indicates that may be not many people had the knowledge of the conversion of the appellant and her husband. The entry cannot be relied upon

by the respondent no.1 as it is mainly based on hearsay knowledge; because of the fact that the parents had themselves not reported the birth of the child. In the present case, the child birth was reported by the Village Head Nurse. She also states that she knows neither Soosaimanickam nor Glory.

43. We now move over to the deposition of Mr. S. Arumugan- PW6 presently working as Tahsildar, Rajapalayam. According to his deposition, the husband of the appellant applied for a permanent community certificate from Adi Dravidar Welfare Department, vide application dated 27.3.1997 (Ex. P 13). The application was received by the Tahsildar's office on 2.4.1997. He clearly states that he did not receive Ex. P 13. At that point of time he was Junior Assistant at different place. On the backside of the said application there are written endorsements of the Village Administrative Officer, Ayyankollkondan Revenue Inspector, Ayyankollkondan and Tahsildar, Rajapalayam. All the endorsements state that the appellant is from the "Hindu Pallan" backward class. The Village Administrative Officer had recorded the statement of the witnesses which have been duly certified by him. The respondent no.1 has pointed out to certain discrepancies in the grant of the community certificate. There has been reference to the fact that the Tahsildar, Rajapalayam had not put his signature to the endorsement of the Deputy Tahsildar where he had written to the Revenue Inspector, Ayyankollkondan, asking for proof with respect to the appellant's caste. Later no documents evidencing the community of the appellant were produced. In these circumstances, it would have been worthwhile to call the then Tahsildar, Rajapalayam and examine him as a witness and also the Village Administrative Officer. The Election petitioner also contends that the certificate was issued on 4.4.1997 within 2 days of receipt which was enough to raise doubts as to the veracity of the said certificate. Also as per the deposition of the present Tahsildar, there is no prescribed format for the issuance of a community certificate. In such a situation it will be difficult to establish whether there

has been any discrepancy in the issuance of the certificate. There was no cancellation endorsement on the application for the certificate. It has not been brought on record by the Election petitioner by way of evidence or by questioning the relevant authorities, as to whether there was proper enquiry before the endorsement was made by the revenue authorities.

44. Mr. V.P Ranjan-RW1 (the original respondent no.2) was also examined as a witness. He is also member of the rival DMK party. He had obtained a copy of the voters list for Andipatty assembly constituency for the year 1999 by filing an application under the Right to Information Act. In Ex. R1, serial no. 865, the voter's name has been mentioned as "Glory Chandra". This fact is referred to by the respondent as being a definite proof that the appellant is still professing Christianity. However his own admission, it is not mentioned in Ex. R1 that the appellant is a Christian. He further states that he has not denied in his counter that the marriage of the appellant was as per Hindu customary rites. He also clarifies that he has not stated anywhere that the marriage of the appellant took place as per Christianity. He clearly states that he does not know much about any of the friends or the family of the appellant and her husband.

45. We move over to the testimony of the K.V Balasubrmaniam (R.W 2), who is the General Manager, Bharat Sanchar Nigam Limited, Virudhumagar Telecom District. The Election petitioner has contended that the application of a telephone connection made by the husband of the appellant showed his name as Soosaimanickam. The application was made in 27.4.1998. There was no name and photograph affixed to the application. More importantly, as per the deposition of R.W 2 there is no column showing religion or caste of the applicant. Also he has not seen the applicant put his signature on the form. As clarified by him, there is no rule that only the owner of the property can apply for the telephone connection. Even the tenant can apply for the telephone connection.

Therefore it is possible that someone on behalf of the appellant's husband might have come to fill the application. There is no bar against it as the customer service centre is open to the general public for registering new telephone connection.

46. After perusal of the deposition of witnesses of both sides, the following relevant points emerge.

47. The contentions of the election petitioner is that parents of the appellant are Christians and their marriage was performed in a Church according to the traditions followed by Christians. This assertion of the election petitioner is denied by the appellant both in her counter statement and in the evidence. She has admitted that her father Navakumar was Christian but her mother was Hindu throughout and the marriage of her parents took place as per the customs prevailing in Hindu Pallan community. It is true that in the counter statement filed she has stated that though she was following Hindu customs, traditions, ceremonies and the other customs prevailing in Hindu Pallan Community in order to reaffirm her faith in Hinduism, she went through various rituals in Arya Samaj, Madurai on 27.08.1994. Apart from this, she has also stated that her husband Murugan got converted into Hinduism in the year 1975 and their marriage took place in the year 1995 according to Hindu tradition and custom. It looks to us that an honest and true statement made by the appellant that she has undergone the rituals in the Arya Samaj for the re-affirmation of her faith in Hindu religion has put her in a black spot and the same has persuaded the learned Judge who decided the lis between the parties to shift the burden of proof. In our view, the pleadings and the evidence adduced in support of the same requires to be read conjointly and not by applying the hypertechnical approach of reading between the lines to arrive at a finding against a candidate in an election petition who has support of the majority of the people in the constituency. This approach in our opinion would defeat the entire election

process. Hypertechnically requires to be eschewed and the ground realities requires to be kept in view while deciding these types of cases. We hasten to add, that this approach need not be adopted when an election petition is filed on the grounds of corruption, inciting people on the ground of particular religion etc. In the instant case, merely because the appellant had stated in her counter affidavit that she got converted into Christian faith in the year 1994 in Arya Samaj, Madurai, after following the required essential rituals, the learned Judge while deciding the lis between the parties has shifted the burden of proof on the appellant to disprove that she is not a Christian but a person practicing Hindu faith and the community has accepted her as a person belonging to Hindu Pallan Community. This reasoning of the learned Judge runs counter to the settled legal principles. We say so for the reason, that in an election petition the burden of proof lies on the person who accuses that the elected person who had the support of the majority of the electorates still does not deserve to represent them in the State Assembly. We reiterate that in the present case, the appellant candidly accepts that her father Navakumar is a Christian, but her mother who is separated from him never practiced Christian faith but continued to follow Hindu religion even after her marriage. The election petitioner has not produced any acceptable evidence to disprove the evidence adduced by the appellant and her witnesses. Therefore, issue of parentage which was sought to be projected as a factor which would prove that the appellant is a Christian and brought up as a Christian cannot be accepted. Reference can be made to the decision of this Court in the case of *Kailash Sonkar Vs. Mayadevi* [(1984) 2 SCC 91]

> "32. Another aspect which one must not forget is that when a child is born neither has he any religion nor is he capable of choosing one until he reaches the age of discretion and acquires proper understanding of the situation. Hence, the mere fact that the parents of a child, who were Christians, would in ordinary course get the usual baptism certificate

and perform other ceremonies without the child knowing what is being done but after the child has grown up and becomes fully mature and able to decide his future, he ought not to be bound by what his parents may have done. Therefore, in such cases, it is the intention of the convertee which would determine the revival of the caste. If by his clear and conclusive conduct the person reconverts to his old faith and abjures the new religion in unequivocal terms, his caste automatically revives.

33. Another dominant factor to determine the revival of the caste of a convert from Christianity to his old religion would be that in cases of election to the State Assemblies or the Parliament where under the Presidential Order a particular constituency is reserved for a member of the scheduled caste or tribe and the electorate gives a majority verdict in his favour, then this would be doubtless proof positive of the fact that his community has accepted him back to his old fold and this would result in a revival of the original caste to which the said candidate belonged.

48. The other minor issue which was argued was that in the school records, it is recorded that the appellant belongs to Indian Christian Pallan community and she studied in CSI School, Baltagundu but in the declaration filed along with nomination papers, it is stated that she studied in Govt. High School, Devathananpatti and, therefore, she has made false declaration and therefore she was ineligible to contest from the reserved constituency. The appellant in her counter affidavit and also in her evidence has explained that the discrepancy in the declaration form filled by her brother, who was assisting her in filing the nomination papers. We have perused the stand of the election petitioner and the evidence of the appellant. In our view, the discrepancy pointed out by the election petitioner has been properly explained by the appellant and in our view, this by itself cannot be a ground to hold that the appellant was ineligible to contest from the reserved constituency.

49. In so far as issuance of community certificate to the appellant, in our view the evidence of PW6 amply demonstrates that due procedure was followed while issuing the Community Certificate. The High Court, in our considered view has not properly appreciated PW6 evidence while doubting the genuineness of the Community Certificate produced by the appellant. Therefore, we do not approve the reasoning of the High Court on this issue. We also add that the learned senior counsel for contesting respondent in this appeal relied on certain observations made by this Court in the case of *Kumari Madhuri Patil & Anr. Vs. Addl. Commissioner, Tribal Development & Ors.* (1994) 6 SCC 241; *GM, Indian Bank Vs. R. Rani & Anr.* (2007) 12 SCC 796; *R. Palanimuthu Vs. Returning Officer & Ors.* (1984) Supp. SCC 77; *John Valiamattom & Anr. Vs. Union of India* (2003) 6 SCC 611; *Meera Kanwaria Vs. Sunitha & Ors.* (2006) 1 SCC 344; *Swagigar Doss Vs. Zonal Manager, FCI* (supra), *Desh Raj Vs. Bodh Raj* (2008) 2 SCC 186. In our considered view, these decisions were rendered by this Court in different context altogether. Reference to the facts in those cases and the law laid down therein, in our opinion, we would be unnecessarily adding few more pages to this Judgment. We desist ourselves from doing so.

50. Reliance placed on the birth records, entries in the telephone application and voters list cannot be the sole ground for proving that the appellant is professing Christianity. As stated above, the records could have been made by people other than the appellant or her husband. As far as the birth register is concerned, it is clear that the birth was reported not by the parents, but the Village Head Nurse. Similarly, it is very likely that after her conversion, the appellant never went ahead and changed the name appearing in the voter's list. Also it is not mentioned in the voter's list as to what religion the appellant professes. There is a common pattern arising that all the witnesses of the Election petitioner as well as the original respondent no.2 are affiliated to the rival party DMK in some

capacity or the other as opposed to the appellant who represented the AIADMK party. The Election petitioner has relied heavily on the testimony of the witnesses Mrs. Deivathai, T.P Paulasamy and Rajaiya to prove that the appellant continues to profess Christianity. However the testimony of all the three witnesses are highly contradictory and hearsay. All the three witnesses have come to know about the religion of the appellant and her husband from other people. Admittedly, none of them have come in close contact with the appellant, appellant's husband and both their families in any form. They have not produced any proof or document to prove that the appellant professes Christianity.

Requirements of Petition under Representation of Peoples Act :

51. Section 83 of the Representation of Peoples Act, 1951 deals with the contents of an election petition. Section 83 (1) of the Act reads:-

"An election petition:-

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings."

52. It is a settled legal position that an election petition must clearly and unambiguously set out all the material facts which the petitioner is to rely upon during the trial, and it must reveal a clear and complete picture of the circumstances and

should disclose a definite cause of action. In the absence of the above, an election petition can be summarily dismissed. To see whether material facts have been duly disclosed or whether a cause of action arises, we need to look at the averment and pleadings taken up by the party.

53. In the case of *V.S Achutanandan v. P.J Francis* [(1999) 2 SCR 99], it was held that failure to plead material facts is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time limit prescribed for filing the election petition.

54. One cannot file an election petition based on frivolous grounds. The facts presented must be clear, concise and unambiguous. All the above cases and provisions, though do not deal directly with the issues in this case, they go on to emphasize that an election result, where the people elect their representatives cannot be taken lightly. For an election result to be annulled, there must be positive evidence to prove illegality of the election. The natural corollary is that the person who files an election petition, must have a clear and definite case, to prove that the election was illegal. Therefore the burden of proof shall lie on the petitioner filing the election petition.

55. An election petition challenging the election of a returned candidate on the grounds of corrupt practices is not a criminal proceeding; but it is no less than a criminal proceeding with regard to the proof required to be furnished to the Court by the Petitioner [See J. *Chandrashekara Rao v. V. Jagapati Rao,* 1993 Supp (2) SCC 229]. Though, in the present case, the charges are not those of corrupt practices, they are not any lesser in terms of seriousness; hence the burden of proof is on the election petitioner to prove the charges he has made beyond reasonable doubt. This is done so that the purity of the election process is maintained.

56. The testimony of the witnesses for the Election petitioner does not qualify the test laid down in the Evidence

Act, to make the evidence admissible. It does not inspire any confidence. The evidence is clearly hearsay. As stated above, the opinion of the High Court is heavily relied on the fact that the burden of proof had been discharged and shifted to the appellant to prove that she had indeed renounced Christianity. We do not approve with the reasoning of the High Court to adopt this line of thinking. The burden of proof lay squarely on the Election petitioner to show that the appellant indeed practiced and professed Christianity. In any event, the evidence put forward by the appellant is consistent and reliable as it has relied on the testimony of people who have actually visited the house of the appellant or attended her wedding or been in close proximity with her and her husband's family.

57. Assuming for a moment that the High Court is justified in shifting the burden of proof on the appellant, we are of the view that the appellant by adducing cogent and reliable evidence has discharged the same. The appellant's testimony is consistent with the documentary evidence produced by her. The evidence of Shri Sengaiah (RW 4) and S. Paulraj (RW 7) also support the facts stated by the appellant. The fact that the appellant was a trustee of the Mayurarathaswamy Temple at Rajapalayam is supported by the testimonies of Shri. P. Magesh (RW 8) and Shri. K. Paramasivam (RW 9). Though the appellant has not produced the original conversion certificate, there is no reason to disbelieve the duplicate that she has submitted, as the petitioner has failed to provide a reasoned rebuttal to the evidence adduced by the appellant, to proof her case.

Validity of community Certificate & Evidence Act :

58. There is nothing on record to show that the community certificate was issued illegally or in contravention of the valid procedure. The Election petitioner should have examined the person in charge while the certificate was being issued to bring to light any alleged malpractice in the issuance of the said certificate. The validity of the issuance of the community

certificate is presumed unless shown otherwise by the respondent no.1, who clearly failed to do so. It is also baffling to note that the conversion certificate from the Arya Samaj was not examined in detail by the respondents inspite of the High Court making a strong observation in this regard. No proof by way of documents or oral evidence was provided to show how the certificate was granted and what procedure was followed. It is also pertinent to mention that no one raised any objection to the appellant filing her nomination for the Assembly elections in 2006 from the reserved constituency. All the issues have been raised after the appellant won the election from the Rajapalayam constituency. As pointed by the High Court, it is not necessary to read too much into contributions made into religious bodies and institutions as it is open for people outside the particular community also. Hence based purely on the evidence before this court and the observations made by us in this regard, the Election petitioner has not been able to prove conclusively that the appellant professes Christianity. The evidence produced is, contradictory and smacks of political rivalry.

59. In light of these findings, we need not go into the other issues.

60. In the result we allow this appeal and set aside the impugned order passed by the High Court. No order as to costs.

D.G. Appeal allowed.

PALRAJ

v.

THE DIVISIONAL CONTROLLER, NEKRTC

(Civil Appeal No. 7430 of 2010)

SEPTEMBER 07, 2010

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Workmen's Compensation Act, 1923:

s.4 and Schedule I, Part II – Compensation due to disability during employment – State Road Transport Corporation bus met with accident – Appellant, the bus driver, lost use of his legs and became disabled from driving any bus – He claimed compensation – Held: For determining compensation, functional disability resulting in loss of earning capacity is the criteria – Although the driver became totally disabled from driving any vehicle, he remained in a position to earn a living other than by functioning as a driver – The loss of earning capacity has to be computed keeping in mind the alternate employment given to the appellant as a Peon on the same salary as he was enjoying while performing the duty of a bus driver – On facts, the percentage of functional disablement in respect of the appellant fixed at 35%, having regard to his restricted mobility after the accident and also because of his loss of future earnings and promotion – Appellant directed to be provided with compensation on the basis of 35% functional disability.

s.4A(3) – Interest under the Act – Payment of – Held: Such interest cannot be claimed from the date of the filing of the application, but only after a default is committed in respect of the payment of compensation within 30 days from the date on which the payment becomes due.

A State Road Transport Corporation bus met with an

accident, due to which the driver of the bus, i.e. the appellant, lost the use of his legs and consequently became disabled from driving any bus. Subsequently, the respondent-Corporation provided alternative employment to the appellant as a Peon, on the same salary as he was drawing while performing the duty of a bus driver.

The Commissioner, Workmen's Compensation quantified the functional disability of the appellant at 85% and on that basis awarded compensation alongwith interest @ 12% p.a..

Aggrieved, the respondent-Corporation filed an appeal whereupon the High Court held that the percentage of disability taken by the Commissioner was against the weight of the medical evidence adduced in the case, and ought to have been taken at 20% instead of 85%, and, accordingly, reduced the compensation amount with interest @ 12% p.a. from 30 days after the date of the passing of the award.

Disposing of the appeal, the Court

HELD:1.1. While computing compensation for disabilities being suffered by a workman in the case of his employment, it is the functional disability resulting in loss of earning capacity which is the criteria which is followed in assessing compensation. The Workmen's Compensation Act, 1923 has its own formula in computing compensation on account of injuries suffered during employment which is reproduced in Schedule I to the said Act. In Part II of the said Schedule, the loss of earning capacity in terms of percentage has been directly related to the loss of any of the limbs and parts thereof, both of the upper limbs as also the lower limbs. [Para 9] [96-G-H; 97-A-B]

1.2. In the instant case, though the appellant has lost

his capacity to function as a driver, but with the help of external aids, his mobility has, to some extent, been restored and he is able to perform work which is suitable to his physical condition after the accident. In the appellant's case, by virtue of the injuries suffered by him, his disablement as far as driving a vehicle is concerned is 100%, but that is not the measure of loss of his earning capacity. The Commissioner, Workmen's Compensation, seems to have confused the issue by combining both functional disability and permanent disability in arriving at the figure of 85% by way of loss of earning capacity and has, therefore, arrived at a sum of Rs.1,75,970/- towards compensation. The High Court, on the other hand, realizing the mistake committed by the Commissioner, assessed the loss of earning capacity as 20% instead of 85% and reduced the compensation payable from Rs.1,75,970/- to Rs.41,404.80p.. [Para 11] [97-D-F]

2.1. Section 4(1)(c) of the Workmen's Compensation Act, 1923 indicates that where a workman suffers injury which is not specified in Schedule I to the Act, compensation is to be assessed on such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity, permanently caused by the injury as assessed by a qualified medical practitioner. Since, in the instant case, the nature of injury suffered by the appellant is not specified in Schedule I to the Act, the compensation has necessarily to be assessed on the basis of the loss of earning capacity caused by the injury which could amount to 100% disablement in a given case. However, although the appellant has lost the use of his legs for the purpose of driving a vehicle, which could be said to be total disablement so far as driving of a vehicle is concerned, he is in a position to earn a living other than by functioning as a driver, which, in fact, he is currently

doing, having been posted as a Peon by the respondent-corporation. [Para 13] [98-G-H; 99-A-C]

2.2. Apart from the fact that the Commissioner, Workmen's Compensation, had confused the concept of functional disablement with permanent disablement in arriving at the figure of 85% loss of earning capacity, one also has to take into consideration the fact that the injury suffered by the appellant did not disable him permanently from earning his living other than as a driver. Therefore, the percentage of functional disablement has to be modified, since the appellant is permanently disabled as far as earning a livelihood as a driver is concerned. [Para 14] [99-D-E]

3. The impugned order of the High Court was only an attempt to correct the erroneous interpretation of Part II of Schedule I of the Workmen's Compensation Act, 1923, by the Commissioner, Workmen's Compensation. The loss of earning capacity has to be computed keeping in mind the alternate employment given to the appellant on the same salary as he was enjoying while performing the duty of a bus driver. The same cannot be ignored in computing the amount of compensation which the appellant was entitled to. In that view of the matter, the order passed by the High Court is acceptable, but the percentage of functional disablement has to be modified from 20% to at least 35%, having regard to the appellant's mobility on account of the medical treatment received after the accident and also because of the appellant's loss of future earnings and also promotion. The order of the High Court is maintained and the appellant is directed to be provided with compensation on the basis of functional disability to the extent of 35% and not 20% as indicated by the High Court. [Paras 17, 18, 19] [101-C-G]

4. On the question of payment of interest, it is evident that compensation assessed under Section 4 of the 1923

Act is to be paid as soon as it falls due and in case of default in payment of the compensation due under the Act within one month from the date when it falls due, the Commissioner would be entitled to direct payment of simple interest on the amount of the arrears @12% per annum or at such higher rates which do not exceed the maximum lending rates of any scheduled Bank as may be specified by the Central Government. Both the Commissioner, Workmen's Compensation, as also the High Court, therefore, rightly held that interest under the 1923 Act cannot be claimed from the date of the filing of the application, but only after a default is committed in respect of the payment of compensation within 30 days from the date on which the payment becomes due. [Para 16] [100-G-H; 101-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7430 of 2010.

From the Judgment & Order dated 14.01.2008 of the High Court of Karnataka at Bangalore in M.F.A. No. 3771 of 2003 (WC).

Basava Prabhu S. Patil, Ajay Kumar M., B. Subrahmanya, V.N. Raghupathy for the Appellant.

Hetu Arora for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. The sole respondent who is the Divisional Controller, North East Karnataka Road Transport Corporation, being duly represented and having regard to the facts involved in the appeal, the same was taken up for final disposal at the stage of admission itself.

3. The Appellant was employed as a Bus Driver in the

Karnataka State Road Transport Corporation. On 10th October, 1998, the vehicle being driven by the Appellant, met with an accident in which he sustained grievous injuries. The Medical Officer who examined the Appellant came to the conclusion that the Appellant had suffered 65% of total body disability and 20% of functional disability. The Commissioner, Workmen's Compensation, however, took 85% as functional disability for quantifying the compensation payable to the Appellant, who was admittedly drawing a salary of Rs.15,000/- per month on the date of the accident.

4. It was also admitted that on account of the injuries suffered by him, the Appellant was no longer able to drive a vehicle and the Corporation accordingly appointed him as a Peon in the Corporation where he is drawing the same salary. Taking the above percentage of disability, both permanent and functional, the Commissioner made an Award granting compensation amounting to Rs.1,75,970/-, together with interest @12% per annum from 10.11.1998 till the date of deposit, to the Appellant.

5. Aggrieved by the compensation awarded by the Commissioner to the Appellant herein, the Corporation through its Divisional Controller filed Misc. First Appeal No.3771 of 2003 in the Karnataka High Court. The only question which was raised in the appeal was whether the percentage of disability taken by the Commissioner, Workmen's Compensation, Gulbarga, at 85% was against the weight of medical evidence adduced in the case. The appeal was heard by the learned Single Judge of the Karnataka High Court who agreed with the case of the Respondent herein that the Commissioner, Workmen's Compensation, had erroneously taken 85% to be the extent of disability suffered by the Appellant and that the same ought to have been 20% instead. On such basis, the learned Single Judge modified the Award passed by the Commissioner, Workmen's Compensation, and reduced the amount of compensation from Rs.1,75,970/- together with

interest at the @12% per annum, to Rs.41,404.80p. It was also held that the Commissioner had committed an error in awarding interest from the date of filing of the claim petition and the Appellant was entitled to interest on the compensation amount only after 30 days from the date of passing of the Award. The appeal was, accordingly, allowed in part, and the Award passed by the Commissioner, Workmen's Compensation, was modified and reduced from Rs.1,75,970/- to Rs.41,405/- together with interest @12% per annum on the said amount from 30 days after the date of the passing of the Award. The amount which was in deposit before the Court was directed to be transferred to the Commissioner, Workmen's Compensation, Gulbarga, for disbursement. It is the said order of the learned Single Judge, which has been challenged in this appeal.

6. On behalf of the Appellant it was contended that the doctors had certified that the Appellant was 100% disabled as far as his functioning as a Driver was concerned and that his total disability had been found to be 65% while his functional disability was assessed at 20%. Taking the two together the Commissioner, Workmen's Compensation had found the Appellant to have acquired 85% disability that entitled him to a sum of Rs.1,75,970/- in accordance with Schedule IV of the Workmen's Compensation Act, 1923, by taking his monthly income as Rs.2,000/- in view of Explanation 2 to Section 4 of the above Act and multiplying it with the multiplier of 172.52.

7. Mr. Basava Prabhu S. Patil, learned Senior counsel for the Appellant, also submitted that, in fact, the limit imposed by way of Explanation 2 to Section 4 had been increased from Rs.2,000/- to Rs.4,000/- with effect from 8th December, 2000, and the amount of compensation awarded to the Appellant should have been computed on the basis of his monthly wages being Rs.4,000/-. It was contended that the High Court had wrongly interfered with the compensation of the Commissioner, Workmen's Compensation, Gulbarga, and the compensation

assessed by him. It was submitted that the High Court had erred in granting compensation on the basis of 20% functional disability thereby reducing the figure from Rs.1,75,970/- to Rs.41,404.80p. Learned counsel for the Appellant submitted that the order of the Commissioner, Workmen's Compensation, Gulbarga, was liable to be restored.

8. As opposed to the aforesaid submissions made on behalf of the Appellant, it was submitted by Ms. Hetu Arora, learned counsel appearing on behalf of the Respondent-Corporation, that in addition to the compensation awarded to the Appellant, he had also been given alternative employment as Peon in the establishment of the Corporation and was also being paid the same salary which he would have drawn if he had continued to be a Driver, so that despite his accident, the Appellant did not face any loss of earnings. She also submitted that since the Commissioner, Workmen's Compensation, had erroneously confused the amount of functional disability of the Appellant as against his permanent disability, the Commissioner ought to have taken the percentage of the disability of the accident of 20% and not 85%, after taking into consideration the fact that the Appellant had been provided with employment as a Peon in the Respondent-Corporation, where he was drawing the same salary as earlier. Learned counsel for the Respondent submitted that the Appellant was also entitled to interest as awarded on the reduced amount only after 30 days from the date of the passing of the Award. On the aforesaid findings, the learned Single Judge allowed the appeal in part and modified the Award passed by the Commissioner, Workmen's Compensation, Gulbarga from Rs.1,75,970/- awarded by the Commissioner to Rs.41,405/- awarded by the High Court.

9. While computing compensation for disabilities being suffered by a workman in the case of his employment, it is the functional disability resulting in loss of earning capacity which is the criteria which is followed in assessing compensation. The

Workmen's Compensation Act, 1923, hereinafter referred to as "the 1923 Act", has its own formula in computing compensation on account of injuries suffered during employment which is reproduced in Schedule I to the said Act. In Part II of the said Schedule the loss of earning capacity in terms of percentage has been directly related to the loss of any of the limbs and parts thereof, both of the upper limbs as also the lower limbs. Loss of earning capacity is commensurate to the injuries suffered and the loss of earning capacity as a result thereof.

10. In the instant case, it is no doubt true that the Appellant has lost his capacity to function as a driver, but with the help of external aids his mobility has, to some extent, been restored and he is able to perform work which is suitable to his physical condition after the accident.

11. In the Appellant's case, by virtue of the injuries suffered by him, his disablement as far as driving a vehicle is concerned is 100%, but that is not the measure of loss of his earning capacity. The Commissioner, Workmen's Compensation, seems to have confused the issue by combining both functional disability and permanent disability in arriving at the figure of 85% by way of loss of earning capacity and has, therefore, arrived at a sum of Rs.1,75,970/- towards compensation. The High Court, on the other hand, realizing the mistake committed by the Commissioner, assessed the loss of earning capacity as 20% instead of 85% and reduced the compensation payable from Rs.1,75,970/- to Rs.41,404.80p. and awarded interest on the compensation amount only after 30 days of passing of the Award.

12. Section 4 of the 1923 Act which had been referred to by Mr. Basava Prabhu S. Patil, learned Senior Counsel for the Appellant, provides for the amount of compensation payable to a workman in different contingencies. Section 4(1)(c)(ii) provides as follows :

"4. Amount of compensation.- (1) Subject to the provisions

of this Act, the amount of compensation shall be as follows, namely:-

(a) …….

(b) …….

(c) Where permanent partial disablement result from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compen-sation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Explanation I.- Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II.- In assessing the loss of earning capacity for the purpose of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;"

13. The aforesaid provision would indicate that where a workman suffers injury which is not specified in Schedule I to the Act, compensation is to be assessed on such percentage of the compensation payable in the case of permanent total

disablement as is proportionate to the loss of earning capacity, permanently caused by the injury as assessed by a qualified medical practitioner. Since in the instant case, the nature of injury suffered by the Appellant is not specified in Schedule I, the compensation has necessarily to be assessed on the basis of the loss of earning capacity caused by the injury which could amount to 100% disablement in a given case. In the instant case, however, although the Appellant has lost the use of his legs for the purpose of driving a vehicle, which could be said to be total disablement so far as driving of a vehicle is concerned, he is in a position to earn a living other than by functioning as a driver, which, in fact, he is currently doing, having been posted as a Peon by the Respondent.

14. Accordingly, apart from the fact that the Commissioner, Workmen's Compensation, had confused the concept of functional disablement with permanent disablement in arriving at the figure of 85% loss of earning capacity, we also have to take into consideration the fact that the injury suffered by the Appellant did not disable him permanently from earning his living other than as a driver. We, therefore, are of the view that the percentage of functional disablement has to be modified, since the Appellant is permanently disabled as far as earning a livelihood as a driver is concerned.

15. As far as the question of payment of interest is concerned, reference may be made to Section 4-A of the 1923 Act, which is reproduced hereinbelow:

> *"4A. Compensation to be paid when due and penalty for default.*- (1) Compensation under section 4 shall be paid as soon as it falls due.
>
> (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the

> workman, as the case may be, without prejudice to the right of the workman to make any further claim.
>
> (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall –
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty :
>
> Provided that an order for the payment of Penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.
>
> *Explanation*.- For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).
>
> (3A) The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be."

16. It will be evident that compensation assessed under Section 4 is to be paid as soon as it falls due and in case of default in payment of the compensation due under the Act within one month from the date when it falls due, the Commissioner

would be entitled to direct payment of simple interest on the amount of the arrears @12% per annum or at such higher rates which do not exceed the maximum lending rates of any scheduled Bank as may be specified by the Central Government. Both the Commissioner, Workmen's Compensation, as also the High Court, therefore, rightly held that interest under the 1923 Act cannot be claimed from the date of the filing of the application, but only after a default is committed in respect of the payment of compensation within 30 days from the date on which the payment becomes due.

17. We are satisfied that the impugned order of the High Court was only an attempt to correct the erroneous interpretation of Part II of Schedule I of the Workmen's Compensation Act, 1923, by the Commissioner, Workmen's Compensation. The loss of earning capacity has to be computed keeping in mind the alternate employment given to the Appellant on the same salary as he was enjoying while performing the duty of a bus driver. The same cannot be ignored in computing the amount of compensation which the Appellant was entitled to.

18. In that view of the matter, we are in agreement with the order passed by the High Court, but we are of the view that the percentage of functional disablement has to be modified from 20% to at least 35%, having regard to the Appellant's mobility on account of the medical treatment received after the accident and also because of the Appellant's loss of future earnings and also promotion.

19. We, therefore, maintain the order of the High Court and direct that the Appellant be provided with compensation on the basis of functional disability to the extent of 35% and not 20% as indicated by the High Court.

20. The appeal is, accordingly, disposed of. There will be no order as to costs.

B.B.B. Appeal disposed of.

CRAIG ALLEN COATES
v.
STATE & ANR.
(Civil Appeal No. 7475 of 2010)

SEPTEMBER 8, 2010

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

Adoption:

Inter-country adoptions – Indian male child with developmental delays and difficulty in learning – Prayer for adoption of, by a U.S. based woman who has professional experience in home based nursing – Medical Board of experts of AIIMS constituted to examine the child and the applicant – Report of the Medical Board that the applicant had adequate financial and emotional resources to provide for the child and that there is reciprocity between them and that the applicant would be a proper person to whom the child can be given in adoption – Prayer allowed – Child and Family Welfare.

Inter-country adoptions – *Procedure to be followed – Directions given.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7475 of 2010.

From the Judgment & Order dated 31.08.2009 of the High Court of Delhi at New Delhi in F.A.O. No. 32 of 2009.

Krishna Mani, Mohindru Singh, Rishi Kesh, Amit Kumar for the Appellant.

Anil Srivastav for the Respondents.

The following order of the Court was delivered

ORDER

Leave granted.

Heard Mr. Krishna Mani, Senior advocate and Mr. Mohindru Singh, advocate for the petitioner and Mr. Gopal Subramaniam, learned Solicitor General who has appeared as amicus curiae in this case, Ms. Coates who proposes to adopt the child Anil, has also appeared before us.

On the previous date, we had requested the learned Solicitor General of India to get the matter examined by an expert committee as to whether the adoption of the child Anil by Ms. Coates would be in the interest of the child. Today, a report has been submitted by the learned Solicitor General made by a committee of Medical experts constituted at the instance of learned Solicitor General and comprising Prof. (Dr.) Rajat Ray, Dr. Pearl Drego, Dr. Amit Sen and Dr. Roma Kumar. The report reads as follow:-

> "A medical board consisting of Prof. (Dr.) Rajat Ray, Dr. Pearl Drego, Dr. Amit Sen and Dr. Roma Kumar constituted on the directions of your goodself met in the Room No. 13, VIP Room, Private Ward Building, AIIMS on 6th September, 2010 at 11.00 AM to examine the minor child Anil and Ms. Cynthia Ann Coates for the purpose of evaluating the petition for adoption vide reference letter No. G-702/SGI/2010 dated 31st August, 2010.
>
> The board looked into the medical records of medical and mental state of the child Anil as presented in the reports of Medical officers of Medical Home for Children. Moolchand Hospital, VIMHNS as well as the psycho metric evaluation of the child from Dr. Roma Kumar on the 3rd September.
>
> From all records it was apparent the child has developmental delays and difficulties with respect to learning and expressing and would require special care

> for learning needs. In the opinion of the board such a child will benefit from family based care and nurturance rather than institutional care.
>
> The board went through the adoption home studies made by Lutheran Social Services Wisconsin, USA which gave a detailed analysis of the adoptive parents and the family.
>
> The board further examined Ms. Coates, her intentions, her professional experience and her proposed education of the child. She has had extended experience in home based nursing and in a respite home where she has given personal care to patients with neuro-muscular disorders, cognitive impairments and other handicaps. Her experience in home health and her sensitivity towards multicultural issues was evident in her interactions. She presented a clear vision of the family, school and community resources she needs to mobilize in order to make the adoption successful. She is committed to providing physical therapy, occupational therapy, speach therapy and special education to her adopted child.
>
> From the records available to the board it seems that she has adequate financial and emotional resources to provide for the adopted child. The board also viewed the recent recorded video made with the child's current setup where the child's interaction within the group was observed. The reciprocity in the relationship between Ms. Coates and the child became apparent during our interview.
>
> Thus the board is of the opinion that the petitioners should be allowed to adopt the minor male child Anil.
>
> (Prof. Rajat Ray)
> Head, Deptt of Psychiatry, AIIMS.
>
> (Dr. Pear Drego)
> Psychotherapist and family Counselor (Dr. Amit Sen)

(Dr. Amit Sen)
Child Psychiatrist
(Dr. Roma Kumar)
Clinical Psychologist"

We are satisfied from the Report of the Medical Board, AIIMS that Ms. Coates would be a proper person, to whom the child Anil can be given in adoption.

In the result, we allow this appeal, set aside the impugned judgment passed by the High Court as also that passed by the District Judge refusing to grant the prayer made by Ms. Coates for adopting minor child Anil and direct that the formalities regarting adoption as per the procedure prescribed shall be completed before the District Judge III (West), Delhi, as expeditiously as possible.

We further direct that for inter-country adoptions the procedure followed heretofore could include a reference to an expert committee on the lines constituted in the present case to ensure that inter country adoption are allowed only after full and proper satisfaction is recorded by all the agencies including a committee of experts wherever reference to such a committee is considered necessary. We are told that Central Adoption Resources Agency (CARA) has the power to make references but no expert committee as such has been constituted of identified for that purpose. The our opinion, it would be appropriate if Central Adoption Resources Agency requests the Director All India Institute of Medical Sciences to constitute a committee of experts to be headed by Professor and Head of the Department of psychiatry, AIIMS.

CARA may have been similar expert committees constituted in other States also to facilitate references to them in regard to children who may be living at distant places from Delhi.

We disposed of this appeal on the above terms. No costs.

R.P Appeal disposed of.

SYED ASHWAQ AHMED
v.
JT. SECRETARY AND CHIEF PASSPORT OFR. AND ANR.
(Special Leave Petition (C) No. 22936 of 2008)

SEPTEMBER 09, 2010

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Constitution of India, 1950 – Article 226 – Travel agents de-recognized from carrying out passport work in July, 1992 – Fresh scheme promulgated on 18th July, 2000, which provided a one-time concession to travel agents provided they were working as travel agents from before July, 1992 – Petitioner, who commenced business as a travel agent in 1997, was denied the benefit of the scheme promulgated on 18th July, 2000 – He filed writ petition which was dismissed by the High Court – On appeal, held: Since the policy of recognizing travel agents for the purpose of carrying out passport work was discontinued after July, 1992, the petitioner, who had begun his travel agency much after July, 1992, was not entitled to the benefit of the fresh guidelines issued on 18th July, 2000 – No reason for interference with the order of High Court.

In July, 1992, travel agents, who were not members of the Travel Agents' Association of India (TAAI), were de-recognized from carrying on the work of submitting passport applications and receiving the same on behalf of their clients. The said de-recognition of travel agents for purpose of passport work was challenged in various courts, including the Supreme Court, whereafter a fresh scheme was promulgated on 18th July, 2000, by providing a one-time concession to travel agents, who were not members of TAAI, provided they were working as travel agents from before July, 1992.

The petitioner, who was not a member of TAAI, but commenced business as a travel agent only from 1997 i.e. he was not recognized as a travel agent prior to July, 1992, was denied the benefit of the scheme promulgated on 18th July, 2000. He filed a writ petition seeking a Mandamus upon the respondents to allow him to perform passport work as a travel agent. The writ petition was dismissed by the High Court.

Dismissing the special leave petition, the Court

HELD: The reasoning of the High Court that the petitioner could not be recognized as a travel agent since he had started his business in 1997, long after the system had been withdrawn, is in keeping with the said scheme and does not require any interference. Once the policy of recognizing travel agents for the purpose of submitting passport applications and receiving the same on behalf of a client, was discontinued after July, 1992, the petitioner, who had begun his travel agency after the said date, was not entitled to the benefit of the fresh guidelines which came to be issued on 18th July, 2000, by providing a one-time concession for all travel agents who were working prior to 1992, even though they were not members of TAAI. The policy is neither irrational nor unreasonable and appears to have been made to streamline the system of applying for and receiving passports. [Paras 8, 9] [111-A-F]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 22936 of 2008.

From the Judgment & Order dated 23.6.2008 of the High Court of Karnataka at Bangalore in W.P. No. 14078 of 2007.

Manohar Lal Sharma, Debasis Misra for the Petitioner.

D.K. Thakur, Deepak Jain, Yogita Yadav, Asha G. Nair, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. This Special Leave Petition is directed against the judgment and order dated 23rd June, 2008, passed by the Karnataka High Court in W.P. No.14078 of 2007, dismissing the Petitioner's writ petition seeking a Mandamus upon the Respondents to allow him to perform passport work as a travel agent, though he was not a member of the Travel Agents' Association of India (TAAI).

2. The Petitioner claims to have been working as a travel agent, without being a member of TAAI, and has been acting on behalf of various clients since 1997 for submitting applications for obtaining passports on their behalf. It is also the Petitioner's case that he was issued with a Travel Agent Code number by the Passport Officer, Government of India, in the Ministry of External Affairs, the Respondent No.2 herein, to whom the applications would be submitted and after the applications had been accepted, the same would be processed by the said Officer upon payment of the prescribed service charge. According to the Petitioner, guidelines were issued from time to time, but the said Respondent withdrew the entire system of recommending travel agents to deal with passport work and issued instructions that in respect of travel agents who were present before the passport office earlier, even if they were not members of TAAI, they would be permitted to continue to do the work which they had been performing. In order to avail of the said benefit, the travel agents, who were similarly placed as the Petitioner, filed applications for permission to continue the work which they had been performing. However, since the said applications were rejected by the authorities, the Petitioner was compelled to file this Special Leave Petition.

3. On behalf of the Petitioner it was also contended that the aforesaid question had been considered by the Karnataka High Court and had been decided in Writ Petition No.40360

of 2004, and, ultimately, the impugned restrictions came to be quashed and all travel agents who were carrying on business earlier became entitled to continue to do the work and the endorsements dated 14th March, 2006, issued by the Respondent No.2 were quashed.

4. According to the Respondents, however, the system of recommending travel agents to carry on the work of applying for and receiving passports on behalf of their clients was dispensed with in July, 1992. Although, the said de-recognition of travel agents in July, 1992, was challenged in various courts, including this Court, the scheme was ultimately upheld and the Ministry of External Affairs, Government of India, gave the benefit thereof to the travel agents who were not members of TAAI, provided they were recognized as travel agents before July, 1992, when the recognition of travel agents was dispensed with. Since the petitioner had started operating as a travel agent only in 1997, after such derecognition, he was not entitled to the benefit of the Scheme promulgated on 18th July, 2000.

5. The matter was considered in some detail by the High Court which took the view that travel agents, who were not members of TAAI, had been recognized by the Department for the issuance of passports on behalf of their clients. Ultimately, all the matters which were filed before this Court were transferred to the various High Courts and fresh guidelines came to be issued on 18th July, 2000. As a one-time concession, agents who were working prior to 1992 were given the benefit of the scheme, even though they were not members of TAAI. The scheme was formulated on 18th July, 2000, and under the scheme travel agents who had been working from before 1992 continued to be recognized as travel agents, although, they were not members of TAAI. Based on the aforesaid reasoning, the High Court held that once the scheme came into operation and a one-time concession was made in respect of travel agents who were working from before 1992 but were not members of TAAI, the Petitioner who commenced business as a travel agent from 1997, was not entitled to the

benefit of the scheme. The High Court dismissed the Petitioner's writ petition upon holding that since the Petitioner was not a member of TAAI and was not also recognized as a travel agent prior to 1992, he was not entitled to the benefit of the scheme promulgated on 18th July, 2000.

6. Mr. Manohar Lal Sharma, learned Advocate who appeared for the Petitioner, urged that since the Petitioner had been awarded a Code Number by the Ministry of External Affairs, Government of India, it must be deemed that he was an accredited agent, notwithstanding the fact that he was not a member of TAAI. Mr. Sharma submitted that pursuant to the decision taken by the Ministry which came into effect from the month of August, 2000, all travel agents who were then recognized by the passport office under the previous dispensation, would continue to be recognized even if they were not members of TAAI. However, no new non-TAAI recognized travel agent could be added to the earlier list in future. Mr. Sharma submitted that since the Petitioner was an accredited agent, the aforesaid provisions would govern the Petitioner as well, despite the fact that he was not a member of TAAI. He also submitted that when the scheme was promulgated and the Petitioner was already functioning as a travel agent, it would be highly arbitrary to prevent him from continuing to function as a travel agent in view of the new policy whereunder only those travel agents who were members of TAAI would be entitled to perform the work of submitting applications on behalf of Indian citizens applying for passports.

7. As indicated hereinbefore, the Respondents took the stand that when the entire system of recognizing travel agents to deal with passport work had been withdrawn in February, 1992, the Petitioner, who was not a member of the TAAI at that point of time, could not get the benefit of the scheme floated by the Respondent.

8. The controversy in this Special Leave Petition hinges on the question as to whether the Petitioner had been unjustly

prevented from carrying on business as travel agent since he was not a member of TAAI and, therefore, not entitled to the benefit of the scheme promulgated on 18th July, 2000. The reasoning of the High Court that the Petitioner could not be recognized as a travel agent since he had started his business in 1997, long after the system had been withdrawn, is in keeping with the said scheme and does not require any interference. Once the policy of recognizing travel agents for the purpose of submitting passport applications and receiving the same on behalf of a client, was discontinued after July, 1992, the Petitioner, who had begun his travel agency after the said date, was not entitled to the benefit of the fresh guidelines which came to be issued on 18th July, 2000, by providing a one-time concession for all travel agents who were working prior to 1992, even though they were not members of TAAI.

9. The new policy adopted by the Government has not been questioned by the Petitioner, whose grievance is confined to his exclusion from the scheme which came into operation in August, 2000. We are not, however, inclined to accept the submissions made on the Petitioner's behalf since a decision had been taken by the Central Government to derecognize travel agents who were not members of TAAI, giving a one-time concession to those travel agents who were not members of TAAI but had been performing passport work for clients prior to 1992. The policy is neither irrational nor unreasonable and appears to have been made to streamline the system of applying for and receiving passports.

10. We, therefore, find no reason to interfere with the decision of the High Court and the Special Leave Petition is, accordingly, dismissed.

B.B.B. SLP dismissed.

COMPETITION COMMISSION OF INDIA

v.

STEEL AUTHORITY OF INDIA LTD. & ANR.

(Civil Appeal No. 7779 OF 2010)

SEPTEMBER 9, 2010

[S.H. KAPADIA, CJI, K.S.PANICKER RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]

Competition Act, 2002:

ss. 19,26(1), 53-A(1) – Proceedings before the Competition Commission – Appealable order – Information furnished to the Commission alleging abuse by a Public Sector Company of its dominant position and depriving others of fair competition – Direction issued by the Commission in terms of s.26(1) – HELD: Taking a prima facie view and issuing a direction to Director General for investigation would not be an order appealable u/s 53-A – Interpretation of statutes – Maxim, 'expressum facit cessare tacitum' and 'est boni judicis ampliare justiciam, non-jurisdictionem' – Applicability of – Code of Civil Procedure, 1908 – Or.43, rr.4(1A).

s.26(1) – Power of Commission – Ambit and scope of – Party claiming issuance of notice – HELD: Neither any statutory duty is cast on the Commission to issue notice/grant hearing nor can any party claim, as a matter of right notice and/or hearing at s.26(1) stage.

ss. 53-A and 53-B – Appeal before Competition Appellate Tribunal – Party – HELD: Competition Commission shall be a necessary party where inquiry has been initiated by it suo motu – In all other cases, it shall be a proper party in the proceedings before the Appellate Tribunal – Competition Commission of India (General) Regulations,

2009 – Regulations 14(4) and 51 – Code of Civil Procedure, 1908 – Or.1,r.10.

s.33 – Power of Commission to grant interim orders – HELD: 'During inquiry', if the Commission is satisfied that an act in contravention of the stated provision has been committed, continues to be committed, or is about to be committed, it may temporarily restrain any party without giving notice to such party – The Legislature has intentionally used the words 'not only ex-parte' but also 'without notice to such party' – However, this power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances, after recording its satisfaction that a case exists for the restraint order – Wherever Commission has passed interim order, it shall hear the affected party, thereafter as soon as possible – Competition Commission of India (General) Regulations, 2009 – Regulation 18(2) and 31(2).

s.33 – 'During inquiry' – Connotation of – HELD: Inquiry is commenced when the Commission, in exercise of its powers u/s 26(1) issues a direction to the Director General.

s.26(1) – Formation of prima facie opinion – Recording of reasons – HELD: Commission is expected to record at least some reasons even while forming a prima facie view – However, while passing directions and order dealing with the rights of parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders.

Object of the Act – Explained – Keeping in view the objective of the Act and various functions performed by the Commission under the Act, directions issued in order to achieve the object of the Act and to ensure its proper implementation – The said directions shall remain in force till appropriate regulations in that regard are framed by the competent authority – Legislation – Administrative Law – Delegated/subordinate Legislation – Need for – Meanwhile,

directions issued by Court through judicial pronouncement to remain in force.

Words and Phrases:

Words 'or', 'and', 'any' – Connotation of.

Expressions 'inquiry' and 'investigation' – Connotation of.

An information was furnished to the Competition Commission of India (Commission) that respondent no. 1(SAIL) entered into an exclusive supply agreement with Indian Railways for supply of rails and, thus, it was alleged, SAIL abused its dominant position in the market and deprived others of fair competition. The Commission registered the information and directed the informant to file an affidavit in support of the information supplied by it. A notice was issued to SAIL enclosing the information submitted by the informant, asking it to submit its reply within two weeks. SAIL requested for six weeks time. The Commission declined extension and, by its order dated 8.12.2009, formed the opinion that *prima facie* case existed against SAIL. It directed the Director General to make investigation into the matter in terms of s.26(1) of the Competition Act, 2002. SAIL was granted liberty to file its reply before the Director General. However, SAIL filed an interim reply before the Commission along with an application that it should be heard before any interim order was passed by the Commission. On 22.11.2009, the Commission reiterated its earlier order directing the Director General for investigation and granting liberty to SAIL to file its reply before the Director General. SAIL filed an appeal before the Competition Appellate Tribunal (Tribunal) challenging the order dated 8.12.2009. The Commission filed an application before the Tribunal seeking impleadment in the appeal, and also questioned the maintainability of the appeal on the ground that the

direction simpliciter to conduct investigation was not an order appealable within the meaning of s.53-A of the Act. The Tribunal, *inter alia,* held that the Commission was neither a necessary party nor was it a proper party in the appeal; and that the appeal against the order dated 8.12.2009 was maintainable.

In the instant appeal filed by the Commission, the following questions arose for consideration.

Q.1Whether the directions passed by the Commission in exercise of its powers u/s 26(1) of the Act forming a *prima facie* opinion would be appealable in terms of Section 53A(1) of the Act?

Q.2What is the ambit and scope of power vested with the Commission u/s 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the *prima facie* case?

Q.3Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

Q.4At what stage and in what manner the Commission can exercise powers vested in it u/s 33 of the Act to pass temporary restraint orders? and

Q.5Whether it is obligatory for the Commission to record reasons for formation of a *prima facie* opinion in terms of s. 26(1) of the Act?

Q.6What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in

achieving the object of the Act, i.e., free market and competition.

Partly allowing the appeal, the Court

HELD: 1.1 In terms of s. 53A(1)(a) of the Competition Act, 2002, an appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of s. 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication. Taking a *prima facie* view and issuing a direction to the Director General for investigation would not be an order appealable u/s 53A. Thus, the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable. [para 21] [149-F-G]

1.2 Right of appeal is neither a natural nor inherent right vested in a party. It is substantive statutory right regulated by the statute creating it. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party. It is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally; if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum. [para 32 and 34] [165-F-H; 166-A; 164-G-H; 165-A]

Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto **(1979) 1 SCC 92;** *M. Ramnarain Private Limited v. State Trading Corporation of India Limited*, **1983 (3) SCR 25 = (1983) 3 SCC 75; and** *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad* **1999 (2) SCR 895 = (1999) 4 SCC 468 – relied on.**

Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar **1999 (2) SCR 728 = *(1999)* 3 SCC 722;** and *Kashmir Singh vs. Harnam Singh* **2008 (3) SCR 763 = 2008 AIR SC 1749;** *Shiv Shakti Co-op. Housing Society, Nagpur vs. Swaraj Developers* **2003 (3) SCR 762 = (2003) 6 SCC 659– referred to**

The Law Commission of India, 183rd Report; *Mimansa Sutras* **by Jaimini – referred to.**

1.3 The Tribunal has been vested with the power to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission in exercise of its powers under the provisions mentioned in s. 53A of the Act. The order passed by the Commission u/s 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable u/s 53A of the Act. [para 24-25] [160-A-E]

1.4 The provisions of s.53A(1)(a) use the expression 'any direction issued or decision made or order passed by the Commission'. There is no occasion for the court to read and interpret the word 'or' in any different form as that would completely defeat the intention of the legislature. It is a settled principle of law that the words 'or' and 'and' may be read as *vice versa* but not normally. The language of the Section is clear and the statute does not demand that the court should substitute 'or' or read this word interchangeably for achieving the object of the Act. On the contrary, the objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. [para 27, 28, and 29] [162-A-E; 163-B-C]

Super Cassettes Industries Ltd. vs. State of U.P. **2009 (14) SCR 627 = (2009)10 SCC 531;** and *Municipal*

Corporation of Delhi vs. Tek Chand Bhatia **1980 (1) SCR 910 = (1980) 1 SCC 158 – relied on**

Green v. Premier Glynrhonwy Slate Co. **(1928) 1 KB 561 p. 568; and** *Mersey Docks and Harbour Board v. Henderson Bros.* **(1888) 13 AC 595; – referred to.**

1.5 The direction u/s 26(1) after formation of a *prima facie* opinion is a direction *simpliciter* to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the *lis.* [para 25] [160-C-E]

Automec Srl v. Commission of the European Communities **(1990) ECR II-00367 – referred to.**

1.6 The Tribunal was not right in holding that the use of the words 'any' and 'or' were the expressions of wide magnitude and that 'any' being an adjective qualifies the nouns under the relevant provisions, i.e. directions, decisions and orders, all were appealable without exception. The expression 'any', in fact, qualifies each of the three expressions 'direction issued or decision made or order passed'. It cannot be said that it signifies any one of them and, particularly, only 'direction issued'. All these words have been used by the legislature consciously and with a purpose. It has provided for complete mechanism ensuring their implementation under the provisions of the Act. [para 39-40] [169-A-D]

1.7 The provisions of s.26 and 53A of the Act clearly depict the legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Under s.26(1) the Commission

is expected to make a decision by formation of a *prima facie* opinion and issue a direction to cause an investigation to be made by the Director General and after receiving the report has to take a final view in terms of s.26(6) and, even otherwise, it has the discretion to form an opinion and even close a case u/s 26(2). Having enacted these provisions, the legislature, in its wisdom, made only the order u/s 26(2) and 26(6) appealable u/s 53A of the Act. Thus, it specifically excludes the opinion/ decision of the authority u/s 26(1) and even an order passed u/s 26(7) directing further inquiry, from being appealable before the Tribunal. Therefore, it would neither be permissible nor advisable to make these provisions appealable against the legislative mandate. [para 40] [169-C-F]

1.8 *Expressum facit cessare tacitum* – Express mention of one thing implies the exclusion of other. (Expression precludes implication). This doctrine has been applied by this Court in various cases to enunciate the principle that expression precludes implication. The first and primary rule of construction is that intention of the legislature is to be found in the words used by the legislature itself. The true or legal meaning of an enactment is derived by construing the meaning of the word in the light of the discernible purpose or object which comprehends the mischief and its remedy to which an enactment is directed. It is always important for the court to keep in mind the purpose which lies behind the statute while interpreting the statutory provisions. The appropriate interpretation of s.53A(1)(a) would be that no other direction, decision or order of the Commission is appealable except those expressly stated in it. The maxim *est boni judicis ampliare justiciam, non-jurisdictionem* finds application here. [para 42-44] [170-B-E; 171-A-C]

Union of India vs. Tulsiram Patel, **1985 (2) Suppl.**

SCR 131 = AIR 1985 SC 1416; *State of Himachal Pradesh vs. Kailash Chand Mahajan* **1992 (1) SCR 917 =AIR 1992 SC 1277 and** *Padma Sundara Rao v. State of T.N.* **2002 (2) SCR 383 =AIR 2002 SC 1334 – referred to.**

1.9 Section 53B(1) itself is an indicator of the restricted scope of appeals that shall be maintainable before the Tribunal; it provides that the aggrieved party has a right of appeal against 'any direction, decision or order referred to in s.53A(1)(a).' One of the parties before the Commission would, in any case, be aggrieved by an order where the Commission grants or declines to grant extension of time. Such orders cannot be held to be appealable within the meaning and language of s.53A of the Act and also on the principle that they are not orders which determine the rights of the parties. No appeal can lie against such an order. Still, the parties are not remediless as, when they prefer an appeal against the final order, they can always take up grounds to challenge the interim orders/directions passed by the Commission in the memorandum of appeal. Such an approach would be in consonance with the procedural law prescribed in O.43, r. 1-A CPC and even in other provisions thereof. [para 44-45] [171-C-D; F-H; 172-A]

2.1 Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of s.26(1) of the Act, that a *prima facie* case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter. The provisions of s.19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. [para 11 and 21] [149-H; 150-A-B; 145-C-D]

2.2 However, the Commission, being a statutory body

exercising, *inter alia*, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive. [para 21] [150-C]

2.3 The principle of *audi alteram partem,* as commonly understood, means 'hear the other side or hear both sides before a decision is arrived at'. The principle is largely understood as integral part of principles of natural justice. It is expected of a tribunal or any quasi-judicial body to ensure compliance of these principles before any order adverse to the interest of the party can be passed. However, the exclusion of the principles of natural justice is also an equally known concept and the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons. Generally, compliance or otherwise, of these principles can be classified mainly under three categories: first, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance to the provisions of principles of natural justice and default in compliance thereto can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance to these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and, therefore, the court has to examine the facts of each case in the light of the Act or the Rules and Regulations in force in relation to such a case. [para 48-49] [172-G-H; 173-A-H; 174-A]

Cooper v. Wands Worth Board of Works **(1863), 14 C.B.**

(N.S.) 180; and *Errington v. Minister of Health* **(1935) 1 KB 249 – referred to.**

2.4 Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. From the provisions of the Act, and some of the Regulations, it is obvious that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and there is no compelling reason to read into the provisions of s.26(1) the requirement of notice, when it is conspicuous by its very absence. [para 51 and 58] [177-E; 175-A-C]

2.5 The provisions of s.26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass *ex parte ad interim* injunction orders immediately in terms of s. 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice. The application of the principle of natural justice, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. [para 61 and 63] [179-G-H; 180-A-D; 181-C-E]

Delhi Transport Corporation vs. Delhi Transport Corporation Mazdoor Congress **(1991) Supp1 SCC 600;**

Union of India v. W.N. Chadha **1992 (3) Suppl. SCR 594 = (1993) Supp 4 SCC 260;** *Maneka Gandhi v. Union of India* **(1978) 1 SCC 48;** *State of Punjab* v. *Gurdayal* **1980 (1) SCR 1071 =*AIR* 1980 SC 319;** *Raj Restaurant and Anr. v. Municipal Corporation of Delhi* **(1982) 3 SCC 338;** *Canara Bank vs. Debasis Das* **2003 (2) SCR 968 = (2003) 4 SCC 557;** *M. Krishna Swami vs. Union of India* **1992 (1) Suppl. SCR 53 = (1992) 4 SCC 605 – referred to.**

Azienda Colori Nazionali - ACNA S.P.A. v Commission of the European Communities, **(1972) ECR 0933 – referred to.**

2.6 Besides, the jurisdiction of the Commission to act u/s 26(1) does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and, therefore, application of *audi alteram partem* is not called for. Formation of a *prima facie* opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of s. 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/ affected party. The functions performed by the Commission u/s 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word 'direction' to be issued to the Director

General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission. [para 66-67] [183-H; 184-A-D; 185-B-C]

2.7 Cumulative reading of the relevant provisions, in conjunction with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of s.26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of s. 26(1), the Court is of the considered view that the right of notice of hearing is not contemplated under the provisions of s. 26(1) of the Act. [para 59 and 66] [177-H; 178-A-B; 184-D-E]

3.1 The Commission, in cases where the inquiry has been initiated by the Commission *suo moto,* shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the Competition Tribunal. The presence of the Commission before the Tribunal would help in complete adjudication and effective and expeditious disposal of matters. Being an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be. [para 21] [150-G-H; 151-A-B]

3.2 The concept of necessary and proper parties is an accepted norm of civil law and its principles can safely be applied to the proceedings before the Tribunal to a

limited extent. The procedure for entertaining the appeals is specified u/s 53-B of the Act. The expression 'any person' appearing in s. 53B has to be construed liberally as the provision first mentions specific government bodies then local authorities and enterprises, which term, in any case, is of generic nature and then lastly mentions 'any person'. Obviously, it is intended that expanded meaning be given to the term 'persons', i.e., persons or bodies who are entitled to appeal. The right of hearing is also available to the parties to appeal. The provisions clearly indicate that the Commission being a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be able to effectively exercise its right to appeal in terms of s. 53 of the Act. [para 72 and 75] [188-H; 189-A; 190-B-D]

3.3 Furthermore, in view of provisions of Regulations 14(4) and 51, the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of s.19 read with s.26 of the Act, is entitled to commence proceedings *suo moto* and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it are passed in such cases.The Tribunal has taken the view that in cases where proceedings initiated *suo moto* by the Commission, the Commission is a necessary party. Even otherwise, as a normal rule, the applicant/informant is dominus litis and has the right to control the proceedings, but at the same time, such applicant is required to notify all other parties against whom the applicant wishes to proceed. Even if an applicant fails to join a party the court has the discretion to direct joining of such party as the question of

impleadment has to be decided on the touchstone of Or.1,r,10 CPC, which provides that a necessary or proper party may be added. [para 75 and 80] [190-D-G; 192-F-G]

Udit Narain Singh Malpaharia v. Addl.Member, Board of Revenue, Bihar, **1963 Suppl. SCR 676 = AIR 1963 SC 786;** *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay* **1992 (2) SCR 1 = (1992) 2 SCC 524 – referred to.**

3.4 In the proceedings, which are initiated by the Commission *suo moto*, it shall be *dominus litis* of such proceedings while in other cases, the Commission being a regulatory body would be a proper party discharging inquisitorial, regulatory as well as adjudicatory functions and its presence before the Tribunal would be proper. The purpose is always to achieve complete, expeditious and effective adjudication. The Commission would be a necessary and/or a proper party in the proceedings before the Tribunal. [para 81] [192-H; 193-A-D]

Brahm Dutt v. Union of India **(2005) 2 SCC 431 – referred to.**

4.1 During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in s. 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order *inter alia* should : (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view u/s 26(1) of the Act) in clear terms that an act in contravention of the stated

provisions has been committed and continues to be committed or is about to be committed; (b) It is necessary to issue order of restraint and (c) from the record before the Commission, it is apparent that there is every likelihood of the party to the *lis*, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect on competition in the market. The three ingredients that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the informant-applicant should also be stronger than a mere *prima facie* case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be exercised in appropriate circumstances. [para 21 and 87] [151-C-H; 197-G-H; 198-A-B]

4.2 The power u/s 33 of the Act to pass temporary restraint order can only be exercised by the Commission when it has formed *prima facie* opinion and directed investigation in terms of s. 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations. [para 21] [152-A-B]

4.3 A bare reading of s.33 shows that the most significant expression used by the legislature in this provision is 'during inquiry'. The word 'inquiry' has not been defined in the Act. However, Regulation 18(2) explains that 'inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). Thus, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers u/s 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained

'inquiry' it will not be permissible to give meaning to this expression contrary to the statutory explanation. The Tribunal erred in holding that the inquiry commences as soon as the aspects highlighted in sub-section (1) of s.19 are fulfilled and brought to the notice of the Commission. It is obvious that Regulation 18(2) was not brought to the notice of the Tribunal which resulted in error of law, particularly, when examined in the light of other provisions and scheme of the Act as well. [para 83 and 91] [194-A-D; 201-F-G]

4.4 Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. The Director General is expected to conduct an investigation *only* in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation *suo motu*. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. [para 83] [194-D-G]

4.5 Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested u/s 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an *ex parte* order. Even at that stage, the Commission is required to record a satisfaction that there has been contravention of the provisions mentioned u/s 33 and that such contravention has been committed, continues to be

committed or is about to be committed. This satisfaction has to be understood differently from what is required while expressing a *prima facie* view in terms of s.26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or enquiry of the information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim *ex parte* injunction. The legislature has intentionally used the words not only '*ex parte'* but also 'without notice to such party'. Again for that purpose, the Commission has to apply its mind, whether or not it is necessary to give such a notice. [para 83] [194-G-H; 195-A-D]

4.6 The intent of the rule is to grant *ex parte* injunction, but it is more desirable that upon passing an order, as contemplated u/s 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure. Wherever the Commission has passed interim order, it shall hear the parties against whom such an order has been made, thereafter, *as soon as possible***. The expression '***as soon as possible'* **appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of jurisdiction in terms of s. 33 but it must be kept in mind that the *ex parte* restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most**

expeditiously. [para 83] [195-D-G]

Morgan Stanley Mutual Funds v. Kartick Das **1994 (1) Suppl. SCR 136 = (1994) 4 SCC 225 – referred to.**

5.1 In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reasons even while forming a *prima facie* view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties. [para 21] [152-C-D]

5.2 By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and therefore, proper reasoning is foundation of a just and fair decision. [para 69] [187-E-F]

Assistant Commissioner, C.T.D.W.C. v. M/s Shukla & Brothers **2010 (4) SCR 627 =JT 2010 (4) SC 35;** *Gurdial Singh Fijji vs.State of Punjab* **[1979] 2 SCC 368 – referred to.**

Alexander Machinery (Dudley) Ltd. v. Crabtree **1974 ICR 120 – referred to.**

5.3 Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision, conclusion or order passed on merits by the

Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a *prima facie* view, as required u/s 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms, by recording minimum reasons, that it is of the view that a *prima facie* case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act. [para 70] [187-G-H; 188-A-D]

6.1 The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources; productive efficiency, which ensures that costs of production are kept at a minimum; and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law. The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical ends of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open

market and resultantly, country's economy cannot be rules out. [para 5 and 7] [138-B-D; 139-F-H]

6.2 The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the Legislature upon the Commission u/ss 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with other provisions, certainly require issuance of certain directions in order to achieve the object of the Act and to ensure its proper implementation. The following directions are, therefore, issued which shall remain in force till appropriate regulations in that regard are framed by the competent authority:

(A) Regulation 16 prescribes limitation of 15 days for the Commission to hold its first ordinary meeting to consider whether *prima facie* case exists or not and in cases of alleged anti-competitive agreements and/or abuse of dominant position, the opinion on existence of *prima facie* case has to be formed within 60 days. Though the time period for such acts of the Commission has been specified, still it is expected of the Commission to hold its meetings and record its opinion about existence or otherwise of a *prima facie* case within a period much shorter than the stated period.

(B) All proceedings, including investigation and inquiry should be completed by the Commission/Director

General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.

(C) Wherever during the course of inquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

(D) The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of s. 26(1) of the Act.

(E) The Commission as well as the Director General shall maintain complete 'confidentiality' as envisaged u/s 57 of the Act and Regulation 35 of the Regulations. Wherever the 'confidentiality' is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in terms of the provisions of the Act and the Regulations in force. [para 93] [202-F-H; 203-A-H; 204-A]

6.3 In the considered view of the Court, the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matters. Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission.

Till such Regulations are framed, the period specified by this Court shall remain in force and the Court expects all the authorities concerned to adhere to the period specified. [para 94] [204-B-C]

7. The Commission, vide its order dated 8th December, 2009, had, for reasons stated therein, declined the extension of time to SAIL. This order of the Commission cannot be stated to be without jurisdiction or suffering from any apparent error of law. However, the Tribunal, in exercise of its judicial discretion, had interfered with the said order and granted further time to SAIL unconditionally. This Court would not interfere in the exercise of the discretion by the Tribunal except to the extent of imposition of cost. Therefore, SAIL is directed to pay cost of Rs. 25,000/- to the informant for seeking extension of time. The cost shall be conditional, whereafter, the additional reply filed by SAIL would be taken on record and the Commission shall apply its mind to form a *prima facie* view in terms of s. 26(1) of the Act, if the report of the Director General has not been received as yet. In the event the report prepared by the Director General during the period 8th December, 2009 to 11th January, 2010 has been received, the Commission shall proceed in accordance with the provisions of the Act and the principles of law enunciated in this judgment giving proper notice to the informant as well as to SAIL and pass appropriate orders. The order dated 15.2.2010 passed by the Tribunal is modified. The Commission shall proceed with the case in accordance with law and the principles enunciated *supra*. [para 91 and 95] [201-A-B; G-H; 202-A-C; 204-D]

Case Law Reference:

(1990) ECR II-00367	**referred to**	**para 26**
(1928) 1 KB 561 p. 568	**referred to**	**para 28**

(1888) 13 AC 595	**referred to**	**para 28**
1980 (1) SCR 910	**relied on**	**para 28**
2009 (14) SCR 627	**relied on**	**para 30**
(1979) 1 SCC 92	**relied on**	**para 33**
1983 (3) SCR 25	**relied on**	**para 34**
1999 (2) SCR 895	**relied on**	**para 34**
1999 (2) SCR 728	**referred to**	**para 34**
2008 (3) SCR 763	**referred to**	**para 34**
2003 (3) SCR 762	**referred to**	**para 36**
1985 (2) Suppl. SCR 131	**referred to**	**para 42**
1992 (1) SCR 917	**referred to**	**para 42**
2002 (2) SCR 383	**referred to**	**para 42**
(1863), 14 C.B. (N.S.) 180	**referred to**	**para 49**
(1935) 1 KB 249	**referred to**	**para 49**
(1991) Supp1 SCC 600	**referred to**	**para 60**
1992 (3) Suppl. SCR 594	**referred to**	**para 60**
(1978) 1 SCC 48	**referred to**	**para 61**
1980 (1) SCR 1071	**referred to**	**para 61**
(1982) 3 SCC 338	**referred to**	**para 62**
2003 (2) SCR 968	**referred to**	**para 63**
1992 (1) Suppl. SCR 53	**referred to**	**para 64**
(1972) ECR 0933	**referred to**	**para 65**
2010 (4) SCR 627	**referred to**	**para 68**
[1979] 2 SCC 368	**referred to**	**para 69**

1974 ICR 120	**referred to.**	**Para 69**
1963 Suppl. SCR 676	**referred to.**	**Para 78**
1992 (2) SCR 1	**referred to**	**Para 80**
(2005) 2 SCC 431	**referred to**	**Para 81**
1994 (1) Suppl. SCR 136	**referred to.**	**Para 86**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7779 of 2010.

From the Judgment & Order dated 15.02.2010 of the Competition Appellate Tribunal, New Delhi in Appeal No. 1 of 2009.

Gopal Subramaniam, SG, Tarun Gulati, Suhail Nathani, Neil Hildreth, Samir Gandhim, Rahul Rai, Sparsh Bhargava, Kishore Kunal, Rony John, Praveen Kumar, Shahi Mathews for the Appellant.

H.N. Salve, R.F. Nariman, Jagdeep Dhankhar, P.S. Shroff, Ruchi A. Mahajan, Harman Singh Sandhu, Jai Mohan, Chetna Rai, (for Suresh A. Shroff & Co.), Sunil Kumar Jain, Aneesh Mittal, K.P.S. Channi for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The application for leave to appeal is allowed.

2. The decision of the Government of India to liberalize its economy with the intention of removing controls persuaded the Indian Parliament to enact laws providing for checks and balances in the free economy. The laws were required to be enacted, primarily, for the objective of taking measures to avoid anti-competitive agreements and abuse of dominance as well as to regulate mergers and takeovers which result in distortion of the market. The earlier Monopolies and Restrictive Trade

Practices Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law. Most countries in the world have enacted competition laws to protect their free market economies- an economic system in which the allocation of resources is determined solely by supply and demand. The rationale of free market economy is that the competitive offers of different suppliers allow the buyers to make the best purchase. The motivation of each participant in a free market economy is to maximize self-interest but the result is favourable to society. As Adam Smith observed: "there is an invisible hand at work to take care of this".

3. As far as American law is concerned, it is said that the Sherman Act, 1890, is the first codification of recognized common law principles of competition law. With the progress of time, even there the competition law has attained new dimensions with the enactment of subsequent laws, like the Clayton Act, 1914, the Federal Trade Commission Act, 1914 and the Robinson-Patman Act, 1936. The United Kingdom, on the other hand, introduced the considerably less stringent Restrictive Practices Act, 1956, but later on more elaborate legislations like the Competition Act, 1998 and the Enterprise Act, 2002 were introduced. Australia introduced its current Trade Practices Act in 1974.

4. The overall intention of competition law policy has not changed markedly over the past century. Its intent is to limit the role of market power that might result from substantial concentration in a particular industry. The major concern with monopoly and similar kinds of concentration is not that being big is necessarily undesirable. However, because of the control exerted by a monopoly over price, there are economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition law is to remedy some of those situations where the activities of one firm

or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other. The model of perfect competition is the 'economic model' that usually comes to an economist's mind when thinking about the competitive markets.

5. As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

6. In India, a High Level Committee on Competition Policy and Law was constituted to examine its various aspects and make suggestions keeping in view the competition policy of India. This Committee made recommendations and submitted its report on 22nd of May, 2002. After completion of the consultation process, the Competition Act, 2002 (for short, the 'Act') as Act 12 of 2003, dated 12th December, 2003, was enacted. As per the statement of objects and reasons, this enactment is India's response to the opening up of its economy, removing controls and resorting to liberalization. The natural corollary of this is that the Indian market should be geared to face competition from within the country and outside. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose

establishment of a quasi judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body namely, the 'Competition Commission of India' (for short, the 'Commission') which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

7. The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed Regulations called The Competition Commission of India (General) Regulations, 2009 (for short, the 'Regulations'). The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out.

The present Act is quite contemporary to the laws presently in force in the United States of America as well as in the United Kingdom. In other words, the provisions of the present Act and Clayton Act, 1914 of the United States of America, The Competition Act, 1988 and Enterprise Act, 2002 of the United Kingdom have somewhat similar legislative intent and scheme of enforcement. However, the provisions of these Acts are not quite *pari materia* to the Indian legislation. In United Kingdom, the Office of Fair Trading is primarily regulatory and adjudicatory functions are performed by the Competition Commission and the Competition Appellate Tribunal. The U.S. Department of Justice Antitrust Division in United States, deals with all jurisdictions in the field. The competition laws and their enforcement in those two countries is progressive, applied rigorously and more effectively. The deterrence objective in these anti-trust legislations is clear from the provisions relating to criminal sanctions for individual violations, high upper limit for imposition of fines on corporate entities as well as extradition of individuals found guilty of formation of cartels. This is so, despite the fact that there are much larger violations of the provisions in India in comparison to the other two countries, where at the very threshold, greater numbers of cases invite the attention of the regulatory/adjudicatory bodies. Primarily, there are three main elements which are intended to be controlled by implementation of the provisions of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. Thus, while dealing with respective contentions raised in the present appeal and determining the impact of the findings recorded by the Tribunal, it is necessary for us to keep these objects and background in mind.

8. Jindal Steel & Powers Ltd. (for short the 'informant') invoked the provisions of Section 19 read with Section 26(1) of the Act by providing information to the Commission alleging

that M/s. Steel Authority of India Ltd. (for short 'SAIL') had, *inter alia*, entered into an exclusive supply agreement with Indian Railways for supply of rails. The SAIL, thus, was alleged to have abused its dominant position in the market and deprived others of fair competition and therefore, acted contrary to Section 3(4) (Anti-competitive Agreements) and Section 4(1) (Abuse of dominant position) of the Act. This information was registered by the Commission and was considered in its meeting held on 27th October, 2008 on which date the matter was deferred at the request of the informant for furnishing additional information. During the course of hearing, it was also brought to the notice of the Commission that a petition being Writ Petition (C) No.8531 of 2009, filed by the informant against the Ministry of Railways, was also pending in the High Court of Delhi at New Delhi. Vide order dated 10th November, 2009 the Commission directed the informant to file an affidavit with respect to the information furnished by it. The Commission also directed SAIL to submit its comments in respect of the information received by the Commission within two weeks from the date of the said meeting and the matter was adjourned till 8th December, 2009. On 19th November, 2009 a notice was issued to SAIL enclosing all information submitted by the informant. When the matter was taken up for consideration by the Commission on 8th December, 2009, the Commission took on record the affidavit filed by the informant on 30th November, 2009 in terms of the earlier order of the Commission, but SAIL requested extension of six weeks time to file its comments. Finding no justification in the request of the SAIL, the Commission, vide its order dated 8th December, 2009, declined the prayer for extension of time. In this order, it also formed the opinion that *prima facie* case existed against SAIL, and resultantly, directed the Director General, appointed under Section 16(1) of the Act, to make investigation into the matter in terms of Section 26(1) of the Act. It also granted liberty to SAIL to file its views and comments before the Director General during the course of investigation. Despite these orders, SAIL filed an interim reply before the Commission along with an application that it may

be heard before any interim order is passed by the Commission in the proceedings. On 22nd December, 2009 the Commission only reiterated its earlier directions made to the Director General for investigation and granted liberty to SAIL to file its reply before the Director General. The correctness of the directions contained in the order dated 8th December, 2009 was challenged by SAIL before the Competition Appellate Tribunal (for short, the 'Tribunal'). The Commission filed an application on 28th January, 2010 before the Tribunal seeking impleadment in the appeal filed by SAIL. It also filed an application for vacation of interim orders which had been issued by the Tribunal on 11th January, 2010, staying further proceedings before the Director General in furtherance of the directions of the Commission dated 8th December, 2009. It will be useful to refer to the order passed by the Commission on 8th December, 2009 at this stage itself which reads as under:

> "The meeting was held under the chairmanship of Sh. H.C. Gupta, Member.
>
> 2. The case was earlier considered by the Commission in its meetings held on 4.11.2009 and 10.11.2009. In the meeting of the Commission held on 10.11.2009, Mr. Suman Kr. Dey, VP and Head Legal and Mrs. Pallavi Shroff, Advocate (along with their fellow advocates) appeared before the Commission on behalf of the informant and made detailed admissions. As per decision taken during the meeting held on 10.11.2009, informant/ his counsel was directed to file an affidavit regarding the current status of the writ petition filed in the Delhi high Court, particular indicating its admission or otherwise and as to whether any other order has been passed by the Hon'ble High Court, in the matter so far. SAIL was also requested to furnish their views/comments in the matter within 2 weeks time.
>
> 3. In the meeting of the Commission held on 08.12.2009, the Commission took on record the affidavit

filed by the informant on 30.11.2009 regarding the current status of the writ petition filed in the Delhi High Court and certified copies of all the orders passed by the Hon'ble High Court, in the matter, till date. However, SAIL did not file its reply within the stipulated time and requested to allow extension of time from 3.12.2009 for a further period of six weeks. The Commission considered the above request of SAIL. However, the Commission did not allow any further extension.

4. The case was discussed in detail. After considering the details filed by the informant with the information and the entire relevant material/record available in this context as well as detailed submission made by the advocates of the informant before the Commission on 10.11.2009. Commission is of the opinion that there exists a prima facie case. Therefore, the Commission decided that the case be referred to Director General for investigation in the matter.

5. Secretary was accordingly directed to refer the case to DG for investigation and submission of the report within 45 days of the receipt of orders of the Commission. SAIL informed that they may furnish their views/comments in the matter to the DG."

9. As already noticed, the legality of this order was questioned before the Tribunal by SAIL on one hand, while, on the other hand the Commission had pressed its application for impleadment. In the application for impleadment it was averred by the Commission that it is a necessary and proper party for adjudication of the matter before the Tribunal and therefore, it should be impleaded as a party and be heard in accordance with law. Emphasis was also placed on Section 18 of the Act to contend that powers, functions and duties of the Commission were such that it would always be appropriate for the Commission to be impleaded as a party in appeals filed before the Tribunal. It was also averred in the application that

intervention of the Commission at the appellate proceedings would not prejudice anybody. The very maintainability of the appeal before the Tribunal was also questioned by the Commission on the ground that the order under appeal before the Tribunal was a direction *simpliciter* to conduct investigation and thus was not an order appealable within the meaning of Section 53A of the Act. The Tribunal in its order dated 15th February, 2010*, inter alia,* but significantly held as under:

(a) The application of the Commission for impleadment was dismissed, as in the opinion of the Tribunal the Commission was neither a necessary nor a proper party in the appellate proceedings before the Tribunal. Resultantly, the application for vacation of stay also came to be dismissed.

(b) It was held that giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review. Thus, the Commission is directed to give reasons while passing any order, direction or taking any decision.

(c) The appeal against the order dated 8th December, 2009 was held to be maintainable in terms of Section 53A of the Act. While setting aside the said order of the Commission and recording a finding that there was violation of principles of natural justice, the Tribunal granted further time to SAIL to file reply by 22nd February, 2010 in addition to the reply already filed by SAIL.

10. This order of the Tribunal dated 15th February, 2010 is impugned in the present appeal.

11. The informant, i.e. the person who wishes to complain to the Commission constituted under section 7 of the Act, would make such information available in writing to the Commission. Of course, such information could also be received from the Central Government, State Government, Statutory authority or on its own knowledge as provided under Section 19(1)(a) of the Act. When such information is received, the Commission is expected to satisfy itself and express its opinion that a *prima facie* case exists, from the record produced before it and then to pass a direction to the Director General to cause an investigation to be made into the matter. This direction, normally, could be issued by the Commission with or without assistance from other quarters including experts of eminence. The provisions of Section 19 do not suggest that any notice is required to be given to the informant, affected party or any other person at that stage. Such parties cannot claim the right to notice or hearing but it is always open to the Commission to call any 'such person', for rendering assistance or produce such records, as the Commission may consider appropriate.

12. The Commission, wherever, is of the opinion that no *prima facie* case exists justifying issuance of a direction under Section 26(1) of the Act, can close the case and send a copy of that order to the Central Government, State Government, Statutory Authority or the parties concerned in terms of Section 26(2) of the Act. It may be noticed that this course of action can be adopted by the Commission in cases of receipt of reference from sources other than of its own knowledge and without calling for the report from Director General.

13. In terms of Section 26(3), the Director General is supposed to take up the investigation and submit the report in accordance with law and within the time stated by the Commission in the directive issued under Section 26(1). After the report is submitted, there is a requirement and in fact specific duty on the Commission to issue notice to the affected parties to reply with regard to the details of the information and

the report submitted by the Director General and thereafter permit the parties to submit objections and suggestions to such documents. After consideration of objections and suggestions, if the Commission agrees with the recommendations of the Director General that there is no offence disclosed, it shall close the matter forthwith, communicating the said order to the person/authority as specified in terms of Section 26(6) of the Act. If there is contravention of any of the provisions of the Act and in the opinion of the Commission, further inquiry is needed, then it shall conduct such further inquiry into the matter itself or direct the Director General to do so in accordance with the provisions of the Act.

14. In terms of Section 26(7), the Commission is vested with the power to refer the matter to the Director General for further investigation, or even conduct further inquiry itself, if it so chooses. The Commission, depending upon the nature of the contravention, shall, after inquiry, adopt the course specified under Sections 27 and 28 of the Act in the case of abuse of dominant position and the procedure under Sections 29 to 31 of the Act in the case of combinations. The Commission is vested with powers of wide magnitude and serious repercussions as is evident from the provisions of Sections 27(d), 28 and 31(3) of the Act. The Commission is empowered to direct modification of agreements insofar as they are in contravention of Section 3, division of an enterprise enjoying dominant position, modification of combinations wherever it deems necessary and to ensure that there is no abuse or contravention of the statutory provisions. We may notice that the provisions relating to combinations have been duly notified vide Notifications dated 12th October 2007 and 15th May, 2009 respectively. However, in the facts of the present case, these provisions do not fall for consideration of the Court.

15. For conducting inquiry and passing orders, as contemplated under the provisions of the Act, the Commission is entitled to evolve its own procedure under Section 36(1) of

the Act. However, the Commission is also vested with the powers of a Civil Court in terms of Section 36(2) of the Act, though for a limited purpose. After completing the inquiry in accordance with law, the Commission is required to pass such orders as it may deem appropriate in the facts and circumstances of a given case in terms of Sections 26 to 31 of the Act.

16. Having referred to the background leading to the enactment of competition law in India and the procedure that the Commission is expected to follow while deciding the matters before it and facts of the case, now it will be appropriate for this Court to refer to the submissions made in light of the facts of this case. According to the Commission (the appellant herein), the directions passed in the order dated 8th December, 2009 under Section 26(1) of the Act are not appealable and further there is no requirement in law to afford an opportunity of hearing to the parties at the stage of formulating an opinion as to the existence of a *prima facie* case. It is also the contention of the Commission that in an appeal before the Tribunal it is the necessary party and that the Commission is not expected to state reasons for forming an opinion at the *prima facie* stage.

17. On the contrary, according to SAIL (the respondent herein), the principles of natural justice have been violated by the Commission while declining to grant extension of time to file its reply and that the direction in referring the matter to Director General was passed in undue haste.

18. The informant placed reliance upon Regulation 30(2) of the Regulations which empowers the Commission to pass such orders as it may deem fit on the basis of the facts available, where a party refuses to assist or otherwise does not provide necessary information within the stipulated time. Further, according to the informant there was no valid reason submitted by the SAIL which would justify grant of extension and

as such the order passed by the Commission on merits was not liable to be interfered.

19. We may also notice that learned counsel appearing for the parties had addressed the Court on certain allied issues which may not have strictly arisen from the memorandum of appeal, but the questions raised were of public importance and are bound to arise before the Commission, as well as the Tribunal in all matters in which the proceedings are initiated before the Commission. Thus, we had permitted the parties to argue those allied issues and, therefore, we would proceed to record the reasons while dealing with such arguments as well.

20. In order to examine the merit or otherwise of the contentions raised by the respective parties, it will be appropriate for us to formulate the following points for determination:—

(1) Whether the directions passed by the Commission in exercise of its powers under Section 26(1) of the Act forming a *prima facie* opinion would be appealable in terms of Section 53A(1) of the Act?

(2) What is the ambit and scope of power vested with the Commission under Section 26(1) of the Act and whether the parties, including the informant or the affected party, are entitled to notice or hearing, as a matter of right, at the preliminary stage of formulating an opinion as to the existence of the *prima facie* case?

(3) Whether the Commission would be a necessary, or at least a proper, party in the proceedings before the Tribunal in an appeal preferred by any party?

(4) At what stage and in what manner the

Commission can exercise powers vested in it under Section 33 of the Act to pass temporary restraint orders?

(5) Whether it is obligatory for the Commission to record reasons for formation of a *prima facie* opinion in terms of Section 26(1) of the Act?

(6) What directions, if any, need to be issued by the Court to ensure proper compliance in regard to procedural requirements while keeping in mind the scheme of the Act and the legislative intent? Also to ensure that the procedural intricacies do not hamper in achieving the object of the Act, i.e., free market and competition.

21. We would prefer to state our answers to the points of law argued before us at the very threshold. Upon pervasive analysis of the submissions made before us by the learned counsel appearing for the parties, we would provide our conclusions on the points noticed supra as follows:

(1) In terms of Section 53A(1)(a) of the Act appeal shall lie only against such directions, decisions or orders passed by the Commission before the Tribunal which have been specifically stated under the provisions of Section 53A(1)(a). The orders, which have not been specifically made appealable, cannot be treated appealable by implication. For example taking a *prima facie* view and issuing a direction to the Director General for investigation would not be an order appealable under Section 53A.

(2) Neither any statutory duty is cast on the

Commission to issue notice or grant hearing, nor any party can claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a *prima facie* case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.

However, the Commission, being a statutory body exercising, *inter alia*, regulatory jurisdiction, even at that stage, in its discretion and in appropriate cases may call upon the concerned party(s) to render required assistance or produce requisite information, as per its directive.

The Commission is expected to form such *prima facie* view without entering upon any adjudicatory or determinative process. The Commission is entitled to form its opinion without any assistance from any quarter or even with assistance of experts or others. The Commission has the power in terms of Regulation 17 (2) of the Regulations to invite not only the information provider but even 'such other person' which would include all persons, even the affected parties, as it may deem necessary. In that event it shall be 'preliminary conference', for whose conduct of business the Commission is entitled to evolve its own procedure.

(3) The Commission, in cases where the inquiry has been initiated by the Commission *suo moto,* shall be a necessary party and in all other cases the Commission shall be a proper party in the proceedings before the

Competition Tribunal. The presence of the Commission before the Tribunal would help in complete adjudication and effective and expeditious disposal of matters. Being an expert body, its views would be of appropriate assistance to the Tribunal. Thus, the Commission in the proceedings before the Tribunal would be a necessary or a proper party, as the case may be.

(4) During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders without giving notice to such party, where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order *inter alia* should : (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) It is necessary to issue order of restraint and (c) from the record before the Commission, it is apparent that there is every likelihood of the party to the *lis*, suffering irreparable and irretrievable damage or there is definite apprehension that it would have adverse effect on competition in the market.

The power under Section 33 of the Act to pass temporary restraint order can only be exercised by the Commission when it has formed *prima facie* opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations.

(5) In consonance with the settled principles of administrative jurisprudence, the Commission is expected to record at least some reason even while forming a *prima facie* view. However, while passing directions and orders dealing with the rights of the parties in its adjudicatory and determinative capacity, it is required of the Commission to pass speaking orders, upon due application of mind, responding to all the contentions raised before it by the rival parties.

Submissions made and findings in relation to Point No.1

22. If we examine the relevant provisions of the Act, the legislature, in its wisdom, has used different expressions in regard to exercise of jurisdiction by the Commission. The Commission may issue directions, pass orders or take decisions, as required, under the various provisions of the Act. The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act. Where prohibition under Section 3 relates to anti-competition agreements there Section 4 relates to the abuse of dominant position. The regulations and control in relation to combinations is dealt with in Section 6 of the Act. The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19

of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act. In other words, the provisions of Sections 19 and 26 are of great relevance and the discussion on the controversies involved in the present case would revolve on the interpretation given by the Court to these provisions.

23. Thus, we may reproduce provisions of Section 19 and 26 which read as under:

> **"19. Inquiry into certain agreements and dominant position of enterprise.—**(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
>
> (a) receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or
>
> (b) a reference made to it by the Central Government or a State Government or a statutory authority.
>
> (2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).
>
> (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—
>
> (a) creation of barriers to new entrants in the market;
>
> (b) driving existing competitors out of the market;

> (c) foreclosure of competition by hindering entry into the market;
>
> (d) accrual of benefits to consumers;
>
> (e) improvements in production or distribution of goods or provision of services;
>
> (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
>
> (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—
>
> (a) market share of the enterprise;
>
> (b) size and resources of the enterprise;
>
> (c) size and importance of the competitors;
>
> (d) economic power of the enterprise including commercial advantages over competitors;
>
> (e) vertical integration of the enterprises or sale or service network of such enterprises;
>
> (f) dependence of consumers on the enterprise;
>
> (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
>
> (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
>
> (i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(/) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market'' and "relevant product market".

(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products.

26. Procedure for inquiry under section 19

(1)On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

(4) The Commission may forward a copy of the report referred to in sub section (3) to the parties concerned:

Provided that in case the investigation is caused to be made based on reference received from the Central Government or the State Government or the statutory authority, the Commission shall forward a copy of the report referred to in subsection (3) to the Central Government or the State Government or the statutory authority, as the case may be.

(5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

(6) If, after consideration of the objections and suggestions referred to in sub section (5), if any, the Commission agrees with the recommendation of the Director General, it shall close the matter forthwith and pass such orders as it deems fit and communicate its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

(7) If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the

opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act."

24. The Tribunal has been vested with the power to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission in exercise of its powers under the provisions mentioned in Section 53A of the Act. The appeals preferred before the Tribunal under Section 53A of the Act are to be heard and dealt with by the Tribunal as per the procedure spelt out under Section 53B of the Act. It will be useful to refer to both these provisions at this stage itself, which read as under:—

"53A. Establishment of Tribunal. - (1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal, –

(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of this Act;

(b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under subsection(2) of section 53Q of this Act, and pass orders for the recovery of compensation under section 53N of this Act.

(2) The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify.

53B. Appeal to Appellate Tribunal. - (1) The Central Government or the State Government or a local authority

or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal."

25. As already noticed, in exercise of its powers, the Commission is expected to form its opinion as to the existence of a *prima facie* case for contravention of certain provisions of the Act and then pass a direction to the Director General to cause an investigation into the matter. These proceedings are

initiated by the intimation or reference received by the Commission in any of the manners specified under Section 19 of the Act. At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no *prima facie* case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper. In other words, the order passed by the Commission under Section 26(2) is a final order as it puts an end to the proceedings initiated upon receiving the information in one of the specified modes. This order has been specifically made appealable under Section 53A of the Act. In contradistinction, the direction under Section 26(1) after formation of a *prima facie* opinion is a direction *simpliciter* to cause an investigation into the matter. Issuance of such a direction, at the face of it, is an administrative direction to one of its own wings departmentally and is without entering upon any adjudicatory process. It does not effectively determine any right or obligation of the parties to the *lis.* Closure of the case causes determination of rights and affects a party, i.e. the informant; resultantly, the said party has a right to appeal against such closure of case under Section 26(2) of the Act. On the other hand, mere direction for investigation to one of the wings of the Commission is akin to a departmental proceeding which does not entail civil consequences for any person, particularly, in light of the strict confidentiality that is expected to be maintained by the Commission in terms of Section 57 of the Act and Regulation 35 of the Regulations.

26. Wherever, in the course of the proceedings before the Commission, the Commission passes a direction or interim order which is at the preliminary stage and of preparatory nature without recording findings which will bind the parties and where such order will only pave the way for final decision, it would not make that direction as an order or decision which affects the rights of the parties and therefore, is not appealable. At this stage the case of *Automec Srl v. Commission of the*

European Communities [(1990) ECR II-00367] can be noted, where the Court of First Instance held as under :—

> "42. As the Court of Justice has consistently held, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 173. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (judgment in Case 60/81 *IBM v. Commission* [1981] ECR 2639, at p. 2651, paragraph 8 et seq.). It follows that the fact that the contested act is a preparatory measure constitutes one of the barriers to the admissibility of an action for annulment which the Court may consider of its own motion, as the Court of Justice acknowledged in its judgment in Case 346/87 *Bossi v. Commission* [1989] ECR 303, especially at p.332 et seq."

27. The provisions of Sections 26 and 53A of the Act clearly depict the legislative intent that the framers never desired that all orders, directions and decisions should be appealable to the Tribunal. Once the legislature has opted to specifically state the order, direction and decision, which would be appealable by using clear and unambiguous language, then the normal result would be that all other directions, orders etc. are not only intended to be excluded but, in fact, have been excluded from the operation of that provision. The presumption is in favour of the legislation. The legislature is deemed to be aware of all the laws in existence and the consequences of the laws enacted by it. When other orders have been excluded from the scope of appellate jurisdiction, it will not be permissible

to include such directions or orders by implication or with reference to other provisions which hardly have any bearing on the matter in issue and thus make non-appealable orders appealable. The provisions of Section 53A(1)(a) use the expression 'any direction issued or decision made or order passed by the Commission'. There is no occasion for the Court to read and interpret the word 'or' in any different form as that would completely defeat the intention of the legislature. The contention raised before us is that the word 'or' is normally disjunctive and 'and' is normally conjunctive, but at the same time they can be read *vice versa*. The respondent argued that the expression 'any direction issued' should be read disjunctive and that gives a complete right to a party to prefer an appeal under Section 53A, against a direction for investigation, as that itself is an appealable right independent of any decision or order which may be made or passed by the Commission.

28. It is a settled principle of law that the words 'or' and 'and' may be read as *vice versa* but not normally. "You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'….." [*Green v. Premier Glynrhonwy Slate Co.* (1928) 1 KB 561 p. 568)]. As pointed out by Lord Halsbury, the reading of 'or' as 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done." [*Mersey Docks and Harbour Board v. Henderson Bros.* (1888) 13 AC 595 at 603)]. The Court adopted with approval Lord Halsbury's principle and in fact went further by cautioning against substitution of conjunctions in the case of *Municipal Corporation of Delhi vs. Tek Chand Bhatia* [(1980) 1 SCC 158], where the Court held as under:—

> "11. ……As Lord Halsbury L.C. observed in *Mersey Docks & Harbour Board v. Henderson* [LR (1888) 13 AC 603], the reading of "or" as "and" is not to be resorted to "unless some other part of the same statute or the clear

intention of it requires that to be done". The substitution of conjunctions, however, has been sometimes made without sufficient reasons, and it has been doubted whether some of the cases of turning "or" into "and" and vice versa have not gone to the extreme limit of interpretation."

29. To us, the language of the Section is clear and the statute does not demand that we should substitute 'or' or read this word interchangeably for achieving the object of the Act. On the contrary, the objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature.

30. We may usefully refer to similar interpretation given by this Court in the case of *Super Cassettes Industries Ltd. vs. State of U.P.* [(2009)10 SCC 531], wherein the Court was dealing with cancellation of a notice issued under Section 9(2) of the U.P. Imposition of Ceiling of Land Holdings Act, 1960, requiring submission of a statement by the tenure holder for determination of surplus land in accordance with law. Sub-section (1) of Section 13 of the said Act read as under:—

"13. Appeals—(1) Any party aggrieved by an order under sub-section (2) of Section 11 or Section 12, may, within thirty days of the date of the order, prefer an appeal to the Commissioner within whose jurisdiction the land or any part thereof is situate."

31. The State of UP through its Collector had preferred an appeal under Section 13 of the Act against an order passed by the authority cancelling the notice which had been issued under Section 9(2) of the Act. The contention raised was that

the said order amounted to an order being passed under Section 11(2) of the Act. An order passed under Section 11(2) of the Act in furtherance of the statement prepared by the tenure holder was final and conclusive and could not be called in question in any court of law. The Court while interpreting the provisions of Section 13(1) held that it is only the specific order passed under Section 11(2) and Section 12 of the Act which could be appealed against and while applying its rule held as under:—

"23. It is well known that right of appeal is not a natural or inherent right. It cannot be assumed to exist unless expressly provided for by statute. Being a creature of statute, remedy of appeal must be legitimately traceable to the statutory provisions…….

xxx xxx xxx xxx

31. Section 13 provides a right of appeal to a party aggrieved by an order under Sub-section (2) of Section 11 or Section 12 and no other. In other words, any order passed by the Prescribed Authority other than the order under-Section (2) of Section 11 or Section 12 is not appealable. From any reckoning, the order dated December 17, 2003 is neither an order under Sub-section (2) of Section 11 nor an order under Section 12. Act 1960 does not make the order of the Prescribed Authority canceling the notice issued under Section 9(2) amenable to appeal. Such order does not fall within the ambit of Section 13."

32. We find that the view taken by the Court in this case squarely applies to the case in hand as well. Right to appeal is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally, if given either of these extreme interpretations, it is bound to adversely affect the

legislative object as well as hamper the proceedings before the appropriate forum.

33. In the case of *Maria Cristina De Souza Sadder vs. Amria Zurana Pereira Pinto* [(1979) 1 SCC 92], this Court held as under:

> "5 …It is no doubt well-settled that the right of appeal is a substantive right and it gets vested in a litigant no sooner the *lis* is commenced in the Court of the first instance, and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferring such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof."

34. The principle of 'appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure' is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law. Reference may be made to *M. Ramnarain Private Limited v. State Trading Corporation of India Limited,* [(1983) 3 SCC 75] and *Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad* [(1999) 4 SCC 468]. Right of appeal is neither a natural nor inherent right vested in a party. It is substantive statutory right regulated by the statute creating it. The cases of *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar* [(1999) 3 SCC 722] and *Kashmir Singh vs. Harnam Singh* [2008 AIR SC 1749] may be referred to on this point. Thus, it is evident that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In absence of any specific provision creating a right in a party to file an

appeal, such right can neither be assumed nor inferred in favour of the party.

35. A statute is stated to be the edict of Legislature. It expresses the will of Legislature and the function of the Court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The Courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the Court would keep in mind that its function is *jus dicere*, not *jus dare*. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.

36. This Court in the case of *Shiv Shakti Co-op. Housing Society, Nagpur vs. Swaraj Developers* [(2003) 6 SCC 659], while referring to the principles for interpretation of statutory provisions, held as under:

> "19. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. *(See Institute of Chartered Accountants of India v. Price Waterhouse.)* The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner Courts cannot aid the

legislatures' defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. *(See State of Gujarat v. Dilipbhai Nathjibhai Patel)*. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. [*See Stock v. Frank Jones (Tipton) Ltd.*] Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of a doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (*Per Lord Loreburn, L.C. in Vickers Sons and Maxim Ltd. v. Evans*, quoted in Jumma Masjid v. Kodimaniandra Deviah."

37. The Law Commission of India, in its 183rd Report, while dealing with the need for providing principles of interpretation of statute as regards the extrinsic aids of interpretation in General Clauses Act, 1897, expressed the view that a statute is a will of legislature conveyed in the form of text. Noticing that the process of interpretation is as old as language, it says that the rules of interpretation were evolved at a very early stage of Hindu civilization and culture and the same were given by *'Jaimini'*, the author of *Mimamsat Sutras;* originally meant for *shrutis,* they were employed for the interpretation of *Smritis* as well. While referring to the said historical background, the Law Commission said:

"It is well settled principle of law that as the statute is an edict of the Legislature, the conventional way of interpreting or construing a statute is to seek the intention of legislature. The intention of legislature assimilates two aspects; one aspect carries the concept of 'meaning', i.e., what the word means and another aspect conveys the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute. The process of construction, therefore, combines both the literal and purposive approaches. However, necessity of interpretation would

arise only where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute. If the language is clear and unambiguous, no need of interpretation would arise. In this regard, a Constitution Bench of five Judges of the Supreme Court in *R.S. Nayak v. A.R. Antulay,* AIR 1984 SC 684 has held:

"...If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self defeating."

Recently, again Supreme Court in *Grasim Industries Ltd. v. Collector of Customs, Bombay,* (2002) 4 SCC 297 has followed the same principle and observed:

"Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for Court to take upon itself the task of amending or altering the statutory provisions."

38. Thus, the Court can safely apply rule of plain construction and legislative intent in light of the object sought to be achieved by the enactment. While interpreting the provisions of the Act, it is not necessary for the Court to implant, or to exclude the words, or over emphasize language of the provision where it is plain and simple. The provisions of the Act should be permitted to have their full operation rather than causing any impediment in their application by unnecessarily expanding the scope of the provisions by implication.

39. We are unable to persuade ourselves to agree with the reasoning given and view taken by the Tribunal in this regard,

in the impugned order. Even though the Tribunal referred to the dictum of the Court in the case of *Tek Chand Bhatia* (supra), it still concluded that the use of the words 'any' and 'or' were the expressions of wide magnitude and that 'any' being an adjective qualifies the nouns under the relevant provisions, i.e. directions, decisions and orders, all were appealable without exception.

40. The expression 'any', in fact, qualifies each of the three expressions 'direction issued or decision made or order passed'. It cannot be said that it signifies any one of them and, particularly, only 'direction issued'. All these words have been used by the legislature consciously and with a purpose. It has provided for complete mechanism ensuring their implementation under the provisions of the Act, for example, under Section 26(1) the Commission is expected to make a *decision* by formation of a *prima facie* opinion and issue a *direction* to cause an investigation to be made by the Director General and after receiving the report has to take a *final view* in terms of Section 26(6) and even otherwise, it has the discretion to form an opinion and even close a case under Section 26(2). Having enacted these provisions, the legislature in its wisdom, made only the order under Section 26(2) and 26(6) appealable under Section 53A of the Act. Thus, it specifically excludes the opinion/decision of the authority under Section 26(1) and even an order passed under Section 26(7) directing further inquiry, from being appealable before the Tribunal. Therefore, it would neither be permissible nor advisable to make these provisions appealable against the legislative mandate.

41. The existence of such excluding provisions, in fact, exists in different statutes. Reference can even be made to the provisions of Section 100A of the Code of Civil Procedure, where an order, which even may be a judgment, under the provisions of the Letters Patent of different High Courts and are appealable within that law, are now excluded from the scope

of the appealable orders. In other words, instead of enlarging the scope of appealable orders under that provision, the Courts have applied the rule of plain construction and held that no appeal would lie in conflict with the provisions of Section 100A of the Code of Civil Procedure.

42. ***Expressum facit cessare tacitum*** – Express mention of one thing implies the exclusion of other. (Expression precludes implication). This doctrine has been applied by this Court in various cases to enunciate the principle that expression precludes implication. [*Union of India vs. Tulsiram Patel,* AIR 1985 SC 1416]. It is always safer to apply plain and primary rule of construction. The first and primary rule of construction is that intention of the legislature is to be found in the words used by the legislature itself. The true or legal meaning of an enactment is derived by construing the meaning of the word in the light of the discernible purpose or object which comprehends the mischief and its remedy to which an enactment is directed. [*State of Himachal Pradesh vs. Kailash Chand Mahajan* (AIR 1992 SC 1277) and *Padma Sundara Rao v. State of T.N.* (AIR 2002 SC 1334)].

43. It is always important for the Court to keep in mind the purpose which lies behind the statute while interpreting the statutory provisions. This was stated by this Court in *Padma Sundara Rao's case* (supra) as under:—

> "11. … The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage,*218 FR 547). The view was reiterated in *Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama* (AIR 1990 SC 981)."

44. Applying these principles to the provisions of Section 53A(1)(a), we are of the considered view that the appropriate interpretation of this provision would be that no other direction, decision or order of the Commission is appealable except those expressly stated in Section 53A(1)(a). The maxim *est boni judicis ampliare justiciam, non-jurisdictionem* finds application here. Right to appeal, being a statutory right, is controlled strictly by the provision and the procedure prescribing such a right. To read into the language of Section 53A that every direction, order or decision of the Commission would be appealable will amount to unreasonable expansion of the provision, when the language of Section 53A is clear and unambiguous. Section 53B(1) itself is an indicator of the restricted scope of appeals that shall be maintainable before the Tribunal; it provides that the aggrieved party has a right of appeal against 'any direction, decision or order referred to in Section 53A(1)(a).' If the legislature intended to enlarge the scope and make orders, other than those, specified in Section 53A(1)(a), then the language of Section 53B(1) ought to have been quite distinct from the one used by the legislature.

45. One of the parties before the Commission would, in any case, be aggrieved by an order where the Commission grants or declines to grant extension of time. Thus, every such order passed by the Commission would have to be treated as appealable as per the contention raised by the respondent before us as well as the view taken by the Tribunal. In our view, such orders cannot be held to be appealable within the meaning and language of Section 53A of the Act and also on the principle that they are not orders which determine the rights of the parties. No appeal can lie against such an order. Still the parties are not remediless as, when they prefer an appeal against the final order, they can always take up grounds to challenge the interim orders/directions passed by the Commission in the memorandum of appeal. Such an approach would be in consonance with the procedural law prescribed in

Order XLIII Rule 1A and even other provisions of Code of Civil Procedure.

46. The above approach will subserve the purpose of the Act in the following manner :

First, expeditious disposal of matters before the Commission and the Tribunal is an apparent legislative intent from the bare reading of the provisions of the Act and more particularly the Regulations framed thereunder. Second, if every direction or recording of an opinion are made appealable then certainly it would amount to abuse of the process of appeal. Besides this, burdening the Tribunal with appeals against non-appealable orders would defeat the object of the Act, as a prolonged litigation may harm the interest of free and fair market and economy. Finally, we see no ambiguity in the language of the provision, but even if, for the sake of argument, we assume that the provision is capable of two interpretations then we must accept the one which will fall in line with the legislative intent rather than the one which defeat the object of the Act.

47. For these reasons, we have no hesitation in holding that no appeal will lie from any decision, order or direction of the Commission which is not made specifically appealable under Section 53A(1)(a) of the Act. Thus, the appeal preferred by SAIL ought to have been dismissed by the Tribunal as not maintainable.

Submissions made and findings in relation to Point Nos.2 & 5

48. The issue of notice and hearing are squarely covered under the ambit of the principles of natural justice. Thus, it will not be inappropriate to discuss these issues commonly under the same head. The principle of *audi alteram partem,* as commonly understood, means 'hear the other side or hear both sides before a decision is arrived at'. It is founded on the rule

that no one should be condemned or deprived of his right even in quasi judicial proceedings unless he has been granted liberty of being heard.

49. In cases of *Cooper v. Wands Worth Board of Works* [(1863), 14 C.B. (N.S.) 180] and *Errington v. Minister of Health,* [(1935) 1 KB 249], the Courts in the United Kingdom had enunciated this principle in the early times. This principle was adopted under various legal systems including India and was applied with some limitations even to the field of administrative law. However, with the development of law, this doctrine was expanded in its application and the Courts specifically included in its purview, the right to notice and requirement of reasoned orders, upon due application of mind in addition to the right of hearing. These principles have now been consistently followed in judicial dictum of Courts in India and are largely understood as integral part of principles of natural justice. In other words, it is expected of a tribunal or any quasi judicial body to ensure compliance of these principles before any order adverse to the interest of the party can be passed. However, the exclusion of the principles of natural justice is also an equally known concept and the legislature has the competence to enact laws which specifically exclude the application of principles of natural justice in larger public interest and for valid reasons. Generally, we can classify compliance or otherwise, of these principles mainly under three categories. First, where application of principles of natural justice is excluded by specific legislation; second, where the law contemplates strict compliance to the provisions of principles of natural justice and default in compliance thereto can result in vitiating not only the orders but even the proceedings taken against the delinquent; and third, where the law requires compliance to these principles of natural justice, but an irresistible conclusion is drawn by the competent court or forum that no prejudice has been caused to the delinquent and the non-compliance is with regard to an action of directory nature. The cases may fall in any of these categories and therefore, the Court has to examine the facts

of each case in light of the Act or the Rules and Regulations in force in relation to such a case. It is not only difficult but also not advisable to spell out any straight jacket formula which can be applied universally to all cases without variation.

50. In light of the above principles, let us examine whether in terms of Section 26(1) of the Act read with Regulations in force, it is obligatory upon the Commission to issue notice to the parties concerned (more particularly the affected parties) and then form an opinion as to the existence of a *prima facie* case, or otherwise, and to issue direction to the Director General to conduct investigation in the matter.

51. At the very outset, we must make it clear that we are considering the application of these principles only in light of the provisions of Section 26(1) and the finding recorded by the Tribunal in this regard. The intimation received by the Commission from any specific person complaining of violation of Section 3(4) read with Section 19 of the Act, sets into the motion, the mechanism stated under Section 26 of the Act. Section 26(1), as already noticed, requires the Commission to form an opinion whether or not there exists a *prima facie* case for issuance of direction to the Director General to conduct an investigation. This section does not mention about issuance of any notice to any party before or at the time of formation of an opinion by the Commission on the basis of a reference or information received by it. Language of Sections 3(4) and 19 and for that matter, any other provision of the Act does not suggest that notice to the informant or any other person is required to be issued at this stage. In contra-distinction to this, when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before

arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be. This obviously means that wherever the legislature has intended that notice is to be served upon the other party, it has specifically so stated and we see no compelling reason to read into the provisions of Section 26(1) the requirement of notice, when it is conspicuous by its very absence. Once the proceedings before the Commission are completed, the parties have a right to appeal under Section 53A(1)(a) in regard to the orders termed as appealable under that provision. Section 53B requires that the Tribunal should give, parties to the appeal, notice and an opportunity of being heard before passing orders, as it may deem fit and proper, confirming, modifying or setting aside the direction, decision or order appealed against.

52. Some of the Regulations also throw light as to when and how notice is required to be served upon the parties including the affected party. Regulation 14(7) states the powers and functions, which are vested with the Secretary of the Commission to ensure timely and efficient disposal of the matter and for achieving the objectives of the Act. Under Regulation 14(7)(f) the Secretary of the Commission is required to serve notice of the date of ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a *prima facie* case and to convey the directions of the Commission for investigation, or to issue notice of an inquiry after receipt and consideration of the report of the Director General. In other words, this provision talks of issuing a notice for holding an ordinary meeting of the Commission. This notice is intended to be issued only to the members of the Commission who constitute 'preliminary conference' as they alone have to decide about the existence of a *prima facie* case. Then, it has to convey the direction of the Commission to the Director General. After the receipt of the report of the Director General, it has to issue notice to the parties concerned.

53. Regulation 17(2) empowers the Commission to invite the information provider and *such other person,* as is necessary, for the preliminary conference to aid in formation of a *prima facie* opinion, but this power to invite cannot be equated with requirement of statutory notice or hearing. Regulation 17(2), read in conjunction with other provisions of the Act and the Regulations, clearly demonstrates that this provision contemplates to invite the parties for collecting such information, as the Commission may feel necessary, for formation of an opinion by the preliminary conference. Thereafter, an inquiry commences in terms of Regulation 18(2) when the Commission directs the Director General to make the investigation, as desired.

54. Regulation 21(8) also indicates that there is an obligation upon the Commission to consider the objections or suggestions from the Central Government or the State Government or the Statutory Authority or the parties concerned and then Secretary is required to give a notice to fix the meeting of the Commission, if it is of the opinion that further inquiry is called for. In that provision notice is contemplated not only to the respective Governments but even to the parties concerned.

55. The notices are to be served in terms of Regulation 22 which specifies the mode of service of summons upon the concerned persons and the manner in which such service should be effected. The expression '*such other person',* obviously, would include all persons, such as experts, as stated in Regulation 52 of the Regulations. There is no scope for the Court to arrive at the conclusion that such other person would exclude anybody including the informant or the affected parties, summoning of which or notice to whom, is considered to be appropriate by the Commission.

56. With some significance, we may also notice the provision of Regulation 33(4) of the Regulations, which requires that on being satisfied that the reference is complete, the Secretary shall place it during an ordinary meeting of the

Commission and seek necessary instructions regarding the parties to whom the notice of the meeting has to be issued. This provision read with Sections 26(1) and 26(5) shows that the Commission is expected to apply its mind as to whom the notice should be sent before the Secretary of the Commission can send notice to the parties concerned. In other words, issuance of notice is not an automatic or obvious consequence, but it is only upon application of mind by the authorities concerned that notice is expected to be issued.

57. Regulation 48, which deals with the procedure for imposition of penalty, requires under Sub-Regulation (2) that show cause notice is to be issued to any person or enterprise or a party to the proceedings, as the case may be, under Sub-Regulation (1), giving him not less than 15 days time to explain the conduct and even grant an oral hearing, then alone to pass an appropriate order imposing penalty or otherwise.

58. Issue of notice to a party at the initial stage of the proceedings, which are not determinative in their nature and substance, can hardly be implied; wherever the legislature so desires it must say so specifically. This can be illustrated by referring to the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 under the Customs Tariff Act, 1975. Rule 5(5) provides that while dealing with an application submitted by aggrieved domestic producers accounting for not less than 25% of total production of the like article, the designated authority shall notify the government of exporting country before proceeding to initiate an investigation. Rule 6(1) also specifically requires the designated authority to issue a public notice of the decision to initiate investigation. In other words, notice prior to initiation of investigation is specifically provided for under the Anti-Dumping Rules, whereas, it is not so under the provisions of Section 26(1) of the Act.

59. Cumulative reading of these provisions, in conjunction

with the scheme of the Act and the object sought to be achieved, suggests that it will not be in consonance with the settled rules of interpretation that a statutory notice or an absolute right to claim notice and hearing can be read into the provisions of Section 26(1) of the Act. Discretion to invite, has been vested in the Commission, by virtue of the Regulations, which must be construed in their plain language and without giving it undue expansion.

60. It is difficult to state as an absolute proposition of law that in all cases, at all stages and in all events the right to notice and hearing is a mandatory requirement of principles of natural justice. Furthermore, that non-compliance thereof, would always result in violation of fundamental requirements vitiating the entire proceedings. Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this Court. Wherever, such exclusion is founded on larger public interest and is for compelling and valid reasons, the Courts have declined to entertain such a challenge. It will always depend upon the nature of the proceedings, the grounds for invocation of such law and the requirement of compliance to the principles of natural justice in light of the above noticed principles. In the case of *Tulsiram Patel* (supra), this Court took the view that *audi alteram partem* rule can be excluded where a right to a prior notice and an opportunity of being heard, before an order is passed, would obstruct the taking of prompt action or where the nature of the action to be taken, its object and purpose as well as the scheme of the relevant statutory provisions warrant its exclusion. This was followed with approval and also greatly expanded in the case of *Delhi Transport Corporation vs. Delhi Transport Corporation Mazdoor Congress* [(1991) Supp1 SCC 600], wherein the Court held that rule of *audi alteram partem* can be excluded, where having regard to the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions, fairness in action does not demand its application and even

warrants its exclusion. In the case of *Union of India v. W.N. Chadha* [(1993) Supp 4 SCC 260], wherein the Court was primarily concerned with Section 166(9) of the Criminal Procedure Code and the application of principles of natural justice in the domain of administrative law and while deciding whether a person was entitled to the right of hearing, held as under:-

> "88. The principle of law that could be deduced from the above decisions is that it is no doubt true that the fact that a decision, whether a prima facie case has or has not been made out, is not by itself determinative of the exclusion of hearing, but the consideration that the decision was purely an administrative one and a full-fledged inquiry follows is a relevant — and indeed a significant — factor in deciding whether at that stage there ought to be hearing which the statute did not expressly grant.
>
> 89. Applying the above principle, it may be held that when the investigating officer is not deciding any matter except collecting the materials for ascertaining whether a prima facie case is made out or not and a full inquiry in case of filing a report under Section 173(2) follows in a trial before the Court or Tribunal pursuant to the filing of the report, it cannot be said that at that stage rule of *audi alteram partem* superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. The question is not whether *audi alteram partem* is implicit, but whether the occasion for its attraction exists at all."

61. The exclusion of principles of natural justice by specific legislative provision is not unknown to law. Such exclusion would either be specifically provided or would have to be imperatively inferred from the language of the provision. There may be cases where post decisional hearing is contemplated. Still there may be cases where 'due process' is specified by offering a full

hearing before the final order is made. Of course, such legislation may be struck down as offending due process if no safeguard is provided against arbitrary action. It is an equally settled principle that in cases of urgency, a post-decisional hearing would satisfy the principles of natural justice. Reference can be made to the cases of *Maneka Gandhi v. Union of India* [(1978) 1 SCC 48] and *State of Punjab v. Gurdayal* [AIR 1980 SC 319]. The provisions of Section 26(1) clearly indicate exclusion of principles of natural justice, at least at the initial stages, by necessary implication. In cases where the conduct of an enterprise, association of enterprises, person or association of persons or any other legal entity, is such that it would cause serious prejudice to the public interest and also violates the provisions of the Act, the Commission will be well within its jurisdiction to pass *ex parte ad interim* injunction orders immediately in terms of Section 33 of the Act, while granting post decisional hearing positively, within a very short span in terms of Regulation 31(2). This would certainly be more than adequate compliance to the principles of natural justice.

62. It is true that in administrative action, which entails civil consequences for a person, the principles of natural justice should be adhered to. In the case of *Raj Restaurant and Anr. v. Municipal Corporation of Delhi,* [(1982) 3 SCC 338], the Supreme Court held as under:

> "5. Where, in order to carry on business a licence is required, obviously refusal to give licence or cancellation or revocation of licence would be visited with both civil and pecuniary consequences and as the business cannot be carried on without the licence it would also affect the livelihood of the person. In such a situation before either refusing to renew the licence or cancelling or revoking the same, the minimum principle of natural justice of notice and opportunity to represent one's case is a must. It is not disputed that no such opportunity was given before taking the decision not to renew the licence though it is admitted

that the for the reasons herein before set out the licence was not renewed such a decision in violation of the principle of natural justice would b void. Now, it is true that no specific order is made setting out the reason for refusal to renew the licence. But the action taken of sealing the premises for carrying on the business without a licence clearly implies that there was refusal to renew the licence and the reasons are now disclosed. And the action disclosing the decision being in violation of the principle of natural justice, deserves to be quashed."

63. Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute. Decision in this regard is, in fact, panacea to the rival contentions which may be raised by the parties in a given case. Reference can be made to the judgment of this Court in the case of *Canara Bank vs. Debasis Das* [(2003) 4 SCC 557]. We may also notice that the scope of duty cast upon the authority or a body and the nature of the function to be performed cannot be rendered nugatory by imposition of unnecessary directions or impediments which are not postulated in the plain language of the section itself. 'Natural justice' is a term, which may have different connotation and dimension depending upon the facts of the case, while keeping in view, the provisions of the law applicable. It is not a codified concept, but are well defined principles enunciated by the Courts. Every quasi judicial order would require the concerned authority to act in conformity with these principles as well as ensure that the indicated legislative object is achieved. Exercise of power should be fair and free of arbitrariness.

64. Now, let us examine what kind of function the Commission is called upon to discharge while forming an opinion under Section 26(1) of the Act. At the face of it, this is

an inquisitorial and regulatory power. A Constitution Bench of this Court in the case of *Krishna Swami vs. Union of India* [(1992) 4 SCC 605] explained the expression 'inquisitorial'. The Court held that the investigating power granted to the administrative agencies normally is inquisitorial in nature. The scope of such investigation has to be examined with reference to the statutory powers. In that case the Court found that the proceedings, before the High Power Judicial Committee constituted, were neither civil nor criminal but *sui generis.* Referring to the investigation under criminal jurisprudence as well as scope of inquiry under service jurisprudence, the Court held as under:

"61. The problem could be broached through a different perspective as well. In normal parlance, in a criminal case, investigation connotes discovery and collection of evidence before charge-sheet is filed and based thereon definite charges are framed. Inquiry by a Magistrate is stopped when the trial begins. The trial is a culminating process to convict or acquit an accused. In Service Jurisprudence, departmental inquiry against a delinquent employee, bears similar insignia to impose penalty. At the investigation stage the accused or the charged officer has no say in the matter nor is he entitled to any opportunity. The disciplinary authority or inquiry officer, if appointed, on finding that the evidence discloses prima facie ground to proceed against the delinquent officer, the inquiry would be conducted. The criminal court frames charges after supplying the record of investigation relied on. Equally, the disciplinary authority/inquiry officer would frame definite charge or charges and would communicate the same together with a statement of the facts in support thereof sought to be relied on and would call upon the delinquent officer to submit his explanation or written statement of defence etc. At the trial/inquiry the person is entitled to reasonable opportunity to defend himself……."

65. The exceptions to the doctrine of *audi alteram partem* are not unknown either to civil or criminal jurisprudence in our country where under the Code of Civil Procedure *ex-parte* injunction orders can be passed by the court of competent jurisdiction while the courts exercising criminal jurisdiction can take cognizance of an offence in absence of the accused and issue summons for his appearance. Not only this, the Courts even record pre-charge evidence in complaint cases in absence of the accused under the provisions of the Code of Criminal Procedure. Similar approach is adopted under different systems in different countries. Reference in this regard can be made to the case of *Azienda Colori Nazionali - ACNA S.P.A. v Commission of the European Communities,* [(1972) ECR 0933], where the argument was raised that the Commission had infringed the administrative procedure laid down in Regulation No. 17/62 of the European Council Regulation. In that case the Commission of the European Communities sent the notice of the objections to the applicant at the time of informing the applicant about the decision to initiate procedure to establish infringement of rules on competition. The European Court of Justice while holding that sending notification of the above mentioned decision simultaneously with the notice of objections cannot affect the rights of the defence, stated as under:-

> "10. Neither the provisions in force nor the general principles of law require notice of the Decision to initiate the procedure to establish an infringement to be given prior to notification of the objections adopted against the interested parties in the context of such proceedings.
>
> 11. It is the notice of objections alone and not the Decision to commence proceedings which is the measure stating the final attitude of the Commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced."

66. The jurisdiction of the Commission, to act under this

provision, does not contemplate any adjudicatory function. The Commission is not expected to give notice to the parties, i.e. the informant or the affected parties and hear them at length, before forming its opinion. The function is of a very preliminary nature and in fact, in common parlance, it is a departmental function. At that stage, it does not condemn any person and therefore, application of *audi alteram partem* is not called for. Formation of a *prima facie* opinion departmentally (Director General, being appointed by the Central Government to assist the Commission, is one of the wings of the Commission itself) does not amount to an adjudicatory function but is merely of administrative nature. At best, it can direct the investigation to be conducted and report to be submitted to the Commission itself or close the case in terms of Section 26(2) of the Act, which order itself is appealable before the Tribunal and only after this stage, there is a specific right of notice and hearing available to the aggrieved/affected party. Thus, keeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice of hearing is not contemplated under the provisions of Section 26(1) of the Act. However, Regulation 17(2) gives right to Commission for seeking information, or in other words, the Commission is vested with the power of inviting such persons, as it may deem necessary, to render required assistance or produce requisite information or documents as per the direction of the Commission. This discretion is exclusively vested in the Commission by the legislature. The investigation is directed with dual purpose; (a) to collect material and verify the information, as may be, directed by the Commission, (b) to enable the Commission to examine the report upon its submission by the Director General and to pass appropriate orders after hearing the parties concerned. No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of *prima facie*

opinion and the matters are dealt with effectively and expeditiously.

67. We may also usefully note that the functions performed by the Commission under Section 26(1) of the Act are in the nature of preparatory measures in contrast to the decision making process. That is the precise reason that the legislature has used the word 'direction' to be issued to the Director General for investigation in that provision and not that the Commission shall take a decision or pass an order directing inquiry into the allegations made in the reference to the Commission.

68. The Tribunal, in the impugned judgment, has taken the view that there is a requirement to record reasons which can be express, or, in any case, followed by necessary implication and therefore, the authority is required to record reasons for coming to the conclusion. The proposition of law whether an administrative or quasi judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more *res integra* and has been settled by a recent judgment of this Court in the case of *Assistant Commissioner, C.T.D.W.C. v. M/s Shukla & Brothers* [JT 2010 (4) SC 35], wherein this Court was primarily concerned with the High Court dismissing the appeals without recording any reasons. The Court also examined the practice and requirement of providing reasons for conclusions, orders and directions given by the quasi-judicial and administrative bodies. The Court examined various judgments of this Court in relation to its application to administrative law and held as under:

> "10. The Supreme Court in the case of *S.N. Mukherjee v. Union of India* [(1990) 4 SCC 594], while referring to the practice adopted and insistence placed by the Courts in United States, emphasized the importance of recording of reasons for decisions by the administrative authorities and tribunals. It said "administrative process will best be vindicated by clarity in its exercise". To enable the Courts

> to exercise the power of review in consonance with settled principles, the authorities are advised of the considerations underlining the action under review. This Court with approval stated:-
>
> "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."
>
> xxx xxx xxx xxx
>
> 12. At the cost of repetition, we may notice, that this Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment...
>
> 13. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the

given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders…

69. In this very judgment, the Court while referring to other decisions of the Court held that it is essential that administrative authorities and tribunals should accord fair and proper hearing to the affected persons and record explicit reasons in support of the order made by them. Even in cases of supersession, it was held in *Gurdial Singh Fijji v. State of Punjab* [(1979) 2 SCC 368] that reasons for supersession should be essentially provided in the order of the authority. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. By practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and therefore, proper reasoning is foundation of a just and fair decision. Reference can be made to *Alexander Machinery (Dudley) Ltd. v. Crabtree* [1974 ICR 120] in this regard.

70. The above reasoning and the principles enunciated, which are consistent with the settled canons of law, we would adopt even in this case. In the backdrop of these determinants, we may refer to the provisions of the Act. Section 26, under its different sub-sections, requires the Commission to issue various directions, take decisions and pass orders, some of which are even appealable before the Tribunal. Even if it is a direction under any of the provisions and not a decision,

conclusion or order passed on merits by the Commission, it is expected that the same would be supported by some reasoning. At the stage of forming a *prima facie* view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that *prima facie* case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred. However, other decisions and orders, which are not directions *simpliciter* and determining the rights of the parties, should be well reasoned analyzing and deciding the rival contentions raised before the Commission by the parties. In other words, the Commission is expected to express *prima facie* view in terms of Section 26(1) of the Act, without entering into any adjudicatory or determinative process and by recording minimum reasons substantiating the formation of such opinion, while all its other orders and decisions should be well reasoned.

71. Such an approach can also be justified with reference to Regulation 20(4), which requires the Director General to record, in his report, findings on each of the allegations made by a party in the intimation or reference submitted to the Commission and sent for investigation to the Director General, as the case may be, together with all evidence and documents collected during investigation. The inevitable consequence is that the Commission is similarly expected to write appropriate reasons on every issue while passing an order under Sections 26 to 28 of the Act.

Submissions made and findings in relation to Point No.3

72. The concept of necessary and proper parties is an accepted norm of civil law and its principles can safely be applied to the proceedings before the Tribunal to a limited

extent. Even some provisions of the Act and the Regulations would guide the discussion in this behalf. In terms of Section 7(2) of the Act the Commission is a body corporate having perpetual succession and a common seal with power to sue and be sued in its name. In terms of Section 53A, the Tribunal is constituted to hear and dispose of appeals against any direction issued, decision made or order passed under the provisions stated therein. The Tribunal is also vested with the power of determining the claim of compensation that may arise from the findings recorded by the Commission. As already noticed, the procedure for entertaining the appeals is specified under Section 53B of the Act.

73. The right to prefer an appeal is available to the Central Government, State Government or a local authority or enterprise or any person aggrieved by any direction, decision or order referred to in clause (a) of Section 53A (ought to be printed as 53A(1)(a)). The appeal is to be filed within the period specified and Section 53B(3) further requires that the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal. Section 53S contemplates that before the Tribunal a person may either appear 'in person' or authorize one or more chartered accountants or company secretaries, cost accountants or legal practitioners or any of its officers to present its case before the Tribunal. However, the Commission's right to legal representation in any appeal before the Tribunal has been specifically mentioned under Section 53S(3). It provides that the Commission may authorize one or more of chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to act as presenting officers before the Tribunal.

74. Section 53T grants a right in specific terms to the Commission to prefer an appeal before the Supreme Court within 60 days from the date of communication of the decision

or order of the Tribunal to them.

75. The expression 'any person' appearing in Section 53B has to be construed liberally as the provision first mentions specific government bodies then local authorities and enterprises, which term, in any case, is of generic nature and then lastly mentions 'any person'. Obviously, it is intended that expanded meaning be given to the term 'persons', i.e., persons or bodies who are entitled to appeal. The right of hearing is also available to the parties to appeal. The above stated provisions clearly indicate that the Commission a body corporate, is expected to be party in the proceedings before the Tribunal as it has a legal right of representation. Absence of the Commission before the Tribunal will deprive it of presenting its views in the proceedings. Thus, it may not be able to effectively exercise its right to appeal in terms of Section 53 of the Act. Furthermore, Regulations 14(4) and 51 support the view that the Commission can be a necessary or a proper party in the proceedings before the Tribunal. The Commission, in terms of Section 19 read with Section 26 of the Act, is entitled to commence proceedings *suo moto* and adopt its own procedure for completion of such proceedings. Thus, the principle of fairness would demand that such party should be heard by the Tribunal before any orders adverse to it are passed in such cases. The Tribunal has taken this view and we have no hesitation in accepting that in cases where proceedings initiated *suo moto* by the Commission, the Commission is a necessary party. However, we are also of the view that in other cases the Commission would be a proper party. It would not only help in expeditious disposal, but the Commission, as an expert body, in any case, is entitled to participate in its proceedings in terms of Regulation 51. Thus, the assistance rendered by the Commission to the Tribunal could be useful in complete and effective adjudication of the issue before it.

76. Regulations 24 to 26 define powers of the Commission

to join or substitute parties in proceedings, permit person or enterprises to take part in proceedings and strike out unnecessary parties. Out of these provisions regulation 25(1) has a distinct feature as it lays down the criteria which should be considered by the Commission while applying its mind in regard to application of a party for impleadment. The person or enterprise sought to be impleaded should have *substantial interest* in the outcome of the proceedings and/or that it is necessary in the public interest to allow such an application. In other words, substantial interest in proceedings and serving of larger public interest, amongst others, are the criteria which could be considered by the Commission. This principle would obviously stand extended for exercise of jurisdiction by the Tribunal. In our view, the Commission would have substantial interest in the outcome of the proceedings in most of the cases as not only would the judgments of the Tribunal be binding on it, but they would also provide guidelines for determining various matters of larger public interest and affect the economic policy of the country.

77. In light of the above statutory provisions, let us examine the scheme under the general principles as well. The provisions of Order I Rule 10 of Code of Civil Procedure control the parties to the proceedings and their addition or deletion thereof. Wide discretion is vested in the Court/appropriate forum in regard to impleadment of necessary and proper parties to the proceedings. Of course, such discretion has to be exercised in accordance with provisions of law and the principles enunciated by various judicial pronouncements. The consideration before the Court, while determining such a question, is whether the said party is a necessary or a proper party and its presence before the Court is essential for complete and effective adjudication of the subject matter, i*nter alia*, it should also be kept in mind that multiplicity of litigation is to be avoided and that the necessary or proper party should not be left out from the proceedings, particularly, before the tribunal or the forum.

78. These principles were stated by this Court in *Udit Narain Singh Malpaharia v. Addl.Member, Board of Revenue, Bihar,* [AIR 1963 SC 786], wherein this Court has held as under:—

> "7. To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

79. Another way to examine the matter is that if the proceedings cannot be concluded completely and effectively in absence of a party, that party should be normally impleaded as a party before the Court, of course, subject to other restrictions in law. While non-joinder of necessary parties may prove fatal, the non-joinder of proper parties may not be fatal to the proceedings, but would certainly adversely affect interest of justice and complete adjudication of the proceedings before the appropriate forum.

80. As a normal rule, the applicant/informant is *dominus litis* and has the right to control the proceedings, but at the same time, such applicant is required to notify all other parties against whom the applicant wishes to proceed. Even if an applicant fails to join a party the Court has the discretion to direct joining of such party as the question of impleadment has to be decided on the touchstone of Order I Rule 10 which provides that a necessary or proper party may be added. [*Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay* [(1992) 2 SCC 524].

81. In the proceedings, which are initiated by the Commission *suo moto*, it shall be *dominus litis* of such

proceedings while in other cases, the Commission being a regulatory body would be a proper party discharging inquisitorial, regulatory as well as adjudicatory functions and its presence before the Tribunal, particularly, in light of the above stated provisions, would be proper. The purpose is always to achieve complete, expeditious and effective adjudication. This Court in the case of *Brahm Dutt v. Union of India* [(2005) 2 SCC 431], while considering the constitutional validity of Section 8 of the Act observed that the Commission is an expert body which had been created in consonance with international practice. The Court observed that it might be appropriate if two bodies are created for performing two kinds of functions, one, advisory and regulatory and other adjudicatory. Though the Tribunal has been constituted by the Competition (Amendment) Act, 2007, the Commission continues to perform both the functions stated by this Court in that case. Cumulative effect of the above reasoning is that the Commission would be a necessary and/or a proper party in the proceedings before the Tribunal.

Submissions made and findings in relation to Point No.4

82. Under this issue we have to discuss the ambit and scope of the powers vested in the Commission under Section 33 of the Act. In order to objectively analyze the content of the submissions made before us, it will be appropriate to refer to the provisions of the said Section, which read as under:

> "33. Power to issue interim orders. - Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary"

83. A bare reading of the above provision shows that the most significant expression used by the legislature in this provision is 'during inquiry'. 'During inquiry', if the Commission is satisfied that an act in contravention of the stated provisions has been committed, continues to be committed or is about to be committed, it may temporarily restrain any party 'without giving notice to such party', where it deems necessary. The first and the foremost question that falls for consideration is, what is 'inquiry'? The word 'inquiry' has not been defined in the Act, however, Regulation 18(2) explains what is 'inquiry'. 'Inquiry' shall be deemed to have commenced when direction to the Director General is issued to conduct investigation in terms of Regulation 18(2). In other words, the law shall presume that an 'inquiry' is commenced when the Commission, in exercise of its powers under Section 26(1) of the Act, issues a direction to the Director General. Once the Regulations have explained 'inquiry' it will not be permissible to give meaning to this expression contrary to the statutory explanation. Inquiry and investigation are quite distinguishable, as is clear from various provisions of the Act as well as the scheme framed thereunder. The Director General is expected to conduct an investigation *only* in terms of the directive of the Commission and thereafter, inquiry shall be deemed to have commenced, which continues with the submission of the report by the Director General, unlike the investigation under the MRTP Act, 1969, where the Director General can initiate investigation *suo moto*. Then the Commission has to consider such report as well as consider the objections and submissions made by other party. Till the time final order is passed by the Commission in accordance with law, the inquiry under this Act continues. Both these expressions cannot be treated as synonymous. They are distinct, different in expression and operate in different areas. Once the inquiry has begun, then alone the Commission is expected to exercise its powers vested under Section 33 of the Act. That is the stage when jurisdiction of the Commission can be invoked by a party for passing of an *ex parte* order. Even at that stage, the Commission is required to record a

satisfaction that there has been contravention of the provisions mentioned under Section 33 and that such contravention has been committed, continues to be committed or is about to be committed. This satisfaction has to be understood differently from what is required while expressing a *prima facie* view in terms of Section 26(1) of the Act. The former is a definite expression of the satisfaction recorded by the Commission upon due application of mind while the latter is a tentative view at that stage. Prior to any direction, it could be a general examination or enquiry of the information/reference received by the Commission, but after passing the direction the inquiry is more definite in its scope and may be directed against a party. Once such satisfaction is recorded, the Commission is vested with the power and the informant is entitled to claim *ex parte* injunction. The legislature has intentionally used the words not only '*ex parte'* but also 'without notice to such party'. Again for that purpose, it has to apply its mind, whether or not it is necessary to give such a notice. The intent of the rule is to grant *ex parte* injunction, but it is more desirable that upon passing an order, as contemplated under Section 33, it must give a short notice to the other side to appear and to file objections to the continuation or otherwise of such an order. Regulation 31(2) of the Regulations clearly mandates such a procedure. Wherever the Commission has passed interim order, it shall hear the parties against whom such an order has been made, thereafter, *as soon as possible*. The expression '*as soon as possible'* appearing in Regulation 31(2) has some significance and it will be obligatory upon the fora dealing with the matters to ensure compliance to this legislative mandate. Restraint orders may be passed in exercise of its jurisdiction in terms of Section 33 but it must be kept in mind that the *ex parte* restraint orders can have far reaching consequences and, therefore, it will be desirable to pass such order in exceptional circumstances and deal with these matters most expeditiously.

84. During an inquiry and where the Commission is satisfied that the act has been committed and continues to be

committed or is about to be committed, in contravention of the provisions stated in Section 33 of the Act, it may issue an order temporarily restraining the party from carrying on such act, until the conclusion of such inquiry or until further orders, without giving notice to such party where it deems it necessary. This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, *inter alia,* should : (a) record its satisfaction (which has to be of much higher degree than formation of a *prima facie* view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the *lis* would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.

85. The power under Section 33 of the Act, to pass a temporary restraint order, can only be exercised by the Commission when it has formed *prima facie* opinion and directed investigation in terms of Section 26(1) of the Act, as is evident from the language of this provision read with Regulation 18(2) of the Regulations.

86. It will be useful to refer to the judgment of this Court in the case of *Morgan Stanley Mutual Funds v. Kartick Das* [(1994) 4 SCC 225], wherein this Court was concerned with Consumer Protection Act 1986, Companies Act 1956 and Securities and Exchange Board of India (Mutual Fund) Regulations, 1993. As it appears from the contents of the judgment, there is no provision for passing *ex-parte* interim orders under the Consumer Protection Act, 1986 but the Court nevertheless dealt with requirements for the grant of an *ad interim* injunction, keeping in mind the expanding nature of the corporate sector as well as the increase in vexatious litigation. The Court spelt out the following principles:

"36. As a principle, *ex parte* injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of *ex parte* injunction are—

(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal or *ex parte* injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant *ex parte* injunction;

(e) the court would expect a party applying for *ex parte* injunction to show utmost good faith in making the application;

(f) even if granted, the *ex parte* injunction would be for a limited period of time.

(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court."

87. In the case in hand, the provisions of Section 33 are specific and certain criteria have been specified therein, which need to be satisfied by the Commission, before it passes an *ex parte ad interim* order. These three ingredients we have already spelt out above and at the cost of repetition we may

notice that there has to be application of mind of higher degree and definite reasons having nexus to the necessity for passing such an order need be stated. Further, it is required that the case of the informant-applicant should also be stronger than a mere *prima facie* case. Once these ingredients are satisfied and where the Commission deems it necessary, it can pass such an order without giving notice to the other party. The scope of this power is limited and is expected to be exercised in appropriate circumstances. These provisions can hardly be invoked in each and every case except in a reasoned manner. Wherever, the applicant is able to satisfy the Commission that from the information received and the documents in support thereof, or even from the report submitted by the Director General, a strong case is made out of contravention of the specified provisions relating to anti-competitive agreement or an abuse of dominant position and it is in the interest of free market and trade that injunctive orders are called for, the Commission, in its discretion, may pass such order *ex parte* or even after issuing notice to the other side.

88. For these reasons, we may conclude that the Commission can pass *ex parte ad interim* restraint orders in terms of Section 33, only after having applied its mind as to the existence of a *prima facie* case and issue direction to the Director General for conducting an investigation in terms of Section 26(1) of the Act. It has the power to pass *ad interim ex parte* injunction orders, but only upon recording its due satisfaction as well as its view that the Commission deemed it necessary not to give a notice to the other side. In all cases where *ad interim ex parte* injunction is issued, the Commission must ensure that it makes the notice returnable within a very short duration so that there is no abuse of the process of law and the very purpose of the Act is not defeated.

Submissions made and findings in relation to Point No.6

89. In light of the above discussion, the next question that we are required to consider is, whether the Court should issue

certain directions while keeping in mind the scheme of the Act, legislative intent and the object sought to be achieved by enforcement of these provisions. We have already noticed that the principal objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effect on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments in the country. In other words, the Act requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim restraint orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalize the Indian Economy to bring it at par with the best of the economies in this era of globalization would be jeopardised if time bound schedule and, in any case, expeditious disposal by the Commission is not adhered to. The scheme of various provisions of the Act which we have already referred to including Sections 26, 29, 30, 31, 53B(5) and 53T and Regulations 12, 15, 16, 22, 32, 48 and 31 clearly show the legislative intent to ensure time bound disposal of such matters.

90. The Commission performs various functions including regulatory, inquisitorial and adjudicatory. The powers conferred by the Legislature upon the Commission under Sections 27(d) and 31(3) are of wide magnitude and of serious ramifications. The Commission has the jurisdiction even to direct that an agreement entered into between the parties shall stand modified to the extent and in the manner, as may be specified. Similarly, where it is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, the Commission is empowered to direct such modification. These powers of the Commission, read with provisions mentioned earlier, certainly require issuance of certain directions in order to achieve the

object of the Act and to ensure its proper implementation. The power to restructure the agreement can be brought into service and matters dealt with expeditiously, rather than passing of *ad interim* orders in relation to such agreements, which may continue for indefinite periods. To avoid this mischief, it is necessary that wherever the Commission exercises its jurisdiction to pass *ad interim* restraint orders, it must do so by issuing notices for a short date and deal with such applications expeditiously. Order XXXIX, Rules 3 and 3A of the Code of Civil Procedure also have similar provisions. Certain procedural directions will help in avoiding prejudicial consequences, against any of the parties to the proceedings and the possibility of abuse of jurisdiction by the parties can be eliminated by proper exercise of discretion and for valid reasons. Courts have been issuing directions in appropriate cases and wherever the situation has demanded so. Administration of justice does not depend on individuals, but it has to be a collective effort at all levels of the judicial hierarchy, i.e. the hierarchy of the Courts or the fora before whom the matters are *sub-judice*, so that the persons awaiting justice can receive the same in a most expeditious and effective manner. The approach of the Commission even in its procedural matters, therefore, should be macro level rather than micro level. It must deal with all such references or applications expeditiously in accordance with law and by giving appropriate reasons. Thus, we find it necessary to issue some directions which shall remain in force till appropriate regulations in that regard are framed by the competent authority.

FINDINGS ON MERITS:

91. Having examined various legal issues arising in the present case, we will now revert back to the facts of the case in hand. It is clear that Jindal Steel, the informant, had made a reference to the Commission. The Commission had initiated proceedings and asked for further information from the informant and thereafter, had even issued notice calling upon SAIL to submit its views and comments. From the record it is

clear that parties had appeared before the Commission. The SAIL had failed to file the reply and prayed for extension of time, which was declined by the Commission in its order dated 8th December, 2009. The Director General was asked to conduct the investigation, but liberty was granted to SAIL to file its views and comments during the pendency of the investigation. Since further time was declined, SAIL preferred an appeal before the Tribunal, which resulted in passing of the order impugned in the present appeal. We are unable to accede to the submission that the Commission is not a necessary or proper party before the Tribunal. On the contrary, the Regulations and even the interest of justice demands that for complete and effective adjudication the Commission be added as a necessary and proper party in the proceedings before the Tribunal. The direction issued by the Commission was set aside by the Tribunal and further time was granted to SAIL to file its further reply in addition to what has been filed on 15th December, 2009 and the Tribunal then directed the Commission to consider all such material and record a fresh decision. We have held that there is no statutory obligation on the Commission to issue notice for grant of hearing to the parties at the stage of forming an opinion under Section 26(1) of the Act unless, upon due application of mind, it finds it necessary to invite parties or experts to render assistance to and produce documents before the Commission at that stage. We are also unable to agree with the view expressed by the Tribunal that the inquiry commences as soon as the aspects highlighted in sub-section (1) to Section 19 are fulfilled and brought to the notice of the Commission. It is obvious that Regulation 18(2) was not brought to the notice of the Tribunal which resulted in error of law, particularly, when examined in the light of other provisions and scheme of the Act as well. The Commission, vide its order dated 8th December, 2009, had, for reasons stated therein, declined the extension of time to SAIL. This order of the Commission cannot be stated to be without jurisdiction or suffering from any apparent error of law. However, the Tribunal, in exercise of its judicial discretion, had interfered with the said

order and granted further time to SAIL unconditionally. We do not propose to interfere in the exercise of the discretion by the Tribunal except to the extent of imposition of cost. We, therefore direct that SAIL should pay cost of Rs. 25,000/- to the informant for seeking extension of time. The cost shall be conditional, whereafter, the additional reply filed by SAIL would be taken on record and the Commission shall apply its mind to form a *prima facie* view in terms of Section 26(1) of the Act, if the report of the Director General has not been received as yet. In the event the report prepared by the Director General during the period 8th December, 2009 to 11th January, 2010 has been received, the Commission shall proceed in accordance with the provisions of the Act and the principles of law enunciated in this judgment giving proper notice to the informant as well as to SAIL and pass appropriate orders.

CONCLUSION AND DIRECTIONS

92. Having discernibly stated our conclusions/ answers in the earlier part of the judgment, we are of the considered opinion that this is a fit case where this Court should also issue certain directions in the larger interest of justice administration.

93. The scheme of the Act and the Regulations framed thereunder clearly demonstrate the legislative intent that the investigations and inquiries under the provisions of the Act should be concluded as expeditiously as possible. The various provisions and the Regulations, particularly Regulations 15 and 16, direct conclusion of the investigation/inquiry or proceeding within a "reasonable time". The concept of "reasonable time" thus has to be construed meaningfully, keeping in view the object of the Act and the larger interest of the domestic and international trade. In this backdrop, we are of the considered view that the following directions need to be issued:

(A) Regulation 16 prescribes limitation of 15 days for the Commission to hold its first ordinary meeting to consider whether *prima facie* case exists or not and in cases of

alleged anti-competitive agreements and/or abuse of dominant position, the opinion on existence of *prima facie* case has to be formed within 60 days. Though the time period for such acts of the Commission has been specified, still it is expected of the Commission to hold its meetings and record its opinion about existence or otherwise of a *prima facie* case within a period much shorter than the stated period.

(B) All proceedings, including investigation and inquiry should be completed by the Commission/Director General most expeditiously and while ensuring that the time taken in completion of such proceedings does not adversely affect any of the parties as well as the open market in purposeful implementation of the provisions of the Act.

(C) Wherever during the course of inquiry the Commission exercises its jurisdiction to pass interim orders, it should pass a final order in that behalf as expeditiously as possible and in any case not later than 60 days.

(D) The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can proceed any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section 26(1) of the Act.

(E) The Commission as well as the Director General shall maintain complete 'confidentiality' as envisaged under Section 57 of the Act and Regulation 35 of the Regulations. Wherever the 'confidentiality' is breached, the aggrieved party certainly has the right to approach the Commission for issuance of appropriate directions in

terms of the provisions of the Act and the Regulations in force.

94. In our considered view the scheme and essence of the Act and the Regulations are clearly suggestive of speedy and expeditious disposal of the matters. Thus, it will be desirable that the Competent Authority frames Regulations providing definite time frame for completion of investigation, inquiry and final disposal of the matters pending before the Commission. Till such Regulations are framed, the period specified by us *supra* shall remain in force and we expect all the concerned authorities to adhere to the period specified.

95. Resultantly, this appeal is partially allowed. The order dated 15th February, 2010 passed by the Tribunal is modified to the above extent. The Commission shall proceed with the case in accordance with law and the principles enunciated *supra*.

96. In the circumstances there will be no order as to costs.

R.P Appeal partly allowed.

CH. NARAYANA RAO
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 7903 of 2010)

SEPTEMBER 10, 2010

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Service Law:

Seniority – Claim for counting ad-hoc service for seniority – Stenographer engaged on ad-hoc basis – His services regularised from the date he passed the proficiency test – He claimed that he should be granted seniority from the date of initial appointment – HELD: No relief can be granted to the employee – His seniority has been correctly worked out only from the date he passed the stenography test as contemplated under the Rules approved by Staff Selection Commission – Income Tax Department (Group C Recruitment) Rules, 1990.

Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and Others **1990 (2) SCR 900 =(1990) 2 SCC 715;** *State of West Bengal and others Vs. Aghore Nath Dey and Others* **1993 (2) SCR 919 = (1993) 3 SCC 371;** and *Union of India Vs. Dharam Pal & Ors*. **2009 (2) SCR 193 = (2009) 4 SCC 170 – relied on.**

O.P. Singla and another etc. Vs. Union of India and Others **1985 (1) SCR 351 = (1984) 4 SCC 450;** *Narender Chadha and Others Vs. Union of India and Others* **1986 (1) SCR 211 = (1986) 2 SCC 157 – distinguished.**

Rudra Kumar Sain and Others Vs. Union of India and Ors. **2000 (2) Suppl. SCR 573 = (2000) 8 SCC 25 – referred to.**

Case Law Reference:

1990 (2) SCR 900	**relied on**	**para 12**
1993 (2) SCR 919	**relied on**	**para 14**
2000 (2) Suppl. SCR 573	**referred to**	**para 18**
1985 (1) SCR 351	**distinguished**	**para 18**
1986 (1) SCR 211	**distinguished**	**para 19**
2009 (2) SCR 193	**relied on**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7903 of 2010.

From the Judgment & Order dated 19.02.2007 of the High Court of Chattisgarh at Bilaspur in W.P. No. 388 of 2002.

Sushil Kumar Jain, Puneet Jain, Pratibha Jain for the Appellant.

Brijender Chahar, B. Sunita Rao, Mohd. Mannan (for B.V. Balaram Das) for the Respondents.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. The continual riven for seniority with regard to ad-hoc service rendered by the Appellant from the year 1981 till his regularisation in the year 1992 is required to be adjudicated in this Appeal by this Court. Further, we are called upon to consider whether the Appellant can be treated as Regular Stenographer (OG – Ordinary Grade) from the year 1981 itself.

3. This appeal arises from the judgment and order dated 19.02.2007 passed by Division Bench of the High Court of Judicature, Chhattisgarh at Bilaspur, in Appellant's Writ Petition No. 388 of 2002, wherein and whereunder he had challenged the order of the Central Administrative Tribunal,

Principal Bench, Delhi, (hereinafter shall be referred to as 'Tribunal') passed in O.A. No. 413 of 1999 dated 02.07.2001. By the order of the Tribunal, the Appellant's Original Application filed by him claiming seniority for the period he had worked on ad-hoc basis till his regularisation was rejected. The order of the Tribunal has been affirmed by the Division Bench of the High Court by dismissing the Appellant's Writ Petition vide the impugned judgment. Hence, this appeal.

4. Factual matrix of the case lies in narrow compass:-

Appellant was appointed on 26.11.1981 on the post of Stenographer (OG). His appointment was against a temporary vacancy of stenographer, with the following rider:

> "His appointment is purely on an ad-hoc and temporary basis and his services may be terminated any time without assigning any reasons."

5. Thus, his letter of appointment clearly stipulated that it was not only ad-hoc but temporary too, terminable at any time without assigning any reasons. However, he continued in service, but after few years, an apprehension arose in the mind of the Appellant and other similarly situated stenographers that their services may be terminated. Thus, the Appellant and others were constrained to approach the Jabalpur Bench of the Tribunal by filing Original Application, claiming that the Respondent be restrained from terminating their services and they be regularised. Tribunal vide its order dated 23.10.1989 directed that the services of the Appellant and other similarly situated stenographers, be not terminated, instead they be regularised subject to qualifying requisite test. The operative part of the order of the Tribunal is reproduced hereinbelow:-

> "The Government may examine and review the position as whether it is possible to regularize the services of these petitioners by relaxing the rule requiring their recruitment through the Staff Selection Commission. If it is not

> considered feasible by the Government, then we direct that the petitioners should be continued in service and the respondents are restrained from terminating their services but two opportunities be given to the petitioners to attain proficiency in Stenography and clear the test with the requisite standard of speed in shorthand etc. before their regularisation. In other words their appointments as stenographers will be treated as officiating appointment although not confirmed but also not ad-hoc pending such a regularisation."

6. It is clear from a reading of the aforesaid direction that the Respondents were restrained from terminating the services of the Appellant and two opportunities were directed to be given to the Appellant to clear proficiency test so that he becomes entitled for regularisation. On the strength of the said order of Tribunal, his services were not terminated and he continued in employment with the Respondents.

7. He, thereafter, qualified the proficiency test in Stenography conducted by the Staff Selection Commission in 1992. Thus, he was regularised with effect from 12.04.1992, the date on which he was declared successful in the test. 50% of his past service was also ordered to be counted for the purpose of computation of pensionary benefits.

8. Aggrieved, Appellant submitted his representation with the Chief Commissioner of Income Tax, Bhopal on 06.08.1993 praying for regularisation of service from the date of his initial appointment and treating his full ad-hoc service as qualifying service for the purpose of pensionary benefits. Since, no fruitful results came forth on the Appellant's representation, he along with another employee, similarly situated, was constrained to file another O.A. No. 413 of 1999 before the Principal Bench of the Tribunal at Delhi which came to be allowed on 11.10.1999. It appears that while the said O.A. was heard, the counsel for Respondents had remained absent. Thus, the order came to be passed ex-parte.

9. The Department, therefore, filed M.A. No. 593 of 2000 in the aforesaid O.A. before the same bench of the Tribunal praying for the grant of opportunity to them to contest the proceedings and for recall of the order dated 11.10.1999. The said M.A. was allowed by the Tribunal on 04.01.2001 and the parties were directed to appear before the Tribunal on 07.03.2001 for re-hearing of the Appellant's Original Application. That is how the matter was heard again by the Tribunal. The Tribunal passed its order on 02.07.2001, dismissing the Appellant's Original Application. It was this order of the Tribunal which was challenged by the Appellant before the Division Bench of the High Court by filing a Writ Petition, but that too met with the fate of dismissal.

10. The contention of the respondents from the very beginning had been that the Appellant was one among several persons who were appointed as stenographers (OG) on purely temporary and ad-hoc basis. However, they were given their regular appointment as stenographers (OG) in the department only from the date of passing the qualifying test with approval by the Staff Selection Commission. All those who had been appointed alongwith Appellant were treated alike and were given their regular appointment only from the date of their passing the requisite test. Thus, no case of discrimination was made out by the Appellant as likes were treated alike.

11. They have also contended that the observations made by Jabalpur Bench of the Tribunal in the Appellant's first O.A., could at best be treated as *obiter* as the question before the Bench was only with regard to grant of injunction in favour of the Appellant so that the services could not be terminated. Thus, any observations made by the said Bench would not have a binding effect. Even otherwise, it has been contended that the first order of the Tribunal clearly stipulated that at the first instance the Respondents were restrained from terminating the services of the Appellant and the Appellant was given opportunity to appear in the test twice to qualify for the appointment on regular basis. It has also been contended that

passing of the requisite examination was condition precedent for appointment on regular basis as per the Income Tax Department (Group C Recruitment Rules, 1990), to be approved by the Staff Selection Commission and there could not have been any deviation therefrom. Unless the Appellant had successfully cleared the said test he could not have been granted the benefits sought by him. As soon as he cleared the said test, he was regularised from the date of his passing the examination, that is on 12.04.1992. In other words, the Respondents have contended that the Appellant alone cannot be extended the benefit of regularisation of counting his service from the date of his initial appointment, which was not only temporary but was ad-hoc also, as the same may amount to hostile discrimination with other Stenographers who are similarly situated. They have, therefore, contended that the Tribunal and the High Court have taken a correct legal view of the matter, which calls for no interference and appeal deserves to be dismissed.

12. We have, accordingly, heard Mr. Sushil Kumar Jain and Mr. Puneet Jain, advocates for the appellant and Mr. B.S. Chahar, Senior Advocate with Mrs. B. Sunita Rao and Mr. Mohd. Mannan for respondents at length and perused the records.

13. The said question, as has been projected above, should not detain us long as the same has been considered in the matter of *Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and Others* reported in (1990) 2 SCC 715 by a Constitution Bench of this Court. After eloquent discussion with regard to *inter se* seniority of direct recruits and promotees, the same has been summed up in para 47. The relevant portion of the said para applicable to the facts of this Appeal is reproduced hereinbelow:-

"47. To sum up, we hold that:-

(A)Once an incumbent is appointed to a post according

to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

14. On the strength of the aforesaid Constitution Bench Judgment, Mr. Sushil Kumar Jain strenuously submitted before us that clause (B) thereof should be invoked for the purpose of grant of seniority to the Appellant.

15. We have minutely examined the same but are unable to accept the said contention as according to us corollary of clause (A) of para 47 of the aforesaid judgment would be applicable to the Appellant's case. It cannot be disputed that the initial appointment of the Appellant was only ad-hoc and for a temporary period and was also not in accordance with the Rules of 1990 as he did not appear in the requisite test, which is conducted by Staff Selection Commission, before his appointment. The same was only a stop-gap arrangement. Therefore, his officiation on such a post cannot be taken into account for considering the seniority. Thus, in our considered opinion neither clause (A) nor clause (B), as reproduced hereinabove, would be applicable to the Appellant's case and he cannot draw any advantages therefrom. On the other hand, he would be squarely covered by the corollary appended to clause (A).

16. This judgment of Constitution Bench in *Direct Recruit's* case (supra) has been followed by three learned Judges of this Court in the case of *State of West Bengal and others Vs. Aghore Nath Dey and Others* reported in (1993) 3 SCC 371, authored by most illustrious learned Judge of this Court - Hon'ble Mr. Justice J.S. Verma (as he then was). After considering the scope and *ratio decidendi* of *Direct Recruit's* case (supra), it has been held in paras 24 and 25 in lucid and concise words as under:-

"24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the 'rules' and the latter expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available

opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stopgap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)."

17. According to us, corollary appended to clause (A) of *Direct Recruit's* case (supra) and the aforesaid judgment in Aghore Nath Dey's case squarely decide the issue.

18. Reliance has also been placed by Mr. Sushil Kumar Jain on yet another Constitution Bench Judgment of this Court reported in (2000) 8 SCC 25 titled *Rudra Kumar Sain and Others Vs. Union of India and Ors.* to distinguish the terminology used in the case of *O.P. Singla and another etc. Vs. Union of India and Others* reported in (1984) 4 SCC 450 namely, "Ad-hoc", "fortuitous" and "stop-gap". However, we are not required to consider the same as it has already been dealt with in *Aghore Nath's* case (supra) elaborately.

19. In *Singla's* case (supra), the question was with regard to seniority and promotion amongst direct recruits and

promotees. The said question is not directly in issue in this case. To the same effect is yet another earlier judgment of this Court is reported in (1986) 2 SCC 157 titled *Narender Chadha and Others Vs. Union of India and Others,* which also dealt only with the aforesaid requirement.

20. In *Narender Chadha's* Case, benefit was directed to be granted to those Appellants as they were working on the said posts for more than 15 to 20 years, which is not the case in the present appeal. Apart from the above, admittedly the Appellant had not cleared the requisite examination/proficiency test as required under the Rules of 1990, as soon as he cleared the examination/proficiency test, he was regularised on the post. His regularisation from the date of initial appointment was impermissible and was rightly denied to him.

21. The view which has been taken by us hereinabove finds favour from a recent judgment of this Court reported in (2009) 4 SCC 170 titled, *Union of India Vs. Dharam Pal & Ors.* Perusal of the said judgment shows that the cases on which we have placed reliance have also been fully relied upon by learned two Judges of this Court while dealing with the said case. Succinctly, it has been held in paragraph 25 and 27 as under :

"25. It is, however, also well settled that where the initial appointment is only ad-hoc, not according to rules and made as a stop-gap arrangement, the period of officiation in such post cannot be taken into account for considering the seniority.

26. ....

27. When an ad-hoc appointment is made, the same must be done in terms of the rules for all purposes. If the mandatory provisions of the rules had not been complied with, in terms of *Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors.*

(1990) 2 SCC 715, the period shall not be taken into consideration for the purpose of reckoning seniority. Furthermore, it is one thing to say that an appointment is made on an ad-hoc basis but it is another thing to say that *inter se* seniority would be determined on the basis laid down in another rule."

22. We are, therefore, fortified in our reasoning as adopted in the aforesaid Appeal.

23. Thus, looking to the matter from all angles, we are of the considered view that no relief can be granted to the Appellant. His seniority has been correctly worked out only from the date he had passed the Stenography Test as contemplated under the Rules approved by Staff Selection Commission.

24. Thus, the appeal being devoid of any merit and substance is hereby dismissed but with no order to costs.

R.P. Appeal dimissed.

PYARE MOHAN LAL

v.

STATE OF JHARKHAND & ORS.

(Writ Petition (C) No. 382 of 2003)

SEPTEMBER 10, 2010

[J.M. PANCHAL, DEEPAK VERMA AND DR. B.S. CHAUHAN, JJ.]

Service law:

Compulsory retirement – Judicial review – Scope of.

Compulsory retirement – Adverse entries in the ACRs – Significance of, while retiring a person compulsorily – Held: The adverse entries remain part of the record for overall consideration to retire a government servant compulsorily – The object always is public interest – Such entries do not lose significance, even if the employee has subsequently been promoted – The law requires the Authority to consider the "entire service record" of the employee before assessing him for compulsory retirement irrespective of the fact that the adverse entries were not communicated to him or that he was promoted earlier in spite of those adverse entries – A single adverse entry regarding the integrity of an employee, even, in remote past is sufficient to award compulsory retirement – Doctrine – Washed off theory.

Compulsory retirement – Judicial Officer compulsorily retired in public interest – Held: The case of a Judicial Officer is required to be examined, treating him different from other wings of the society, as he is serving the State in a different capacity – His case is considered by a Committee of Judges of the High Court duly constituted by the Chief Justice and then the report of the Committee is placed before the Full Court – A decision is taken by the Full Court after due

deliberation on the matter – Therefore, fault cannot be found in the decision making process or the decision – The perusal of some of the entries in the ACRs of the Judicial Officer of the last years showed that he remained an average officer throughout his service career and could never improve – His out turn was poor – He was given adverse entries regarding his integrity and reputation – No reason to interfere with the order of compulsory retirement – Jharkhand Civil Service Code – r.74(b)(ii).

***Precedent**: Conflict between judgments – Held: Judgment of larger bench to be followed.*

***Relief** – Held: Relief not specifically sought cannot be granted by the court*

The petitioner was a judicial officer. In his ACRs for the year 1996-97 to 2001-2002, certain adverse remarks were made against him. His name was recommended for promotion in October, 2001 and he was appointed as Additional District and Sessions Judge on *ad hoc* basis. On 12.5.2003, an order of compulsory retirement of six judicial officers including the petitioner was issued in public interest invoking the provision of Rule 74(b)(ii) of the Jharkhand Civil Services Code. The instant writ petition was filed challenging the said order of compulsory retirement.

Dismissing the writ petition, the Court

HELD: 1. An order of compulsory retirement is not a punishment and it does not imply stigma unless such order is passed to impose a punishment for a proved misconduct, as prescribed in the Statutory Rules. The Authority must consider and examine the over-all effect of the entries of the officer concerned and not an isolated entry, as it may well be, in some cases that in spite of

satisfactory performance, the Authority may desire to compulsorily retire an employee in public interest, if in the opinion of the said Authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in exercise of its limited power of judicial review. [Para 18] [231-E-G]

Baikuntha Nath Das & Anr. v. Chief District Medical Officer, Baripada & Anr. **AIR 1992 SC 1020;** *Posts and Telegraphs Board & Ors. v. C.S.N. Murthy* **AIR 1992 SC 1368;** *Sukhdeo v. Commissioner Amravati Division, Amravati & Anr.* **(1996) 5 SCC 103;** *I.K. Mishra v. Union of India & Ors.* **AIR 1997 SC 3740;** *M.S. Bindra v. Union of India & Ors.* **AIR 1998 SC 3058;** *Rajat Baran Roy & Ors. v. State of West Bengal & Ors.* **AIR 1999 SC 1661;** *State of Gujarat & Anr. v. Suryakant Chunilal Shah* **(1999) 1 SCC 529;** *State of U.P. & Anr. v. Bihari Lal* **AIR 1995 SC 1161;** *State of U.P. & Ors. v. Vijay Kumar Jain* **AIR 2002 SC 1345;** *Jugal Chandra Saikia v. State of Assam & Anr.* **AIR 2003 SC 1362;** *Nawal Singh v. State of U.P. & Anr.* **AIR 2003 SC 4303;** *Chandra Singh & Ors. v. State of Rajasthan & Anr.* **AIR 2003 SC 2889;** *Shiv Dayal Gupta v. State of Rajasthan & Anr.* **(2005) 13 SCC 581;** *M.P. State Cooperative Dairy Federation Ltd. & Anr. v. Rajnesh Kumar Jamindar & Ors.* **(2009) 15 SCC 221;** *Surender Kumar v. Union of India & Ors.* **(2010) 1 SCC 158, relied on.**

2. In ****State of Punjab*, a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of**

crossing the efficiency bar. This view was based on washed off theory. However, a three-Judge Bench of this Court in ***State of Orissa taking a different view held that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose significance, even if the employee has subsequently been promoted. In case of conflict between two or more judgments of this Court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or is required to be given compulsory retirement, as the Authority is to assess his suitability taking into consideration his "entire service record". [Paras 19, 21, 26] [232-A-B; G-H; 233-A; 235-B-C]

***State of Orissa & Ors. v. Ram Chandra Das* **AIR 1996 SC 2436;** *State of Gujarat v. Umedbhai M. Patel* **AIR 2001 SC 1109;** *State of U.P. v. Ram Chandra Trivedi* **AIR 1976 SC 2547;** *Smt. Triveniben v. State of Gujarat* **AIR 1989 SC 1335, relied on.**

State of Punjab v. Dewan Chuni Lal* **AIR 1970 SC 2086; *Baidyanath Mahapatra v. State of Orissa & Anr.* **AIR 1989 SC 2218, referred to.**

3. A perusal of some of the entries in the ACRs' of the petitioner of the previous years showed that the petitioner remained an average officer throughout his service career and could never improve. His out turn was poor; he was given adverse entries regarding his integrity/reputation as not good in the years 1999-2000 and remarks to that effect by the Inspecting Judges in 1997 and 2001-2002. The petitioner made a bald assertion

that the adverse entries were not yet communicated to him. Indisputably, uncommunicated adverse entries could be taken into account for the purpose of assessing an officer for compulsory retirement. The petitioner did not disclose on what dates the representations against the adverse entries were made by him. He did not challenge the said adverse entries, rather he considered it appropriate to challenge only the order of compulsory retirement which was a consequential effect of such adverse entries. The law requires the Authority to consider the "entire service record" of the employee while assessing whether he can be given compulsory retirement irrespective of the fact that the adverse entries were not communicated to him and the officer was promoted earlier in spite of those adverse entries. More so, a single adverse entry regarding the integrity of an officer even in remote past is sufficient to award compulsory retirement. The case of a Judicial Officer is required to be examined, treating him different from other wings of the society, as he is serving the State in a different capacity. The case of a Judicial Officer is considered by a Committee of Judges of the High Court duly constituted by the Chief Justice and then the report of the Committee is placed before the Full Court. A decision is taken by the Full Court after due deliberation on the matter. Therefore, there is hardly any chance to make the allegations of non- application of mind or *mala fide*. [Paras 28, 29] [235-E; 236-G-H; 237-A-F]

4. The service record of the petitioner revealed that he had not been promoted in the regular cadre of the District Judge as he was not found fit for the same because of the adverse entries. The petitioner was promoted as Additional District Judge on Ad hoc basis and posted in the Fast Track Court. It was definitely not a promotion on merit (selection). The High Court objectively decided to recommend his compulsory

retirement and the State Authorities acted accordingly. No fault can be found with the decision making process or with the decision. The original service record of the petitioner was placed before this Court alongwith the report submitted by the Judicial Commissioner, who after taking into consideration a large number of facts recorded that the general reputation of the petitioner was not good, but no one had approached with any specific case against his general reputation. [Paras 30, 31] [237-G-H; 238-A-F]

5. There was no factual foundation in the contention of the petitioner that adverse entries were not made in *bona fide* manner and as per the requirement prescribed by circulars etc., and, therefore, the consequential order of compulsory retirement was illegal. The petitioner had sought quashing of the order of compulsory retirement and not quashing of the adverse entries. Relief not specifically sought cannot be granted by the court. Therefore, there was no occasion to probe the issue further. In view of the same, there was no cogent reason to interfere with the impugned order. [Paras 32, 33] [238-G-H; 239-A-B]

Baldev Raj Chadha v. Union of India & Ors. **AIR 1981 SC 70, relied on.**

Case Law Reference:

AIR 1992 SC 1020	**relied on**	**Paras 8, 20**
AIR 1992 SC 1368	**relied on**	**Para 9**
(1996) 5 SCC 103	**relied on**	**Para 9**
AIR 1997 SC 3740	**relied on**	**Para 9**
AIR 1998 SC 3058	**relied on**	**Para 9**
AIR 1999 SC 1661	**relied on**	**Para 9**

(1999) 1 SCC 529	**relied on**	**Para 10**
AIR 1995 SC 1161	**relied on**	**Para 11**
AIR 2002 SC 1345	**relied on**	**Paras 12, 16,23**
AIR 2003 SC 1362	**relied on**	**Para 13**
AIR 2003 SC 4303	**relied on**	**Para 14**
AIR 2003 SC 2889	**relied on**	**Para 15**
(2005) 13 SCC 581	**relied on**	**Para 16**
(2009) 15 SCC 221	**relied on**	**Para 17**
(2010) 1 SCC 158	**relied on**	**Para 17**
AIR 1970 SC 2086	**referred to**	**Para 19**
AIR 1989 SC 2218	**referred to**	**Para 20**
AIR 1996 SC 2436	**relied on**	**Para 21**
AIR 2001 SC 1109	**relied on**	**Para 22**
AIR 1976 SC 2547	**relied on**	**Para 24**
AIR 1989 SC 1335	**relied on**	**Para 25**
AIR 1981 SC 70	**relied on**	**Para 32**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 382 of 2003.

Sunil Kumar, C.K. Sucharita for the Petitioner.

Ashok Mathur Anil K. Jha, Santosh Kumar for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This writ petition has been filed

against the order dated 20.5.2003, passed by the State of Jharkhand – Respondent No. 2, giving compulsory retirement to the petitioner, a Judicial Officer of the State of Jharkhand, on the recommendation of the High Court of Jharkhand - the respondent No. 3 on administrative side.

2. Facts and circumstances giving rise to this case are that the petitioner was selected in the Bihar Civil Services (Judicial Branch) in 1982 and was appointed to the post of Munsif by the State and was confirmed in the grade of Munsif vide order dated 11th March, 1987. He was further promoted to the junior selection grade post in the cadre of Munsif of the Bihar Judicial Service vide order dated 23rd September, 1994. The Patna High Court issued Notification dated 10th March, 2001 promoting the petitioner to the post of Subordinate Judge.

3. Consequent to the bifurcation of the State of Bihar and formation of the State of Jharkhand, the services of the petitioner were allocated to the Jharkhand State by the order of the Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training), New Delhi dated 28th March, 2001. The petitioner was appointed as a Sub-Judge, Ranchi, vide Notification dated 21st April, 2001, issued by the High Court of Jharkhand and, subsequently, the petitioner was placed at the disposal of the State of Jharkhand as Under Secretary-cum-Deputy Legal Remembrancer and Law Officer in the Law Department vide order dated 1st August, 2001.

4. The High Court of Jharkhand recommended the name of the petitioner along with others for promotion to the post of Additional District Judge on Ad hoc basis vide letter dated 21st October, 2001. The petitioner was appointed as Additional District and Sessions Judge, (Fast Track), on ad-hoc basis and was posted at Ranchi vide order dated 14th December, 2001. The High Court of Jharkhand on administrative side vide order dated 12th May, 2003 recommended compulsory retirement of six judicial officers including the petitioner, and in pursuance

thereof, the Respondent No. 2 issued a consequential order of compulsory retirement of the petitioner dated 20th May, 2003, in public interest, invoking the provisions of Rule 74(b)(ii) of the Jharkhand Civil Services Code (hereinafter called the Code) along with five other judicial officers. Hence, this writ petition.

5. Shri Sunil Kumar, learned Senior Advocate appearing for the petitioner, has submitted that the petitioner had unblemished service record and there was no adverse entry against him and he had even been promoted to the post of Additional District and Sessions Judge, (Fast Track), thus adverse entries, if any, stood washed off as the same had been prior to the date of his promotion. The order of compulsory retirement passed by Respondent No. 2 is arbitrary, unreasonable and unwarranted. The adverse entries on the basis of which the petitioner had been given compulsory retirement had not been communicated to the petitioner. The representation made by the petitioner against the said adverse entries has not been disposed of till date. The order of compulsory retirement as far as the petitioner is concerned cannot be held to be in public interest; there was no material whatsoever to support the conclusion reached by the High Court of Jharkhand. The recommendation made by the High Court is unreasonable and arbitrary. Order impugned casts stigma. Rule 74(b)(ii) of the Code empowers competent authorities only to get rid of and to do away with the services of employees, who have lost their utility, became useless and whose further continuance in service is not in public interest. There was no occasion for the respondents to pass an order of compulsory retirement of the petitioner in absence of any material to justify such an order. Thus, the order impugned is liable to be held to be illegal and invalid. Petition deserves to be allowed.

6. On the other hand, Shri Ashok Mathur and Shri Anil Kumar Jha, learned counsel appearing for the respondents, have vehemently opposed the petition contending that there had been large number of adverse entries against the petitioner and the said entries were not expunged; his disposal was very

low; he did not enjoy a good reputation as several entries relating to his integrity being doubtful had been recorded. Thus, he could not claim himself to be fit to be retained in judicial service. The petition lacks merit and is liable to be dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

COMPULSORY RETIREMENT

8. In *Baikuntha Nath Das & Anr. Vs. Chief District Medical Officer, Baripada & Anr.,* AIR 1992 SC 1020, this Court has laid down certain criteria for the Courts, on which it can interfere with an order of compulsory retirement and they include mala fides, if the order is based on no evidence, or if the order is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material, i.e. if it is found to be a perverse order. The Court held as under:–

> *"(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.*
>
> (ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.
>
> (iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or the Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary- in the sense that no reasonable person would form the requisite opinion on the given material : in short, if it is found to be a perverse order.

> (iv) The Government (or the Review Committee, as the case may be) shall have to *consider the entire record of service before taking a decision in* the matter- of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.
>
> (v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it *uncommunicated adverse remarks were also taken into consideration.* That circumstance by itself cannot be a basis for interference." (Emphasis added).

9. Similar view has been reiterated by this Court in *Posts and Telegraphs Board & Ors. Vs. C.S.N. Murthy,* AIR 1992 SC 1368; *Sukhdeo Vs. Commissioner Amravati Division, Amravati & Anr.,* (1996) 5 SCC 103; *I.K. Mishra Vs. Union of India & Ors.,* AIR 1997 SC 3740; *M.S. Bindra Vs. Union of India & Ors.,* AIR 1998 SC 3058; and *Rajat Baran Roy & Ors. Vs. State of West Bengal & Ors.,* AIR 1999 SC 1661. This Court observed that there was a very limited scope of judicial review in a case of compulsory retirement and it was permissible only on the grounds of non-application of mind; mala fides; or want of material particulars. Power to retire compulsorily a Government servant in terms of Service Rules is absolute, provided the authority concerned forms a bona fide opinion that compulsory retirement is in public interest.

10. In *State of Gujarat & Anr. Vs. Suryakant Chunilal Shah,* (1999) 1 SCC 529, this Court held that while considering the case of an employee for compulsory retirement, public interest is of paramount importance. The dishonest, corrupt and dead-wood deserve to be dispensed with. How efficient and

honest an employee is, is to be assessed on the basis of the material on record, which may also be ascertained from confidential reports. However, there must be some tangible material against the employee warranting his compulsory retirement.

11. In *State of U.P. & Anr. Vs. Bihari Lal,* AIR 1995 SC 1161, this Court held that if the *general reputation of an employee is not good, though there may not be any tangible material against him,* he may be given compulsory retirement in public interest and judicial review of such order is permissible only on limited grounds. The Court further held that:

> "…..What is needed to be looked into, is the bona fide decision taken in public interest to augment efficiency in the public service."

12. In *State of U.P. & Ors. Vs. Vijay Kumar Jain,* AIR 2002 SC 1345, this Court while dealing with the issue observed as under:

> *"Withholding of integrity of a government employee is a serious matter.* In the present case, what we find is that the integrity of the respondent was withheld by an order dated 13-6-1997 and the said entry in the character roll of the respondent was well within ten years of passing of the order of compulsory retirement. During pendency of the writ petition in the High Court, the U.P. Services Tribunal on a claim petition filed by the respondent, shifted the entry from 1997-98 to *1983-84. Shifting of the said entry to a different period or entry going beyond ten years of passing of the order of compulsory retirement does not mean that vigour and sting of the adverse entry is lost.* Vigour or sting of an adverse entry is not wiped out, merely it is relatable to 11th or 12th year of passing of the order of compulsory retirement. The aforesaid adverse entry which could have been taken into account while considering the case of the respondent for his compulsory

> retirement from service, was duly considered by the State Government and the said single adverse entry in itself was sufficient to compulsorily retire the respondent from service. We are, therefore, of the view that entire service record or confidential report with emphasis on the later entries in the character roll can be taken into account by the Government while considering a case for compulsory retirement of a government servant. (Emphasis added)

13. In *Jugal Chandra Saikia Vs. State of Assam & Anr.,* AIR 2003 SC 1362, this Court held that where the screening committee is consisting of responsible officers of the State and they have examined/assessed the entire service record and formed the opinion objectively as to whether any employee is fit to be retained in service or not, in the absence of any allegation of mala fides, there is no scope of a judicial review against such an order.

14. In *Nawal Singh Vs. State of U.P. & Anr.,* AIR 2003 SC 4303, a similar view has been reiterated. The Court observed as under:

> "At the outset, it is to be reiterated that the judicial service is not a service in the sense of an employment. Judges are discharging their functions while exercising the sovereign judicial power of the State. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. Further, the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility. If such evaluation is done by the Committee of the High Court Judges and is affirmed in the writ petition, except in very exceptional circumstances, this Court would not interfere with the same, particularly because the order of compulsory retirement is based on the subjective satisfaction of the authority.
>
> ……Further, it is impossible to prove by positive evidence

the basis for doubting the integrity of the judicial officer. In the present-day system, reliance is required to be placed on the opinion of the higher officer who had the opportunity to watch the performance of the officer concerned from close quarters and formation of his opinion with regard to the overall reputation enjoyed by the officer concerned would be the basis.

.....the lower judiciary is the foundation of the judicial system. We hope that the High Courts would take appropriate steps regularly for weeding out the dead wood or the persons polluting the justice delivery system".

15. In *Chandra Singh & Ors. Vs. State of Rajasthan & Anr.,* AIR 2003 SC 2889, this Court after examining the entire evidence on record came to the conclusion that the compulsory retirement awarded to the appellant therein, Chandra Singh, a Judicial Officer, was not in consonance with law. However, considering the report of the Committee and taking note of the adverse remarks made against him, the Court refused to grant him any relief. The relevant part of the judgment reads as under:

"It will bear repetition to state that in terms of Rule 53 of the Pension Rules, an order for compulsory retirement can be passed only in the event the same is in public interest and/or three months' notice or three months' pay in lieu thereof had been given. Neither of the aforementioned conditions had been complied with....

We have, therefore, no option but to hold that the actions on the part of the High Court or the State in compulsorily retiring the appellants herein were illegal.

Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the deadwood. This constitutional power of the High Court cannot be circumscribed by any rule or order. We

can usefully refer to some of the leading cases on Article 235:

1. *State of Assam v. Ranga Mohd.,* AIR 1967 SC 903 (five Judges)

2. *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 (seven Judges)

3. *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil,* AIR 1997 SC 2631.

xxx xxx xxx

In the instant case, we are dealing with the higher judicial officers. We have already noticed the observations made by the Committee of three Judges. The nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility."

16. In *Shiv Dayal Gupta Vs. State of Rajasthan & Anr.,* (2005) 13 SCC 581, this Court examined the case of the compulsory retirement of a Judicial Officer and came to the conclusion that the Review Committee had made an overall assessment considering the entire service record of the said officer and came to the conclusion that continuance of the said officer in service would be a liability to the Department and adverse to public interest as his ACRs. revealed that he was poor in writing the judgments and was advised to improve the same. His judicial work was found unsatisfactory and he had been advised to improve the same. His integrity was found doubtful in the year 1983. He had earlier been superseded while being considered for promotion in 1983 and he had been given an adverse entry in 1993 that he failed to inspire confidence in subordinate staff and lawyers and had a low rate of disposal. On the basis of the aforesaid adverse entries, he was given compulsory retirement vide order dated 9.11.2000. This Court refused to interfere with the said order in view of the fact that

he could not raise proper allegations of mala fides or establish that the order of compulsory retirement was passed without application of mind. While deciding the said case, the court placed reliance upon the judgment of this Court in *Vijay Kumar Jain* (supra).

17. In *M.P. State Cooperative Dairy Federation Ltd. & Anr. Vs. Rajnesh Kumar Jamindar & Ors.,* (2009) 15 SCC 221, this Court held that judicial review of an order of compulsory retirement is permissible if the order is perverse or arbitrary, as also where there is non-compliance of statutory duty by statutory authority but the court should not go into the factual findings. The factors not germane for passing an order of compulsory retirement should not be taken into consideration. The criteria and rules adopted by the employer must be adhered to, to determine whether the employee had become liable for compulsory retirement. An authority discharging a public function must act fairly.

18. Thus, the law on the point can be summarised to the effect that an order of compulsory retirement is not a punishment and it does not imply stigma unless such order is passed to impose a punishment for a proved misconduct, as prescribed in the Statutory Rules. (See *Surender Kumar Vs. Union of India & Ors.,* (2010) 1 SCC 158). The Authority must consider and examine the over-all effect of the entries of the officer concerned and not an isolated entry, as it may well be in some cases that in spite of satisfactory performance, the authority may desire to compulsorily retire an employee in public interest, as in the opinion of the said Authority, the post has to be manned by a more efficient and dynamic person and if there is sufficient material on record to show that the employee "rendered himself a liability to the institution", there is no occasion for the Court to interfere in the exercise of its limited power of judicial review.

WASHED OFF THEORY

19. In *State of Punjab Vs. Dewan Chuni Lal,* AIR 1970 SC 2086, a two-Judge Bench of this Court held that adverse entries regarding the dishonesty and inefficiency of the government employee in his ACRs have to be ignored if, subsequent to recording of the same, he had been allowed to cross the efficiency bar, as it would mean that while permitting him to cross the efficiency bar such entries had been considered and were not found of serious nature for the purpose of crossing the efficiency bar.

20. Similarly, a two-Judge Bench of this Court in *Baidyanath Mahapatra Vs. State of Orissa & Anr.,* AIR 1989 SC 2218, had taken a similar view on the issue observing that adverse entries awarded to the employee in the remote past lost significance in view of the fact that he had subsequently been promoted to the higher post, for the reason that while considering the case for promotion he had been found to possess eligibility and suitability and if such entry did not reflect deficiency in his work and conduct for the purpose of promotion, it would be difficult to comprehend how such an adverse entry could be pressed into service for retiring him compulsorily. When a government servant is promoted to higher post on the basis of *merit and selection,* adverse entries if any contained in his service record lose their significance and remain on record as part of past history.

This view has been adopted by this Court in *Baikuntha Nath Das* (supra).

21. However, a three-Judge Bench of this Court in *State of Orissa & Ors. Vs. Ram Chandra Das,* AIR 1996 SC 2436, had taken a different view as it had been held therein that such entries still remain part of the record for overall consideration to retire a government servant compulsorily. The object always is public interest. Therefore, such entries do not lose

significance, even if the employee has subsequently been promoted. The Court held as under:–

> "*Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered.* The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension." (Emphasis added)

22. This judgment has been approved and followed by this court in *State of Gujarat Vs. Umedbhai M. Patel,* AIR 2001 SC 1109, emphasising that the "entire record" of the government servant is to be examined.

23. In *Vijay Kumar Jain,* (supra), this Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service records, including character rolls and confidential reports. 'Vigour or sting of an adverse entry is not wiped out' merely it relates to the remote past. There may be a single adverse entry of integrity which may be sufficient to compulsorily retire the government servant.

Larger Benchs' Judgment:

24. In *State of U.P. Vs. Ram Chandra Trivedi,* AIR 1976 SC 2547, this Court observed that it must be borne in mind that

in cases where there is any conflict between the views expressed by larger and smaller Bench of this Court, the court cannot disregard or skirt the views expressed by the larger Bench.

25. In *Smt. Triveniben Vs. State of Gujarat,* AIR 1989 SC 1335, this Court considered the issue and observed as under:

> "……The practice over the years has been that a larger bench straightway considers the correctness of and if necessary overrules the view of a smaller bench. This practice has been held to be a crystallised rule of law in a recent decision by a Special Bench of seven learned Judges. In *A. R. Antulay v. R. S. Nayak,* AIR 1988 SC 1531, Sabyasachi Mukharji, J., speaking for the majority said (at p. 1548 of AIR) :
>
> 'The principle that the size of the bench whether it is comprised of two or three or more judges does not matter, was enunciated in *Young v. Bristol Aeroplane Ltd.,* (1944-2 All ER 293) (supra) and followed by Justice Chinnappa Reddy in *Javed Ahmad Abdul Hamid Pawla v. State of Maharashtra,* (AIR 1985 SC 231), where it has been held that a Division Bench of two judges, has not been followed by our Courts.
>
> xxxx xxxx xxxx xxxx xxxx
>
> The law laid down by this Court is somewhat different. There is a hierarchy within the Court itself here where larger benches overrule smaller benches. See *Mattulal v. Radhey Lal,* AIR 1974 SC 1596, *Union of India v. K. S. Subramanian,* AIR 1976 SC 2433 at 2437; and *State of U.P. v. Ram Chandra Trivedi,* AIR 1976 SC 2547 at p. 2555. This is the practice followed by this Court and now it is a crystallised rule of law.'
>
> The answer to the question posed in *Javed Ahmad* case thus stands concluded and it is now not open to any one

to contend that a bench of two judges cannot be overruled by a bench of three judges. We must regard this as a final seal to the controversy."

26. In view of the above, the law can be summarised to state that in case there is a conflict between two or more judgments of this court, the judgment of the larger Bench is to be followed. More so, the washed off theory does not have universal application. It may have relevance while considering the case of government servant for further promotion but not in a case where the employee is being assessed by the Reviewing Authority to determine whether he is fit to be retained in service or requires to be given compulsory retirement, as the Committee is to assess his suitability taking into consideration his "entire service record".

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

28. Some of the entries in the ACRs' of the petitioner of the last years, which are relevant for this purpose are being mentioned here as under:

Year	**Remarks**
1996-97	(i) Knowledge – Average
	(ii) Promptness in disposal – **Out turn Poor**
	(iii) Net Result – Average
1997-98	(i) Promptness in Disposal – Average
	(ii) Efficiency – Average
	(iii) Net result – **Average officer capable of improvement**
1998-99	(i) Promptness in disposal – Average

	(ii) Efficiency – Average
	(iii) Net result – **out-turn capable of improvement**
1999-2000	(i) Promptness in disposal – Average
	(ii) Efficiency – Average
	(iii) Reputation – **Not good**
	Is he fit for exercise of any enhanced power – No

Beside these, adverse remarks made by the inspecting Judge against the petitioner are given as under:

Year	**Remarks**
30.8.1997	(i) Knowledge – Average, extensive study required.
	(ii) Promptness in disposal – **Not upto mark**
	(iii) Reputation – Some whispers are there but nothing concrete could be found.
2001-02	(i) Judgment – Average i.e. B
	(ii) Efficiency – Average (B)
	(iii) Integrity – **Seriously Doubtful**

29. It is evident from the aforesaid service record of the petitioner that he remained an *average officer* throughout his service career and could never improve. *His out turn had been poor;* he had been given adverse entries regarding his integrity/ reputation as not good in the years 1999-2000 and remarks to that effect by the Inspecting Judges in 1997 and 2001-2002.

The petitioner had made a bald assertion that the adverse entries have not yet been communicated to him. It has been repeatedly submitted by him that representations made by him against the said adverse entries had not been disposed of. Indisputably, uncommunicated adverse entries could be taken into account for the purpose of assessing an officer for compulsory retirement. The petitioner has not disclosed on what dates the representations against the adverse entries had been made. The petitioner had not challenged the said adverse entries, rather he considered it appropriate to challenge only the order of compulsory retirement which has been a consequential effect of such adverse entries. The law requires the Authority to consider the "entire service record" of the employee while assessing whether he can be given compulsory retirement irrespective of the fact that the adverse entries had not been communicated to him and the officer had been promoted earlier in spite of those adverse entries. More so, a single adverse entry regarding the integrity of an officer even in remote past is sufficient to award compulsory retirement. The case of a Judicial Officer is required to be examined, treating him to be differently from other wings of the society, as he is serving the State in a different capacity. The case of a Judicial Officer is considered by a Committee of Judges of the High Court duly constituted by Hon'ble the Chief Justice and then the report of the Committee is placed before the Full Court. A decision is taken by the Full Court after due deliberation on the matter. Therefore, there is hardly any chance to make the allegations of non- application of mind or mala fide.

30. Be that as it may, the service record of the petitioner revealed that he had not been promoted in the regular cadre of the District Judge as he was not found fit for the same because of the adverse entries. Petitioner was promoted as Additional District Judge on Ad hoc basis and posted in the Fast Track Court. It was definitely not a promotion on merit (selection). The High Court had objectively decided to

recommend his compulsory retirement and the State Authorities acted accordingly. No fault can be found with the decision making process or with the decision.

31. We do not find any force in the submissions made by Shri Sunil Kumar, learned senior counsel appearing for the petitioner that the counter affidavit filed by the High Court and the State reveal that certain reports called for from the District Judge had been considered, though such reports were not even available, and therefore, the affidavit to that extent is misleading. In fact, it is evident from the record that at the time of making of the note by the Registry for the Full court, it had been mentioned that report was still awaited. However, by the time the Full Court was held the report had been made available and was duly considered. Shri Ashok Mathur and Shri Anil Kr. Jha, learned counsel appearing for the respondents had placed before us the original record relating to the services of the petitioner and the report submitted by the Judicial Commissioner, Ranchi dated 5.4.2003, who after taking into consideration a large number of facts recorded the following conclusion:

> "However, on confidential enquiry I have found that his general reputation is not so good, but still no one came to me with any specific case against his general reputation."

Thus, the aforesaid submission made on behalf of the petitioner is preposterous.

32. Placing reliance on the judgments of this Court in *M.S. Bindra* (supra) and *Baldev Raj Chadha Vs. Union of India & Ors.,* AIR 1981 SC 70, it has been canvassed on behalf of the petitioner that adverse entries had not been made in bona fide manner and as per the requirement prescribed by circulars etc. Therefore, the consequential order of compulsory retirement is illegal. There is no factual foundation on the basis of which such an assertion can be examined, nor there is a challenge in the

writ petition to the said adverse entries. Petitioner sought quashing of order of compulsory retirement dated 20.5.2003 and not quashing of the adverse entries. Relief not specifically sought cannot be granted by the court. Therefore, there is no occasion for us to probe the issue further.

33. In view of the above, we do not find any cogent reason to interfere with the impugned order. The petition lacks merit and is accordingly dismissed. No costs.

D.G. Writ Petition dismissed.

SANDUR MANGANESE & IRON ORES LTD.
v.
STATE OF KARNATAKA & ORS.
(Civil Appeal No. 7944 of 2010)

SEPTEMBER 13, 2010

[P. SATHASIVAM AND H.L. DATTU, JJ.]

Mines and Minerals (Development and Regulation) Act, 1957 – s. 11(1), (2), (3), (4), (5) – Mineral Concession Rules, 1960 – rr. 59, 60 and 35 – Mining lease – Grant of – Renewal of mining lease in favour of 'S' Company but not for the entire area– Applications by 'S' for lease over certain area within the deleted area – Rejected by State Government – Notification u/r.59(1) by State Government notifying large area for re-grant of mining lease including area applied by 'S' – Invitation of applications from public – Fresh application by 'S', 'MSPL' and 'K' pursuant to the Notification – However, application by 'J' made only prior to the Notification – Recommendation by State Government to Central Government for approval of proposed grant in favour of 'J' and 'K' which was subsequently approved by Central Government – Writ petition challenging the recommendation – Single Judge of High Court quashing the grant in favour of 'J' and 'K' – Division Bench setting aside the order – On appeal, held: State Government cannot justify grant based on criteria that are de hors the MMDR Act and MC Rules – State Government's recommendation and the proceedings of Chief Minister was contrary to the provisions of s. 11 and rr. 59 and 60 and not valid in law – J's application made prior to the Notification could not be entertained along with the applications made pursuant to the Notification – Proposed investment in mines and in the industry based on the minerals is a relevant factor – Criteria of captive consumption not a controlling factor to grant fresh lease – State Government has no authority under the Act to make

commitments to any person that it will, in future, grant a mining lease in the event that person makes investment in any project – Recommendation in favour of 'J' and 'K' cannot be saved by law of equity – Flaw in the recommendation of State Government requires re-consideration, thus, matter cannot be remitted to the Central Government – Order of Division Bench as well as the decision of State Government and the Central Government quashed – State Government directed to consider all applications afresh – Mines and minerals.

Power of State Government under the Act and the Rules – Extent of – Held: State Government is denuded of all legislative and executive power under Entry 23 of List-II read with Article 162 after passing of the MMDR Act – State Government is purely a delegate of Parliament and a statutory functionary, for the purposes of s. 11(3), hence it cannot act in a manner that is inconsistent with the provisions of s. 11(1) in the grant of mining leases – Constitution of India, 1950 – Article 162, List II Entry 23.

Interpretation of statutes – Rule of construction – When statute vests certain power in an Authority to be exercised in a particular manner – Held: Authority has to exercise the power in the manner provided in the statute itself – Any deviation therein, cannot be sustained.

Ex-Ruler of Sandur State (now appellant Company) was granted lease for 20 years for mining of Iron and Manganese Ores in respect of 29 sq. miles falling within the boundaries of the Sandur State. The appellant Company invested in mining of Ores. After the expiry of 20 years, the lease was not renewed for the entire area as given in the original lease. In 1992, 'HG' was granted 60 hectares out of the same applied area. The appellant Company again applied for grant of lease within the area deleted from its original lease but the same was rejected. The appellant Company filed a revision petition before the

Government of India and the matter was remanded to the State Government. Thereafter, 'MSPL' made an application to the State Government for grant of mining lease over an area which was previously held by Sandur and also sought relaxation of the conditions specified in Rule 59(1) of the Mineral Concession Rules, 1960. Subsequently, 'J' Company also made an application for grant over the same area. The State Government made a recommendation to the Central Government for grant of lease to the 'MSPL'. While the matter was under consideration, one 'ZS' filed a writ petition seeking declaration that he was entitled for grant of a mining lease in his favour. However, the Central Government returned the proposal of the State Government directing it to await an environmental study.

On 26/27.02.2002, the State Government by a letter conveyed to the appellant Company that out of the area of 513.16 hectares applied for by the appellant Company, only an extent of 256 hectares (640 acres) was available to it. The appellant Company again filed a revision petition. On 15.03.2003, the State Government issued a Notification under Rule 59(1) of the Rules, notifying the availability of a large area for re-grant of mining lease which was referred to as 'Held Area Notification' including the area applied by the appellant Company. The appellant Company applied for the grant of mining lease over an area of 200 hectares in the notified area afresh. On 29.07.2003, the Government of India directed the State Government to consider the appellant's application. However, the State Government did not pass any order. Pursuant to the Notification, 'MSPL' made a fresh application for grant of mining lease over the notified area. 'K' and 88 other applicants also applied. However, 'J' did not apply. On 06.12.2004, the State Government made a recommendation to the Central Government

under Section 5 of the Mines and Minerals (Development and Regulation) Act, 1957 for approval of the proposed grant of mining lease to 'J' and 'K'. 'MSPL' and some of the applicants made representations to the Central Government against the said recommendation made by the State Government. The appellant Company as also 'MSPL' filed separate writ petitions challenging the recommendation dated 06.12.2004 of the State Government. During pendency, the Central Government gave its approval for grant of mining lease in favour of 'J' and 'K'. The Single Judge of the High Court by order dated 07.08.2008 quashed the Notification dated 15.03.2003 and the mining licences granted in favour of 'J' and 'K'. The Division Bench of the High Court by order dated 05.06.2009 upheld the validity of Notification of the State Government dated 15.03.2003 and the proceedings dated 06.12.2004 and consequently approval of the Central Government were held valid. Therefore, the instant Special Leave Petitions were filed.

The questions which arose for consideration in these appeals were as follows:

(i) Whether the State Government's recommendation dated 06.12.2004 and the proceedings of the Chief Minister are contrary to the provisions of Section 11 of the Act and Rules 59 and 60 of MC Rules and not valid in law.

(ii) Whether the application made by respondent-'J' prior to the Notification dated 15.03.2003 is capable of being entertained along with the applications made pursuant to the said notification.

(iii) Whether the order of the High Court of Karnataka in the case of 'ZS' permit the consideration of the application made by the respondent-'J' prior to the Notification dated 15.03.2003.

(iv) Whether Rule 35 of the MC Rules justify the recommendation of the State Government in favour of 'J' and 'K'.

(v) Whether the criterion of 'captive consumption' referred to in *Tata Iron and Steel Co. Ltd*. vs. *Union of India* (1996) 9 SCC 709 was applicable to the instant case despite not being one of the factors referred to in Section 11 (3) of the MMDR Act or Rule 35 of the MC Rules.

(vi) Whether factors such as the past commitments by the State Government to applicants who have already set up steel plants, are relevant for grant of lease despite the MMDR Act and the MC Rules constituting a complete Code.

(vii) Whether the recommendation in favour of 'J' and 'K' is saved by the operation of the Law of Equity.

(viii) Whether the Single Judge as well as the Division Bench of the High Court are justified in arriving at the said conclusion.

(ix) Whether it is advisable to remit the matter to the Central Government.

Partly allowing the appeals, the Court

HELD: 1.1. A perusal of the proceedings of the Chief Minister shows that no clear reasons were given to show as to why 'J' and 'K' were preferred over other applicants. There was no plausible reason why the applications of the appellants were not considered favourably. A summary of the applications was prepared and at the end certain columns were left blank which the Chief Minister filled by hand and then signed the proceedings. [Para 18] [281-B-C]

1.2. The evaluation of all 111 applications was done in three successive stages in a manner not envisaged by Section 11 of the Mines and Minerals (Development and Regulation) Act, 1957. No such procedure of three stage consideration or differentiation between individuals and Companies and those Companies with existing investments and those without existing investment is envisaged in Section 11. The proceedings of the Chief Minister, at no level, considered the various guiding criteria mentioned in Section 11(3). Only one criteria, namely, 'proposed investment' was taken into account in evaluating some applications. However, two irrelevant points were taken into account, namely, (i) whether or not the applicant holds a mining lease in the State, and (ii) the amount of their past investment in steel plant. The proceedings recommended in favour of 'J' and 'K' was justified by the special reasons specifically stated at the very end in terms of Section 11(5). [Paras 19 and 20] [281-D-F; 282-B-D]

1.3. A plain reading of Section 11 (5) makes it amply clear that it would apply to favour a later applicant over an earlier applicant which is relevant only in the event that the main provision of Section 11(2) relating to preference of prior applicants applies and not in the case of Notification inviting applications, whether it is under the first proviso to Section 11(2) or 11(4) under the later proviso, upon Notification, by deeming fiction all applications are treated as having been received on the same date. [Para 20] [282-G-H; 283-A]

1.4. The proceedings of the Chief Minister also violate Section 11 (4). Sub-section (4) permits only the applications made pursuant to the Notification to be taken into account and not applications made prior to the Notification. The Notification referred to in the first proviso to Section 11(2) is intended only to invite applications in respect of 'virgin areas'. In the case of

previously held areas covered by Notification dated 15.03.2003, applications made prior to the Notification could not be entertained because they were pre-mature. [Para 21] [283-A-F]

1.5. In view of the specific parliamentary declaration, there is no question of the State having any power to frame a policy *de hors* the MMDR Act and the Rules. [Paras 22, 24 and 25] [283-F-G; 287-B-D]

State of Orissa vs. *M.A. Tulloch and Co.* **(1964) 4 SCR 461;** *Baijnath Kedio* vs. *State of Bihar and Ors.* **(1969) 3 SCC 838;** *Hingir Rampur Coal Co. Ltd.* vs. *State of Orissa* **1961 (2) SCR 537;** *State of West Bengal vs. Kesoram Industries Ltd. and Ors.* **(2004) 10 SCC 201;** B*harat Coking Coal Ltd.* vs. *State of Bihar and Ors.* **(1990) 4 SCC 557;** *State of Assam and Ors. vs. Om Prakash Mehta and Ors.* **(1973) 1 SCC 584;** *Quarry Owners' Association vs. State of Bihar and Ors.* **(2000) 8 SCC 655, relied on.**

1.6. It is not open to the State Government to justify grant based on criteria that are *de hors* to the MMDR Act and the MC Rules. The exercise has to be done strictly in accordance with the statutory provisions and if there is any deviation, the same cannot be sustained. It is the normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. [Para 28] [287-G-H]

C.I.T. Mumbai vs. *Anjum M.H. Ghaswala and Ors.* **(2002) 1 SCC 633;** *Captain Sube Singh and Ors.* vs. *Lt. Governor of Delhi and Ors.* **(2004) 6 SCC 440;** *State of U.P.* vs. *Singhara Singh and Ors.* **(1964) 4 SCR 485, relied on.**

TISCO vs. U.O.I. and Anr. **(1996) 9 SCC 709, distinguished.**

2.1. Section 11(1) provides preferential right to the holder of reconnaissance permits or a prospecting licencee who has identified mineral resources in the area allotted to him for grant of a mining lease, subject to certain conditions specified in the proviso appended thereto. The over-riding character of the priority given to the successful prospecting licencee or reconnaissance permit-holder is clear from the fact that each of the subsequent sub-sections in Section 11 is made subject to Section 11(1). Section 11(2) gives preference to a prior applicant for grant of reconnaissance permit, prospecting licence or mining lease over later applicants where the State Government has not issued any Notification. The analysis of the Report of the Committee to Review the Existing Laws and Procedure for Regulation and Development of Minerals makes it clear that the main provision in Section 11(2) applies to 'virgin areas'; and that an area that is previously held or reserved would require a Notification for it to become available. The first proviso to Section 11(2) carves out an exception to the preferential right based on priority of applications in point of time referred to in the main provision. It makes it clear that where the State Government subsequently issues a notification inviting applications for grant, the prior and subsequent applications to the Notification would be considered as if they were filed on the same day and no priority in order of time would be given. The second proviso requires the State Government to examine the matters set out in Section 11(3) while considering the applications for grant. Under the ordinary principles of statutory interpretation, the first proviso to Section 11(2) embraces the field that is covered by the main provision. Thus, the Notification calling for applications referred to in the first proviso to Section 11(2) applies only to virgin areas. [Paras 31, 32 and 33] [290-D-H; 291-A-D; 292-C-E]

Indian Metals and Ferro Alloys Ltd. vs. *Union of India and*

Ors. **1992 Supp. 1 SCC 91;** *Abdul Jabar vs. State of J&K.* **AIR 1957 SC 281;** *Ram Narain Sons vs. Asst. CST* **1955 (2) SCR 483, relied on.**

2.2. Section 11(3) specifies the matter relevant for purposes of second proviso to Section 11(2). Section 11(3)(d) provides that "the investment which the applicant proposes to make in the mines and in the industry based on minerals" and it speaks about investment proposed to be made and not past investments. Thus, it confines the concept of "captive consumption of minerals to proposed investment and not past investments". Even the residuary clauses in Section 11(3)(e) are limited to 'matters as may be prescribed', which would necessarily mean matters prescribed by Rules. [Para 35] [293-C-F]

BSNL Ltd. and Anr. vs. *BPL Mobile Cellular Ltd. and Ors.* **(2008) 13 SCC 597, referred to.**

2.3. Sub-section (4) of Section 11 contemplates a situation where a Notification is issued inviting applications for an area for grant. In contrast to the first proviso to Section 11(2), it provides that all applications received pursuant to a Notification shall be considered simultaneously without assigning any priority in point of time, and after taking into account the matters specified in Section 11(3). Section 11(4), in effect, covers exactly the same field as the first and second proviso to Section 11(2) read along with Section 11(3) with one difference, i.e., unlike the first proviso to Section 11(2), it provides for consideration of only those applications that are made pursuant to the Notification and not those made prior to the Notification. Notification under Section 11(4) is consistent with Rule 59(1) read with Rule 60 insofar as applications received prior to the notification would not be entertained. The first proviso to Section 11(2) was being added to cover virgin areas, then provided for the

addition of Section 11(4), in order to ensure that the Notification referred to in Rule 59(1) together with Rule 60 would not render *ultra vires* the MMDR Act. It cannot be said that the first proviso of Section 11(2) would cover Notifications under Rule 59(1) because this would render Section 11(4) otiose and redundant. [Para 36] [293-F-H; 294-A-D]

J.K. Cotton Spinning & Weaving Mills Co. Ltd. vs. *State of U.P.* **AIR 1961 SC 1170;** *O.P. Singla and Anr. vs. Union of India and Ors.* **(1984) 4 SCC 450, referred to.**

2.4. Section 11(5) carves out an exception to the preference in favour of prior applicants in the main provision of Section 11(2). It permits the State Government, with the prior approval of the Central Government, to disregard the priority in point of time in the main provision of Section 11(2) and to make a grant in favour of a latter applicant as compared to an earlier applicant for special reasons to be recorded in writing. It also gives an indication that it can have no application to cases in which a Notification is issued because, in such a case, both the first proviso to Section 11(2) and Section 11(4) make it clear that all applications will be considered together as having been received on the same date. Thus, the proceedings of the Chief Minister and the recommendation dated 06.12.2004 are contrary to the Scheme of the MMDR Act as they were based on Section 11(5) which had no application at all to applications made pursuant to the Notification dated 15.03.2003. [Para 37] [294-F-H; 295-A]

2.5. Section 11(4) would apply to a Notification issued under Rule 59(1). Rule 59(1) provides that the categories of areas listed in it including, *inter alia*, areas that were previously held or being under a mining lease or which was reserved for exploitation by the State Government or under Section 17A of the Act, shall not be available for

grant unless (i) an entry is made in the register and (ii) its availability for grant is notified in the Official Gazette specifying a date not earlier than 30 days from the date of Notification. Sub-rule (2) of Rule 59 empowers the Central Government to relax the conditions set out in Rule 59(1). As per r. 60, an application for grant of connaissance permit, prospecting licence or mining lease in respect of an area whose availability is required to be notified under Rule 59 shall, if no notification is issued; or where Notification is issued, the 30-days black-out period specified in the Notification pursuant to Rule 59(1)(i)(ii) has not expired, be deemed to be pre-mature and shall not be entertained. Section 11(4) is consistent with Rules 59 and 60 when it provides for consideration only of applications made pursuant to a Notification. The consideration of applications made prior to the Notification, as required by the first proviso to Section 11(2), is clearly inconsistent with Rules 59 and 60. In such circumstances, a harmonious reading of Section 11 with Rules 59 and 60, therefore, mandates an interpretation under which Notifications would be issued under Section 11(4) in the case of categories of areas covered by Rule 59(1) of the Rules. [Para 38] [295-B-G]

2.6. The Division Bench erred in concluding that applications made prior to the Notification under Rule 59(1) which are pre-mature and cannot be entertained under Rule 60 would revive upon issuance of the Notification. The conclusion is against basic principles of statutory interpretation. The effect of Rule 60 is couched in negative language that is mandatory in nature. The purpose of Rule 59(1), which is to ensure that mining lease areas are not given by State Governments to favour persons of their choice without notice to the general public would be defeated. The Single Judge correctly interpreted Section 11 read with Rules 59 and 60. [Paras 39 and 41] [295-H; 296-A-B; 297-B-C]

Amritlal Nathubhai Shah and Ors. vs. Union Government of India and Anr. **(1976) 4 SCC 108;** *State of Tamil Nadu vs. M.S. Hindstone and Ors.* **(1981) 2 SCC 205;** *State of U.P. vs. Babu Ram Upadhya* **(1961) 2 SCR 679;** *Gujarat Pradesh Panchayat Parishad amd Ors. vs. State of Gujarat and Ors.* **(2007) 7 SCC 718, referred to.**

2.7. The Division Bench concluded that if Rule 60 is interpreted to render applications made prior to Rule 59(1) Notification *non est*, it would make Rule 59(2) unworkable because persons normally apply for mining lease areas along with an application for relaxation under Rule 59(2). The conclusion is clearly misplaced. It is only the request under Rule 59(2) of any person for relaxation in respect of an area that is considered and not the application for grant. Only after the relaxation under Rule 59(2) by the Central Government of the requirement of Notification under Rule 59(1) that applications could be considered for grant of mining lease. Section 11(2) alongwith Rules 59 and 60 should be interpreted that Section 11(2) is to cover virgin areas alone. Thus, the application made by 'J' prior to the Notification cannot be entertained along with the applications made pursuant to the Notification dated 15.03.2003 because it is Section 11(4) which covers the Notification along with Rule 59(1) and not the first proviso to Section 11(2) of the Act. [Para 41] [297-E-H; 298-A-C]

3. A perusal of the order of the High Court in the writ petition filed by 'ZS' shows that the State Government was directed to consider only the application of 'MSPL' and the applications filed by the impleading applicants and others pursuant to the Notification dated 15.03.2003 in accordance with law and in terms of the provisions of the MMDR Act and MC Rules. The High Court did not issue any direction to consider all applications made prior to the Notification. There was no *mandamus* from the

High Court to consider prior applications. The word 'others' qualify the phrase 'pursuant to' and not the class of applicants who had applied even prior to the 'Held Area Notification' dated 15.03.2003. The High Court merely directed the State Government to consider the applications in accordance with the provisions of the MMDR Act and MC Rules. The said order was passed without going into the specific provisions in the Act or Rules. The order does not deal with the interpretation of Section 11 or Rules 59 and 60. Hence, the orders of the High Court in the case of 'ZS' do not permit the consideration of application by 'J' which was made prior to the Notification dated 15.03.2003. [Para 42] [298-E-H; 299-A-B]

4.1. Rule 35 permits the State Government to differentiate between the 'end use' of the minerals for the purpose of sub-section (2) of Section 11 in addition to the matters in Section 11(3). Rule 35 does not differentiate between 'proposed' and 'existing' end use. In the instant case, all the parties, namely, 'MSPL', the appellant Company, 'J' and 'K' expressed their intention to use iron ore from the mines for producing steel and, therefore, the same 'end use' requirement is satisfied. Therefore, it could have enabled the State Government to take into account the claim of 'J' and 'K', whose past investments would not have qualified on the 'proposed' investment criterion under Section 11(3)(d), in addition to 'MSPL' and the appellant Company. This could have been a basis to exclude those with proposed investments in steel plants from consideration. [Para 43] [300-A-C]

4.2. Rule 35 specifies one additional factor apart from the factors set out in Section 11(3). The plain language of Rule 35 requires its application only in cases covered by Section 11(2) and not by Section 11(4). Therefore, to the extent that it is Section 11(4) that covers Notification

under Rule 59(1) and not Section 11(2). The State Government committed an error in relying on Rule 35 to exclude 'MSPL' and the appellant Company on the premise that it is intended to give preference to those who have made existing investments in industries based on iron ore and that the respondents-'J' and 'K', qualify on the said consideration. However, Rule 35 only permits the State Government to take additional factor of the 'end use' of the minerals and not the existing investments made by the applicants. The respondents also do not satisfy the requirements under Section 11(3)(d) which talks solely about proposed investments to be made and not the existing ones. [Para 44] [300-D-G]

5. Section 11(4) and second proviso to Section 11(2) provide that the State Government may grant, *inter alia*, a mining lease after taking into consideration the matters specified in Section 11(3). Section 11(3)(d) specifies "the investment which the applicant proposes to make in the mines and in the industry based on the minerals" as one of such matters and on a plain interpretation, it is clear that only the proposed investment is a relevant factor. If the Legislature had intended that it should include past investments also, the use of the word 'proposed' is superfluous, which could never be the case. The respondents did not point out any other provision in the MMDR Act or the MC Rules permitting grant of mining lease based on past commitments or for captive purposes in existing industries. [Para 45] [301-B-D]

Tata Iron and Steel Co. Ltd. vs. *Union of India* **(1996) 9 SCC 709, distinguished.**

Indian Charge Chrome Ltd. and Anr. vs. Union of India and Ors. **(2006) 12 SCC 331, referred to.**

6.1. The State Government is denuded of all legislative and executive power under Entry 23 of List-II

read with Article 162 after passing of the MMDR Act. The State Government is purely a delegate of Parliament and a statutory functionary, for the purposes of Section 11(3) of the Act, hence, it cannot act in a manner that is inconsistent with the provisions of Section 11(1) of the MMDR Act in the grant of mining leases. Section 2 of the Act clearly states that the regulation of mines and mineral development comes within the purview of the Union Government and not the State Government. The respondents have not been able to point out any other provision in the MMDR Act or MC Rules permitting grant of mining lease based on past commitments. The State Government has no authority under the MMDR Act to make commitments to any person that it will, in future, grant a mining lease in the event that the person makes investment in any project. Assuming that the State Government had made any such commitment, it could not be possible for it to take an inconsistent position and proceed to notify a particular area. Further, having notified the area, the State Government certainly could not, thereafter, honour an alleged commitment by ousting other applicants even if they are more deserving on the merit criteria as provided in Section 11(3). [Para 48] [302-D-H; 303-A-D]

6.2. The State Government cannot grant mining leases keeping in mind any considerations apart from the ones mentioned in the MMDR Act and MC Rules. Thus, no extraneous considerations such as past commitments made by the State Government to 'J' and 'K' who have already set up steel plants can be entertained by the State Government while granting mining leases and the State Government must abide by the Act and Rules. [Para 49]

State of Assam and Ors. vs. Om Prakash Mehta and Ors. **AIR 1973 SC 678;** *Quarry Owners' Association vs. State of Bihar and Ors.* **(2000) 8 SCC 655;** *State of Orissa* vs. *M.A.*

Tulloch and Co. **(1964) 4 SCR 461;** *Baijnath Kedio* vs. *State of Bihar and Ors.* **(1969) 3 SCC 838;** *State of West Bengal vs. Kesoram Industries Ltd. and Ors.* **(2004) 10 SCC 201;** B*harat Coking Coal Ltd.* vs. *State of Bihar and Ors.* **(1990) 4 SCC 557;** *C.I.T. Mumbai* vs. *Anjum M.H. Ghaswala and Ors.* **(2002) 1 SCC 633;** *Captain Sube Singh and Ors.* vs. *Lt. Governor of Delhi and Ors.* **(2004) 6 SCC 440;** *State of U.P.* vs. *Singhara Singh and Ors.* **(1964) 4 SCR 485, relied on.**

7. The Law of Equity cannot save the recommendation in favour of 'J' and 'K' because equity stands excluded when a matter is governed by statute. Where the field is covered expressly by Section 11 of the MMDR Act, equitable considerations cannot be taken into account to assess 'J' and 'K', when the recommendation in their favour is in violation of statute. 'K' did not have a commitment from the State Government regarding its iron ore needs. In the proceedings of the State Government, there is only a statement that it may apply for a lease. 'J' emphasized that it has already set up its steel plant based on the commitments made by the State Government to grant a mining lease and it is in need of iron ore for these steel plants. Commitments made by the State Government cannot be a relevant factor for grant of lease in the teeth of the consideration set out in Section 11(3). If that was to be the sole criterion, the State Government ought not to have notified the area as 'Held Area Notification' dated 15.03.2003. Since the entire field of granting mining lease is covered by MMDR Act and MC Rules, the State Government cannot use any consideration apart from the ones mentioned in the Act and Rules. [Paras 50 and 51] [304-D-H; 306-B]

Kedar Lal vs. Hari Lal Sea **(1952) SCR 179;** *Raja Ram vs. Aba MarutiMali* **(1962) Supp. 1 SCR 739, referred to.**

8.1. The Division Bench erred in concluding that the application made by 'J' prior to the Notification could be

entertained along with the applications made pursuant to the Notification because it is not Section 11(4) which covers the said Notification under Rule 59(1) but the first proviso to Section 11(2). The Division Bench did not even mention Section 11(4) in its reasoning apart from stray references even though the conclusion of the Single Judge hinged on how Section 11(4) would be rendered otiose and redundant if the first proviso to Section 11(2) was taken as governing the consideration of applications under a Notification pursuant to Rule 59(1). It also erred in concluding that the applications made prior to Notification under Rule 59(1) which are pre-mature and cannot be entertained under Rule 60 would revive upon issuance of the Notification. Had that been the intention of the Legislature, there was no reason for the Legislature to take pains under Rule 60(b) that an application made during the period of 30 days specified in the Notification also would be pre-mature and could not be entertained. If the decision of the Division Bench is taken to its logical conclusion, then it would result in reading a proviso at the end of Rule 60 to the effect that once the 30 days' period specified in the Notification contemplated by Rule 59(1) sub-clause (ii) is over, pre-mature applications would revive. After taking such pains to make it clear that the application would not be entertained until the end of 30 days' period, surely the Legislature itself would have inserted such proviso in Rule 60 if that were its intention. If such pre-mature applications are allowed to be entertained, it would result in the State Government giving out mining leases to favoured persons without notice to the general public. [Paras 52 and 53] [306-D-H; 307-A-B]

8.2. The conclusion arrived at by the Division Bench that if Rule 60 is interpreted to render applications made prior to Rule 59(1) Notification *non est*, in that event, it would make Rule 59(2) unworkable because persons will

normally apply mining lease areas along with an application for relaxation under Rule 59(2), is clearly misplaced. It is only the request under Rule 59(2) for relaxation in respect of an area that is considered and not the application for grant. It is only after the relaxation under Rule 59(2) by the Central Government of the requirement of the Notification under Rule 59(1) that the applications could be considered for grant of mining lease. Though the Single Judge in his order dated 07.08.2008 quashed the communication/recommendation of the State Government dated 06.12.2004 proposing to grant mining lease to 'J' and 'K', however, the Single Judge traveled much beyond the reliefs sought for in the writ petition and quashed the entire Notification No. CI.16:MMM.2003 dated 15.03.2003. While approving earlier part of the order and quashing the communication/ recommendation of the State Government dated 06.12.2004, the other observations/directions are not warranted in the light of the provisions of the Act and the Rules. The said observations/directions are deleted. [Paras 54 and 55] [307-C-H]

9.1. The Central Government considers only the materials forwarded by the State Government along with its recommendation. If the recommendation of the State Government cannot be upheld in law, all consequential orders including the subsequent approval by the Central Government are also liable to be quashed. If the very same recommendation of the State Government is sent back to the Central Government on the administrative side in its role as an approving authority under Section 5(1) without setting aside the impugned judgment, it is more likely that the Central Government would simply follow its previous order. In that event, the Central Government would be influenced by the judgment passed by the Division Bench upholding the grant made in favour of 'J' and 'K'. Such an exercise would be in the

nature of post-decisional hearing which would be impermissible. As on date the Central Government hears revision petitions through an Executive Officer and without participation of a Judicial Member. The exact procedure of the revisional tribunal has kept changing over the last few months. It would not be an independent and efficacious alternative forum. When there was no valid recommendation by the State Government for the grant of lease, there cannot be any valid approval of the Central Government relying on defective recommendation. [Para 56] [308-B-H; 309-A-C]

H.L. Trehan and Ors. vs. *Union of India and Ors.* **(1989) 1 SCC 764;** *K.I. Shephard and Ors.* vs. *Union of India and Ors.* **(1987) 4 SCC 431;** *Shekhar Ghosh* vs. *Union of India and Anr.* **(2007) 1 SCC 331;** *Union of India vs. R. Gandhi, President, Madras Bar Association* **JT 2010 (5) SC 553, relied on.**

Pavani Sridhara Rao vs. *Govt. of A.P and Ors.* **(1996) 8 SCC 298;** *State of Kerala* vs. *Puthenkavu N.S.S. Karayogam and Anr.* **(2001) 10 SCC 191;** *Indian Charge Crome Ltd. and Anr. v. Union of India and Ors.* **(2006) 12 SCC 331, referred to.**

Barnard vs. *National Dock Labour Board* **(1953) 1 All E.R. 1113;** *McFoy* vs. *United Africa Co.* **(1961) All E.R. 1169, referred to.**

9.2. The recommendation of the State Government dated 06.12.2004 is not valid with reference to the provisions of MMDR Act and the Rules, hence the invalid recommendation cannot be looked into by the Central Government. The proviso to Section 5(1) itself provides only for the Central Government either to grant or reject its approval to the State Government's recommendation in the case of mining lease for a mineral such as iron ore

in the First Schedule. Such consideration on the administrative side does not involve consideration of all the applicants based on their mining lease applications and after giving an opportunity of hearing. Inasmuch as the Central Government does not have all relevant materials before it, it may not be in a position to substitute itself for the State Government and it would not be proper, in fact, it would be inconsistent with the provisions of the MMDR Act and the Rules, to frame the issue on the administrative side of the Central Government. Even otherwise, inasmuch as there is a flaw in the recommendation of the State Government which requires re-consideration, the request for remitting the matter to the Central Government for its decision is rejected. [Para 56] [309-C-G]

10. The impugned order of the Division Bench of the High Court in Writ Appeal No. 5084 of 2008 and allied matters as well as the decision of the State Government dated 26/27.02.2002 and the subsequent decision of the Central Government dated 29.07.2003 are quashed. The State Government is directed to consider all applications afresh in light of the interpretation of Section 11 of the Act and Rules 35, 59 and 60 of MC Rules and make a recommendation to the Central Government within the stipulated period. [Para 57] [309-H; 310-A-C]

Case Law Reference:

(1964) 4 SCR 461	Relied on.	Para 22, 49
(1969) 3 SCC 838	Relied on.	Para 22, 49
1961 (2) SCR 537	Relied on.	Para 22
(2004) 10 SCC 201	Relied on.	Para 23, 49
(1990) 4 SCC 557	Relied on.	Para 24, 49
(1973) 1 SCC 584	Relied on.	Para 26

(2000) 8 SCC 655	Relied on.	Para 27, 49
(2002) 1 SCC 633	Relied on.	Para 28, 49
(2004) 6 SCC 440	Relied on.	Para 28, 49
(1964) 4 SCR 485	Relied on.	Para 28, 49
(1996) 9 SCC 709	Distinguished.	Para 29, 46
1992 Supp. 1 SCC 91	Relied on.	Para 33
AIR 1957 SC 281	Relied on.	Para 33
1955 (2) SCR 483	Relied on.	Para 33
(2008) 13 SCC 597	Referred to.	Para 35
AIR 1961 SC 1170	Referred to.	Para 36
(1984) 4 SCC 450	Referred to.	Para 36
(1976) 4 SCC 108	Referred to.	Para 40
(1981) 2 SCC 205	Referred to.	Para 41
(1961) 2 SCR 679	Referred to.	Para 41
(2007) 7 SCC 718	Referred to.	Para 41
(2006) 12 SCC 331	Referred to.	Para 47
AIR 1973 SC 678	Referred to.	Para 49
(1952) SCR 179	Referred to.	Para 50
(1962) Supp. 1 SCR 739	Referred to.	Para 50
(1953) 1 All E.R. 1113	Referred to.	Para 56
(1961) All E.R. 1169	Referred to.	Para 56
(1996) 8 SCC 298	Referred to.	Para 56
(2001) 10 SCC 191	Referred to.	Para 56
(1989) 1 SCC 764	Relied on.	Para 56

(1987) 4 SCC 431	**Relied on.**	**Para 56**
(2007) 1 SCC 331	**Relied on.**	**Para 56**
JT 2010 (5) SC 553	**Relied on.**	**Para 56**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7944 of 2010.

From the Judgment & Order dated 05.06.2009 of the High Court of Karnataka at Bangalore in W.A. No. 5084 of 2008.

With

C.A.Nos. 7945-54, 7955-61 of 2010

K.K. Venugopal, Krishnan Venugopal, Uday Tiwary, Abir Phukan, Sidharth Singh, A. Raghunath, Shyam Mohan, Nishant, A. V., P.V. Dinesh, P. Rajesh, P.V. Vinod, T.P. Sindhu, Athouba K., Sunil Dogra, A. Venayagam Balan, Harshad V. Hameed, Kuriakose Varghese, K. Rajeev, B. Agrawal, Rajeev Mehta for the Appellant.

Dushant Dave, D.L.N. Rao, Bhardwaj S. Iyengar, Badri Vishal, Prashant Kumar, M. Gireesh Kumar, S.K. Kulkarni, A.S. Kulkarni, AP & J Chambers, Manu Nair, P.C. Sen, R. Sharma Mark Disouza, Suresh A. Shroff & Co., Anitha Shenoy, Rashmi Nand Kumar, S. Udaya Kumar Sagar, Bina Madhavan, Biswanath Agrawalla, Vivek Chib, Rajiv Mehta, K.N. Phanindra, Kiran Suri, Aparna Bhat Mattoo, S.J. Amith, Nazneen Ahmed, Ravindra Keshavrao Adsure for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted in all the special leave petitions.

2. These appeals seek to challenge the common judgment and order of the Division Bench of the High Court of Karnataka dated 05.06.2009 arising out of Writ Appeal No. 5084 of 2008

and allied matters and the decision of the State Government dated 26/27.02.2002 as well as the Central Government dated 29.07.2003.

3. The appellants in these appeals are Sandur Manganese & Iron Ores Ltd. (in short "Sandur") and M/s MSPL Ltd. The principal respondents are M/s Kalyani Steels Ltd. (in short "Kalyani") and M/s Jindal Vijayanagar Steels Ltd. (in short "Jindal"). Apart from these, the State of Karnataka and the Union of India are also arrayed as respondents.

4. Factual matrix:

(a) The case of **Sandur** (Petitioner in SLP (C) No. 22077 of 2009) is as follows:

(i) Shri Y.R. Ghorpade, ex-Ruler of Sandur State, was granted lease for mining of Iron & Manganese Ores under Order No. GEO.Ms.068 dated 26.02.1953, for a period of 20 years commencing from 01.01.1954 to the extent of 29 sq. miles, falling within the boundaries of the Sandur State. On 18.01.1954, the appellant-Company was incorporated as a Private Limited Company under the provisions of the Companies Act, 1956. On 21/23.06.1956, a lease was transferred in favour of the Company as per Government Order No. I.1432-38 GE43.55-22. On 28.11.1964, the Company was converted into a Public Limited Company. In 1965, the Company, with the aim of value addition to Ores mined by the Company and also to industrial area, set up a 15 MVA Metal and Ferro Alloys Plant at Vyasankere near Hospet at a substantial capital cost. In 1980, Sandur also set up two more 20 MVA Furnaces in the Plant for manufacture of Ferro-Silicon by entering into an agreement with the State Government and the Karnataka Electricity Board to receive power at a viable tariff. On 19.09.1973, upon applying for renewal of the abovesaid lease, the Company was allotted an area of 20 sq. miles only instead of 29 sq. miles which was leased earlier. However, the

Company was further granted renewal of lease for another 1.46 sq. miles out of the area held earlier. On the very same date, the State Government deleted an area of 9 sq. miles from the appellant-Company's lease agreement on the ground that the said area is reserved for exploitation by the National Mineral Development Corporation (in short "NMDC") – a Government of India Undertaking. When the company noticed that the NMDC did not initiate any Mining Lease Application on the said area, then on 29.09.1987, it applied for mining lease over an area of 2 sq. miles within the said deleted area. On 25.01.1989, the State Government rejected the application on the ground that the area applied for was already reserved by NMDC. However, NMDC was not granted lease and in 1992, one Sri H.G. Rangangoud was granted 60 Hectares out of the same applied area.

(ii) Again, on 24.06.1993, again the Company applied for grant of lease over an area of 513.16 Hectares within the area deleted from its original lease but it was rejected by the State Government on the ground that the area applied by them has overlapped with the area granted to one Sri Rangangoud and nine others. On 11.12.1993, the Company challenged the above decision of the State Government by filing a Revision Petition before the Government of India, Ministry of Coal and Mines, New Delhi. On 09.04.1999, the Government of India by holding that the order passed by the State Government was in violation of Rule 26 (1) of the Mineral Concession Rules, 1960 (hereinafter referred to as "MC Rules") and opposed to the principles of natural justice remanded the matter to the State Government for early disposal as per the provisions of Mines & Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as the "MMDR Act") and the Rules framed thereunder. On 26/27.02.2002, the Company got a letter from the State Government that out of the area of 513.16 Hectares applied for by it, only an extent of 256 Hectares (640 acres) was available and it could choose either Block A (168 Acres or 67 Hectares) or Block B (472 Acres or 189 Hectares).

(iii) On 13.05.2002, the Company filed a revision petition before the Government of India against the said decision of the State Government. On 15.03.2003, the State Government issued a Notification in exercise of its power under Rule 59 of the MC Rules reserving the entire area calling for applications from the general public for grant of mining leases and by notifying large extent of previously held areas as available for grant of mines including the area applied by the appellant-Company. On 16.04.2003, the appellant-Company, by way of abundant caution, applied afresh for grant of mining lease over an area of 200 Hectares in the notified area without prejudice to its rights for consideration of its earlier application dated 24.06.1993. On 29.07.2003, the Government of India allowed the revision petition filed by the appellant-Company and directed the State Government to consider the application dated 24.06.1993 filed by the appellant-Company on merits, in terms of order dated 09.04.1999 of the Revisional Authority and pass a final order in the case. In spite of this order, the State Government has not passed any order. On 06.12.2004, a letter was issued by the State Government seeking approval of the Central Government for grant of lease to other applicants i.e. Jindal & Kalyani. Being aggrieved by the said recommendation, on 11.06.2007, the appellant-Company filed Writ Petition No. 8971 of 2007 before the High Court. The learned single Judge clubbed this writ petition along with W.P. No. 21608 of 2005 filed by another applicant – MSPL Ltd. On 07.08.2008, the learned single Judge quashed the Notification dated 15.03.2003 and the Mining Licences granted in favour of Jindal and Kalyani with certain observations.

(iv) On 22.08.2008, Jindal-Respondent No.5 herein filed W.A. No. 5026 of 2008 in the High Court. Being aggrieved by the order passed by the learned single Judge, Sandur preferred Writ Appeal No. 5084 of 2008 before the High Court. By the impugned common order dated 05.06.2009, the Division Bench of the High Court set aside the order of the learned single Judge dated 07.08.2008 and upheld the validity of Notification of the

State Government dated 15.03.2003 and the proceedings dated 06.12.2004 and the consequential approval of the Central Government were held valid. Aggrieved by the said order, the appellant-Company has filed S.L.P.(C) No. 22077 of 2009 before this Court.

(b) The case of **MSPL** (Petitioner in SLP (C) Nos. 22943-22952 of 2009) is as follows:

(i) MSPL Limited filed above SLPs against the common judgment and order dated 05.06.2009 passed by the High Court of Karnataka in W.A. Nos. 5024, 5026, 5032, 5052, 5053, 5064-5066, 5077 and 5145/2008 setting aside the judgment of the learned single Judge dated 07.08.2008 in the writ petitions.

(ii) On 24.05.2001, MSPL Ltd. made an application to the Director of Mines & Geology (hereinafter referred to as "the Mines Director") for grant of a mining lease over an extent of 298.5 Hectares in the area known as Eddinpada in Kumaraswamy Range of the State of Karnataka which was part of a mining lease previously held by the appellant-Company in S.L.P. (C) No. 22077 of 2009. On 30.08.2001, the State of Karnataka requested the Central Government to relax the conditions set out in Rule 59(1) in favour of MSPL Ltd. under Rule 59(2). While the matter was under consideration of the Central Government, one *Ziaullah Sharieff* (another applicant for a mining lease) filed Writ Petition No. 35915 of 2001 (GM-MMS) before the High Court seeking declaration that he is entitled for grant of a mining lease in his favour. On 21.12.2001, the Central Government returned all proposals for grant of mining lease pending before it to the State Government to await the report of the Regional Environmental Impact Assessment of the Bellary-Hospet Region by National Environmental Engineering Research Institute (NEERI).

(iii) On 13.05.2002, Sandur filed a revision before the Central Government under Rule 54 of the MC Rules challenging the proposal of the State Government dated 30.08.2001, in

favour of the MSPL. During pendency of the said revision, Sandur also filed W.P. No. 22767 of 2002 seeking a *mandamus* to the Central Government to consider its revision petition. On 24.10.2002, Jindal made an application for grant of mining lease over a part of the same area previously held and surrendered by Sandur. On 15.03.2003, the State Government issued Notification informing the general public that the areas mentioned in the annexure thereof were available for grant under Rule 59 of the Rules and interested persons were requested to file applications for grant of mining leases. On 16.04.2003, pursuant to the said notification, MSPL made an application for the same area previously held by Sandur. On 29.07.2003, the Central Government rejected the revision petition of MSPL. On 20.12.2003, MSPL made further submissions before the Mines Director. On 30.04.2004, the respondent-Mines Director sent a notice to the MSPL for making submissions. Again on 06.10.2004, the Under Secretary to the new State Government, Mines (C & I Department) issued another notice under Rule 26(1) of the Rules requiring the MSPL to appear before the Hon'ble Chief Minister of Karnataka to make a presentation for sanction of lease. MSPL put-forth its claim and submitted a detailed presentation to the Principal Secretary to the Chief Minister. Vide letter dated 06.12.2004, the State Government sought the approval of the Central Government under Section 5(1) of the MMDR Act to grant lease to Jindal over an area of 200.73 Hectares and Kalyani over an area of 179.70 Hectares in respect of a part of the land mentioned in S.No.1 to the Notification dated 15.3.2003. On 15.12.2004, MSPL made representations both to the Minister for Mines and to the Secretary, Department of Mines in the Central Government against the said proposal. On 21.12.2004, a further representation was made to the Secretary, Department of Mines. Against the said approval, two others preferred writ petitions before the High Court for quashing of the said proposal. MSPL filed application for impleadment in the said writ petitions and the same was rejected by the learned single Judge vide order dated 21.07.2005.

(iv) On 12.09.2005, MSPL preferred writ petition being W.P. No. 21608 of 2005 before the High Court challenging the recommendation in favour of Jindal and Kalyani. On 05.06.2006/ 27.06.2006, the Central Government granted approval to the recommendation dated 06.12.2004 of the State Government for grant of mining lease in favour of Jindal and Kalyani. Vide judgment dated 07.08.2008, learned single Judge of the High Court allowed W.P. No. 21608 of 2005 quashing the recommendation. Against the judgment of the learned single Judge, Jindal and Kalyani preferred W.A. Nos. 5026 & 5028 of 2008 respectively, before a Division Bench of the High Court. MSPL also filed W.A. No. 5057 of 2008 challenging the same judgment of the learned single Judge save and except to the extent that the recommendations of the State Government to the Central Government insofar as it recommended the grant of mining to Jindal and Kalyani was quashed. A large number of other writ appeals were also filed, heard together and disposed of by a common judgment and order dated 05.06.2009.

5. Heard Mr. Nariman, learned senior counsel for Sandur, Mr. K.K. Venugopal and Mr. Krishnan Venugopal, learned senior advocates for MSPL, Mr. Harish N. Salve, learned senior counsel for Jindal, Mr. Dushyant Dave, learned senior counsel for Kalyani and Mr. Ashok Haranahalli, learned Advocate General for the State of Karnataka.

6. **Main issues:-**

(a) Whether the State Government's recommendation dated 06.12.2004 and the proceedings of the Chief Minister are contrary to the provisions of Section 11 of the Act and Rules 59 and 60 of MC Rules and not valid in law.

(b) Whether the respondent-Jindal's application dated 24.10.2002 made prior to the Notification dated 15.03.2003 is capable of being entertained along with the applications made pursuant to the said

notification.

(c) Whether the order of the High Court of Karnataka in *Ziaulla Sharieff's* case permit the consideration of the respondent-Jindal's application dated 24.10.2002 made prior to the notification dated 15.03.2003.

(d) Whether Rule 35 of the MC Rules justify the recommendation of the State Government in favour of the Respondents-Jindal and Kalyani.

(e) Whether the criterion of "captive consumption" referred to in *Tata Iron and Steel Co. Ltd. vs. Union of India,* (1996) 9 SCC 709, have any application in this case despite not being one of the factors referred to in Section 11 (3) of the MMDR Act or Rule 35 of the MC Rules.

(f) Whether factors such as the past commitments by the State Government to applicants who have already set up steel plants, matter for consideration for grant of lease despite the MMDR Act and the MC Rules constituting a complete Code.

(g) Whether the recommendation in favour of respondents-Jindal and Kalyani saved by the operation of the Law of Equity.

(h) Whether the learned single Judge as well as the Division Bench are justified in arriving at such conclusion.

(i) Whether it is advisable to remit it to the Central Government.

7. Before considering various issues as mentioned above, let us refer relevant provisions of the Act and the Rules concerned to the issues in question. The Preamble of the MMDR

Act, as amended by Act 38 of 1999, makes it clear that it is intended for the development and regulation of mines and minerals under the control of Union. The relevant provisions from the Act are:

> *"2. Declaration as to the expediency of Union control.*—It is hereby declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals to the extent herein after provided.
>
> *3. Definitions:*-In this Act, unless the context otherwise requires:—
>
> a. "minerals" includes all minerals except mineral oils;
>
> b. .....
>
> c. "mining lease" means a lease granted for the purpose of undertaking mining operations, and includes a sub-lease granted for such purpose;
>
> d. .....
>
> e. .....
>
> f. .....
>
> g. "prospecting licence" means a licence granted for the purpose of undertaking prospecting operations;
>
> h. "prospecting operations" means any operations undertaken for the purpose of exploring, locating or proving mineral deposits;
>
> (ha) "reconnaissance operations" means any operations undertaken for preliminary prospecting of a mineral through regional, aerial, geophysical or geochemical surveys and geological mapping, but does not include pitting, trenching, drilling (except drilling of boreholes on a grid specified from

> time to time by the Central Government) or sub-surface excavation;
>
> (hb) "reconnaissance permit" means a permit granted for the purpose of undertaking reconnaissance operations; and.
>
> *11. Preferential right of certain persons.*—(1)Where a reconnaissance permit or prospecting licence has been granted in respect of any land, the permit holder or the licencee shall have a preferential right for obtaining a prospecting licence or mining lease, as the case may be, in respect of that land over any other person:
>
> Provided that the State Government is satisfied that the permit holder or the licensee, as the case may be,-
>
> (a) has undertaken reconnaissance operations or prospecting operations, as the case may be, to establish mineral resources in such land;
>
> (b) has not committed any breach of the terms and conditions of the reconnaissance permit or the prospecting licence;
>
> (c) has not become ineligible under the provisions of this Act; and
>
> (d) has not failed to apply for grant of prospecting licence or mining lease, as the case may be, within three months after the expiry of reconnaissance permit or prospecting licence, as the case may be, or within such further period, as may be extended by the said Government.
>
> (2) Subject to the provisions of sub-section (1), where the State Government has not notified in the Official Gazette the area for grant of reconnaissance permit or prospecting licence or mining lease, as the case may be, and two or more persons have applied for a reconnaissance permit, prospecting licence or a mining lease in respect of any land

in such area, the applicant whose application was received earlier, shall have the preferential right to be considered for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, over the applicant whose application was received later:

Provided that where an area is available for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, and the State Government has invited applications by notification in the Official Gazette for grant of such permit, licence or lease, all the applications received during the period sepcified in such notification and the applications which had been received prior to the publication of such notification in respect of the lands within such area and had not been disposed of, shall be deemed to have been received on the same day for the purposes of assigning priority under this sub-section:

Provided further that where any such applications are received on the same day, the State Government, after taking into consideration the matter specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applications as it may deem fit.

(3) The matters referred to in sub-section (2) are the following:-

a. any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;

b. the financial resources of the applicant;

c. the nature and quality of the technical staff employed or to be employed by the applicant;

d. the investment which the applicant proposes to make

in the mines and in the industry based on the minerals;

e. such other matters as may be prescribed.

(4) Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be , all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit.

(5) Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an application whose application was received earlier:

Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this sub-section."

8. In exercise of the powers conferred by Section 13 of the Act, the Central Government framed rules called the Minerals Concession Rules, 1960. We are concerned only with the following Rules:-

"35. *Preferential rights of certain persons.* – Where two or more persons have applied for a reconnaissance permit or a prospecting licence or a mining lease in respect of the

same land, the State Government shall, for the purpose of sub-section(2) of Section 11, consider, besides the matters mentioned in clauses (a) to (d) of sub-section(3) of Section 11, the end use of the mineral by the applicant.

59. *Availability of area for regrant to be notified.* – (1) No area –

(a) which was previously held or which is being held under a reconnaissance permit or a prospecting licence or a mining lease; or

(b) which has been reserved by the Government or any local authority for any purpose other than mining; or

(c) in respect of which the order granting a permit or licence or lease has been revoked under sub-rule (1) of rule 7A or sub-rule(1) of rule15 or sub-rule(1) of rule 31, as the case may be; or

(d) in respect of which a notification has been issued under the sub-section (2) or sub-section (4) of Section 17; or

(e) which has been reserved by the State Government under Section 17A of the Act

shall be available for grant unless –

(i) an entry to the effect that the area is available for grant is made in the register referred to in sub-rule (2) of rule 7D or sub-rule (2) of rule 21 or sub-rule (2) of rule 40 as the case may be; and

(ii) the availability of the area for grant is notified in the Official Gazette and specifying a date (being a date not earlier than thirty days from the date of the publication of such notification in the Official Gazette) from which such area shall be available for grant:

Provided that nothing in this rule shall apply to the renewal of a lease in favour of the original lessee or his legal heirs notwithstanding the fact that the lease has already expired:

Provided further that where an area reserved under rule 58 or under section 17A of the Act is proposed to be granted to a Government Company, no notification under clause (ii) shall be required to be issued:

Provided also that where an area held under a reconnaissance permit or a prospecting licence, as the case may be, is granted in terms of sub-section(1) of section 11, no notification under clause (ii) shall be required to be issued..

(2) The Central Government may, for reasons to be recorded in writing, relax the provisions of sub-rule (1) in any special case.

60. **Premature applications.** – Application for the grant of a reconnaissance permit, prospecting licence or mining lease in respect of areas whose availability for grant is required to be notified under rule 59 shall, if -

(a) no notification has been issued, under that rule ; or

(b) where any such notification has been issued, the period specified in the notification has not expired, shall be deemed to be premature and shall not be entertained.".

9. In the light of the above statutory provisions, let us consider the issues framed, one by one, and test the validity or otherwise of the decision of the State Government as well as the order passed by the learned single Judge and the Division Bench of the High Court.

10. As mentioned earlier, by the impugned common judgment dated 05.06.2009, the Division Bench reversed the judgment of the learned single Judge and held that the

applications for grant of mining lease made prior to notification under Rule 59 of the MC Rules could be considered for grant along with applications filed pursuant to the notification. In the case on hand, the application was made by Jindal prior to the notification. The Division Bench upheld the recommendations dated 06.12.2004 of the State Government together with the proceedings of the Chief Minister which were the basis for the recommendation under Section 5(1) of the MMDR Act to the Central Government for approval of grant of mining lease in favour of Jindal and Kalyani. It is seen from the records that on 24.05.2001, MSPL made an application to the State Government for grant of mining lease over an area of 298.5 hectares in Eddinpada area in Kumaraswamy range of the State of Karnataka and also sought relaxation of the conditions specified in Rule 59(1) of the MC Rules. This area was previously held under a mining lease by Sandur. Subsequently, on 24.10.2002, Jindal also made an application for grant over the same area. The State Government made a recommendation to the Central Government for grant of lease to the MSPL and sought relaxation of the conditions set out in Rule 59(1). However, it is not in dispute that the Central Government returned the proposal of the State Government directing it to await an environmental study being carried out by the NEERI.

11. The materials placed further show that on 15.03.2003, the State Government issued a Notification under Rule 59(1) of the MC Rules notifying the availability of a large area for re-grant of mining lease which was referred to as the "Held Area Notification". Pursuant to the same, MSPL made a fresh application on 16.04.2003 for grant of mining lease over the notified area. Kalyani and 88 other applicants also applied pursuant to the said Notification. Admittedly, Jindal did not apply pursuant to the "Held Area Notification", even though some of its sister concerns applied for the grant. On 06.12.2004, the State Government made a recommendation to the Central Government under Section 5 of the MMDR Act for approval of the proposed grant of mining lease to Jindal and Kalyani. MSPL

and some of the applicants made representations to the Central Government against the said recommendation made by the State Government. Challenging the recommendation dated 06.12.2004 of the State Government, writ petitions were filed by the aggrieved companies before the High Court. During the pendency of the writ petitions, the Central Government gave its approval for grant of mining lease in favour of Jindal and Kalyani on 05.06.2006 and 27.06.2006 respectively. By judgment dated 07.08.2008, the learned single Judge allowed the writ petitions filed by MSPL and Sandur as well as others and quashed the grant on the ground among others, that Jindal's application prior to the "Held Area Notification" could not have been entertained in view of Section 11(4) of the MMDR Act and Rules 59 and 60 of the MC Rules. The Division Bench, by judgment and order dated 05.06.2009, reversed the judgment passed by the learned single Judge. With this background, let us discuss the issues formulated above.

Issue (a)

"Whether the State Government's recommendation dated 06.12.2004 and the proceedings of the Chief Minister are contrary to the provisions of Section 11 of the Act and Rules 59 and 60 of MC Rules and not valid in law."

12. Mr. Nariman and Mr. K.K. Venugopal, learned senior counsel appearing for the Sandur and MSPL respectively, by taking us through the entire proceedings of the Chief Minister, vehemently contended that the State Government was pre-determined to grant the lease in favour of Jindal and Kalyani. They also contended that there is no clear reason as to why Jindal and Kalyani alone were given preference and the applications of MSPL, Sandur and others were not considered favourably. They also highlighted that all that is done is the reproduction of the details mentioned in their applications and at the end, certain columns were left blank in which the Chief Minister has filled in by hand, after which he has signed the proceedings. They also pointed out that though relevant criteria

is provided under Section 11(3) of the Act, only one criteria, namely, the proposed investment, is taken into account while evaluating the applicants. It is their grievance that the special reason mentioned in the recommendation is only to favour Jindal and Kalyani. Even if it is so, according to them, the decision of the State Government is violative of Section 11(4) of the Act which permits only applications made pursuant to the Notification to be taken into account and not applications made prior to the Notification. Both the learned senior counsel, relying on Rule 35, pointed out that the recommendations made to justify preference taking into account past investments by steel companies cannot be sustained. In any event, according to them, in view of Section 2 of the Act, State Legislature is denuded of its legislative power to make any law with respect to the regulation of mines and mineral development. Finally, it was pointed out that there is no question of framing policy such as the Karnataka Mineral Policy to give out mining leases independently of the MMDR Act and the Rules. On the other hand, Mr. Harish N. Salve and Mr. Dushyant Dave, learned senior counsel appearing for Jindal and Kalyani, by drawing our attention to the very same provisions and the orders of the courts, submitted that the recommendations made by the State Government is in terms of the provisions of the Act and Rules and the Division Bench was right in affirming the same.

13. It is useful to refer notification dated 15.03.2003 issued by the Government of Karnataka which reads thus:

"GOVERNMENT OF KARNATAKA

NO. CI/16/MMM/2003

Government of Karnataka Secretariat
Ms. Building
Bangalore, Dated 15.03.2003

NOTIFICATION

It is hereby informed for the mining public that the area

noted in the annexure is available for regrant under rule 59 of Mineral Concession Rules, 1960.

The application for grant of mining lease shall be received by the Director of Mines and Geology, No.49, "Khanij Bhavan", D.Devaraj Urs Road, Bangalore-01, after 30 days from the date of publication of the notification in the Official Gazette. If the day notified for receiving the application happens to be a Public Holiday or General Holiday, applications will be received on the next working day under amended Rules. The sketch of the area is available for inspection at the office of the Director, Department of Mines and Geology, Khanija Bhavan, D.Devaraj Urs Road, Bangalore-01 during working hours on all working days.

The mining public should note that the availability of the area published here in is subject to the clearance from the Revenue Department for mining activities and compliance of the MM (D&R) Act, 1957 and the M.C.Rules and all other relevant Acts and Rules by the applicants. In case the area is found to consist of Forest Lands, the clearance from the Forest Department under Section (2) of the Forest (Conservation) Act, 1980 for utilizing the area for non-forest activities should be obtained by the applicants.

Interested persons are advised to inspect the area and satisfy themselves about the availability of mineral deposits (as the area is previously under held. ML/PL block) and the present status of the land there is before making application for mining lease.

BY ORDER AND IN THE NAME OF THE
GOVERNOR OF KARNATAKA
(A.B. SIDDHANTI)
Under Secretary to Govt. (Mines),
Commerce and Industries Department."

14. After expiry of the cut-off date, as mentioned in the said

notification, hearing was conducted by the Chief Minister under Rule 26A of the Rules. The order of the Chief Minister shows that as per the direction of the High Court in a writ petition filed by *Ziaulla Sharieff*, the State has to consider their applications in accordance with law along with other applications. It is the claim of the State that as per the said decision, it was necessary to consider the applications filed for grant of mining lease over the area in question before the issue of Notification on 15.03.2003 along with applications received in response to the said Notification. Para 3 of the order of the Chief Minister shows that 21 applications were filed for grant of mining lease over the area in question before the notification was issued and 90 applications were received in response to the notification. In all, the Chief Minister has considered 111 applications for grant of mining lease. The order further shows that notice under Rule 26(1) of the Rules was issued to all the applicants to appear for hearing on 12.10.2004 at 4.00 PM to make presentation for sanction of mining lease in their favour. On 12.10.2004, the hearing was adjourned. According to the State, applicants were heard on different dates. Out of 111 applicants, 85 applicants attended the hearing and 75 applicants gave their written representations. On 16.10.2004, the hearing was again adjourned, 72 applicants attended and 9 applicants submitted their written representations. Again, the hearing was held on 25.10.2004, 76 applicants attended and 27 applicants submitted their written submissions. On 04.11.2004, 16 applicants attended the hearing and 7 applicants submitted their written submissions.

15. The order of the Chief Minister further shows that out of 111 applications, 55 are companies/firms and 30 are individuals. Out of 111 applicants, 11 have given more than one application in the name of their sister companies/partnership firms etc. The proceeding further shows that all applications were examined under Section 11(5) of the Act with a view to provide an opportunity to all the applicants who have filed their applications on subsequent days i.e. after 16.04.2003. The order

further shows that out of 30 individuals who have applied for mining lease, only 3 applicants hold mining lease in the State and the remaining 27 applicants do not hold any mining lease. Some of the individuals are local people and have some past experience in mining. Some of them are qualified engineers. Most of the applicants have indicated that they would be exporting ore or would be supplying it to the local market. The order proceeds that none of them have indicated any proposal for the value addition to the ore. The Chief Minister, after considering them, do not merit any consideration for grant of mining lease, rejected all those applications. It is brought to our notice that no one from that category challenged the same in the court of law.

16. After rejecting those applications, the impugned proceeding shows that a total number of 55 companies/firms have applied for mining lease and the details furnished by them have been incorporated in a tabular form in para 9. In para 10 of the order, it was stated that out of 55 companies/firms who have applied for mining lease, only 12 companies/firms were having mining lease in the State. Some of the companies have already established their units in the State and they have requested the sanction of mining lease for using the ore for captive consumption and for value addition to the ore. Some of the firms who are willing to invest huge amounts in mining industry have indicated that they require the mines for exporting ore and for supplying it to the local market. Some of the companies have already established their units in Karnataka by investing huge amounts and they are depending upon local market for their raw material, that is, iron ore. In para 11 of the order, it is stated that since the request of such of the companies is for 'captive consumption' and for 'value addition', they deserve consideration over others. In para 12, the order refers those who established steel plants in Karnataka. Finally, after quoting Rule 35 which provides for preferential rights for certain persons and by arriving at a conclusion that "it is desirable to allot the mining areas to applicants who have already established their plants in the State

by investing huge amounts", and by invoking Rule 35 of the MC Rules, the Chief Minister recommended or in other words filled up dotted lines by mentioning Jindal and Kalyani.

17. It is the grievance of the appellants, namely, Sandur and MSPL that the proceedings of the Chief Minister shows that the State Government was pre-determined to grant the lease in favour of Jindal and Kalyani.

18. A perusal of the proceedings of the Chief Minister shows that no clear reasons were given to show as to why Jindal and Kalyani were preferred over other applicants. There is also no plausible reason why the applications of the appellants herein were not considered favourably. A summary of the applications was prepared and at the end certain columns were left blank which the Chief Minister filled by hand and then signed the proceedings.

19. The evaluation of all 111 applications has been done in three successive stages in a manner not envisaged by Section 11. In the first stage of the process, the applications by individuals were discarded. In the second stage, those by companies as a whole and in the third stage, only companies with existing investment in steel plants out of which Jindal and Kalyani were chosen without any special or adequate reason. In fact, no such procedure of three stage consideration or differentiation between individuals and companies and those companies with existing investments and those without existing investment is envisaged in Section 11. As rightly pointed out by learned senior counsel for the appellants, the proceedings of the Chief Minister, at no level, consider the various guiding criteria mentioned in Section 11(3) as mentioned below:

> a. "any special knowledge of, or experience in, reconnaissance operations, prospecting operations or mining operations, as the case may be, possessed by the applicant;

> b. the financial resources of the applicant;
>
> c. the nature and quality of the technical staff employed or to be employed by the applicant;
>
> d. the investment which the applicant proposes to make in the mines and in the industry based on the minerals;
>
> e. such other matters as may be prescribed."

20. It is true that among the criteria mentioned, only one criteria, namely, "proposed investment" is taken into account in evaluating some applications. However, as mentioned above, in the said proceedings, two irrelevant points were taken into account, namely, (i) whether or not the applicant holds a mining lease in the State and (ii) the amount of their past investment in steel plant. It is equally true that the proceedings recommended in favour of Jindal and Kalyani was justified by the special reasons specifically stated at the very end in terms of Section 11(5) which is reproduced below:-

> "(5) Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the State Government may, for any special reasons to be recorded, grant a reconnaissance permit, prospecting licence or mining lease, as the case may be, to an applicant whose application was received later in preference to an application whose application was received earlier:
>
> Provided that in respect of minerals specified in the First Schedule, prior approval of the Central Government shall be obtained before passing any order under this sub-section."

A plain reading of the above provision makes it amply clear that it would apply to favour a later applicant over an earlier applicant which is relevant only in the event that the main provision of Section 11(2) relating to preference of prior

applicants applies and not in the case of notification inviting applications, whether it is under the first proviso to Section 11(2) or 11(4) under the later proviso, upon notification, by deeming fiction all applications are treated as having been received on the same date.

21. Apart from the above infirmity, the proceedings of the Chief Minister also violate Section 11(4) of the Act which reads thus:

> "(4) Subject to the provisions of sub-section (1), where the State Government notifies in the Official Gazette an area for grant of reconnaissance permit, prospecting licence or mining lease, as the case may be, all the applications received during the period as specified in such notification, which shall not be less than thirty days, shall be considered simultaneously as if all such applications have been received on the same day and the State Government, after taking into consideration the matters specified in sub-section (3), may grant the reconnaissance permit, prospecting licence or mining lease, as the case may be, to such one of the applicants as it may deem fit."

The above sub-section permits only the applications made pursuant to the notification to be taken into account and not applications made prior to the notification. The notification referred to in the first proviso to Section 11(2) is intended only to invite applications in respect of "virgin areas". In the case of previously held areas covered by present notification dated 15.03.2003, applications made prior to the notification cannot be entertained because they are premature.

22. We have already adverted to Section 2 of the MMDR Act, which is a parliamentary declaration, makes it clear that the State Legislature is denuded of its legislative power to make any law with respect to the regulation of mines and mineral development to the extent provided in the MMDR Act. (Vide *State of Orissa* vs. *M.A. Tulloch & Co.* (1964) 4 SCR 461). In

Baijnath Kedio vs. *State of Bihar and Others*, (1969) 3 SCC 838, a Constitution Bench of this Court reiterated the above view. Argument of the appellant in that case was that, apart from the provisions of the 2nd proviso to Section 10 added to the Land Reforms Act, 1950 in 1964, by Act IV of 1965 and second sub-rule added to Rule 20 of the Bihar Minor Mineral Concession Rules, 1964, there is no power to modify the terms. It was further contended that these provisions of law are said to be outside the competence of the State Legislature and the Bihar Government. With regard to the State Legislature, it was contended that the scheme of the relevant entries in the Union and the State List is that to the extent to which regulation of mines and mineral development is declared by Parliament by law to be expedient in the public interest, the subject of legislation is withdrawn from the jurisdiction of the State Legislature and, therefore, Act 67 of 1957 (MMDR Act) leaves no legislative field to the Bihar Legislature to enact Act 4 of 1955 amending the Land Reforms Act. Answering those questions, the Constitution bench has held thus:

> "13. …. ….. Entry 54 of the Union List speaks both of Regulation of mines and minerals development and Entry 23 is subject to Entry 54. It is open to Parliament to declare that it is expedient in the public interest that the control should rest in Central Government. To what extent such a declaration can go is for Parliament to determine and this must be commensurate with public interest. Once this declaration is made and the extent laid down, the subject of legislation to the extent laid down becomes an exclusive subject for legislation by Parliament. Any legislation by the State after such declaration and trenching upon the field disclosed in the declaration must necessarily be unconstitutional because that field is abstracted from the legislative competence of the State Legislature. This proposition is also self-evident that no attempt was rightly made to contradict it. There are also two decisions of this Court reported in the *Hingir Rampur Coal Co. Ltd.* v. *State*

of Orissa, and *State of Orissa* v. *M.A. Tulloch and Co.* in which the matter is discussed. The only dispute, therefore, can be to what extent the declaration by Parliament leaves any scope for legislation by the State Legislature. If the impugned legislation falls within the ambit of such scope it will be valid; if outside it, then it must be declared invalid.

14. The declaration is contained in Section 2 of Act 67 of 1957 and speaks of the taking under the control of the Central Government the regulation of mines and development of minerals to the extent provided in the Act itself. We have thus not to look outside Act 67 of 1957 to determine what is left within the competence of the State Legislature but have to work it out from the terms of that Act. In this connection we may notice what was decided in the two cases of this Court. In the *Hingir Rampur case* a question had arisen whether the Act of 1948 so completely covered the field of conservation and development of minerals as to leave no room for State legislation. It was held that the declaration was effective even if the rules contemplated under the Act of 1948 had not been made. However, considering further whether a declaration made by a Dominion Law could be regarded as a declaration made by Parliament for the purpose of Entry 54, it was held that it could not and there was thus a lacuna which the Adaptation of Laws Order, 1950 could not remove. Therefore, it was held that there was room for legislation by the State Legislature.

15. In the *M.A. Tulloch case* the firm was working a mining lease granted under the Act of 1948. The State Legislature of Orissa then passed the Orissa Mining Areas Development Fund Act, 1952 and levied a fee for the development of mining areas within the State. After the provisions came into force a demand was made for payment of fees due from July 1957 to March 1958 and the demand was challenged. The High Court held that after the

coming into force of Act 67 of 1957 the Orissa Act must be held to be non existent. It was held on appeal that since Act 67 of 1957 contained the requisite declaration by Parliament under Entry 54 and that Act covered the same field as the Act of 1948 in regard to mines and mineral development, the ruling in *Hingir Rampur's case* applied and as Sections 18(1) and (2) of the Act 67 of 1957 were very wide they ruled out legislation by the State Legislature. Where a superior legislature evinced an intention to cover the whole field, the enactments of the other legislature whether passed before or after must be held to be overborne. It was laid down that inconsistency could be proved not by a detailed comparison of the provisions of the conflicting Acts but by the mere existence of two pieces of legislation. As Section 18(1) covered the entire field, there was no scope for the argument that till rules were framed under that Section, room was available."

The Constitution Bench after considering *Hingir Rampur Coal Co. Ltd.* vs. *State of Orissa*, 1961 (2) SCR 537 and *M.A. Tulloch* (supra) held that in view of the two undermentioned rulings of this Court and by enacting Section 15 of Act 67 of 1957, the Union of India has taken all the power to itself and authorized the State Government to make rules for the regulation of leases. By the declaration and the enactment of Section 15, the whole of the field relating to minor minerals came within the jurisdiction of Parliament and no scope was left for the enactment of the second proviso to Section 10 in the Land Reforms Act. The enactment of the proviso was, therefore, without jurisdiction.

23. In *State of West Bengal vs. Kesoram Industries Ltd. and Others*, (2004) 10 SCC 201, after referring to earlier judgments including *M.A. Tulloch* (supra) and *Baijnath Kedio* (supra), the Constitution Bench held as under:

"95. .... All that the Court has said is that the 1957 enactment covers the field of legislation as to the regulation of mines and the development of minerals. As Section 2

itself provides and indicates, the assumption of control in public interest by the Central Government is on: (*i*) the regulation of mines, (*ii*) the development of minerals, and (*iii*) to the extent hereinafter provided. The scope and extent of declaration cannot and could not have been enlarged by the Court nor has it been done. The effect is that no State Legislature shall have power to enact any legislation touching: (*i*) the regulation of mines, (*ii*) the development of minerals, and (*iii*) to the extent provided by Act 67 of 1957…. …. "

24. In the same way, the State is also denuded of its executive power in regard to matters covered by the MMDR Act and the Rules. [vide *Bharat Coking Coal Ltd. vs. State of Bihar & Ors.,* (1990) 4 SCC 557].

25. In view of the specific parliamentary declaration as discussed and explained by this Court in various decisions, there is no question of the State having any power to frame a policy *de hors* the MMDR Act and the Rules.

26. In *State of Assam & Ors. vs. Om Prakash Mehta & Ors.,* (1973) 1 SCC 584, this Court in paragraph 12 held that the MMDR Act, 1957 and the MC Rules, 1960 contain complete code in respect of the grant and renewal of prospecting licences as well as mining leases in lands belonging to Government as well as lands belonging to private persons.

27. Again this Court in *Quarry Owners' Association vs. State of Bihar & Ors.,* (2000) 8 SCC 655, held that both the Central and the State Government act as mere delegates of Parliament while exercising powers under the MMDR Act and the MC Rules.

28. It is not open to the State Government to justify grant based on criteria that are *de hors* to the MMDR Act and the MC Rules. The exercise has to be done strictly in accordance with the statutory provisions and if there is any deviation, the same cannot be sustained. It is the normal rule of construction that when

a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. This principle has been reiterated in *C.I.T. Mumbai vs. Anjum M.H. Ghaswala & Ors.,* (2002) 1 SCC 633 at 644, *Captain Sube Singh & Ors. vs. Lt. Governor of Delhi & Ors.,* (2004) 6 SCC 440 and *State of U.P. vs. Singhara Singh & Ors.,* (1964) 4 SCR 485.

29. Mr. Harish N. Salve and Mr. Dushyant Dave, by drawing our attention to the decision of this Court in *TISCO vs. U.O.I. & Anr.,* (1996) 9 SCC 709, submitted that inasmuch as this Court had upheld the grants based on "captive consumption", there is no flaw or error in the recommendation of the State Government dated 06.12.2004. A perusal of the above decision clearly shows that it concerned with Section 8(3) of the MMDR Act which requires consideration of the extremely general criterion of the interests of mineral development before granting second renewal of a mining lease. Unlike in Section 11(3), no further criteria was specified and it was in this background, this Court upheld on the facts of that case that relevant material taken into account by the Committee set up by the Central Government rightly included "captive consumption". In view of the factual situation, the said decision can have no bearing on initial grants of mining lease where the only permissible criteria are the matters set out in Section 11(3) of the MMDR Act.

Issue (b)

"Whether the respondent-Jindal's application dated 24.10.2002 made prior to the Notification dated 15.03.2003 is capable of being entertained along with the applications made pursuant to the said notification."

30. The next vital issue that arises in this case is whether Jindal's application dated 24.10.2002 made prior to the Notification dated 15.03.2003 inviting applications for previously held area could be considered in view of Section 11(4) of the MMDR Act read with Rules 59 and 60 of the MC Rules. Before

considering the above aspect, it is relevant to note the stand taken by Jindal that in 2001, one *Ziaulla Sharieff* filed a writ petition being Writ Petition No 35915 of 2001 seeking a declaration that he was entitled to a mining lease in respect of 388 acres of land in Sandur Taluk, Bellary District. It was pointed out that in the said writ petition, MSPL was arrayed as respondent No.3 and Sandur was arrayed as Respondent No.7. Three sister concerns of Jindal were also arrayed as respondents. During the pendency of the said writ petition, the State Government issued a notification dated 15.03.2003 inviting applications from the general public for mineral concessions over large areas of the State of Karnataka. It was further pointed out that the area concerned in the said writ petition as also the area concerned in the present appeals were included in the said notification. By judgment and order dated 29.03.2004, the High Court disposed of Writ Petition No. 35915 of 2001 with the following direction "in view of the subsequent notification issued by the State Government dated 15.03.2003, inviting that the area is available for grant, the State Government is now expected not only to consider the applications pending before it but also the applications that may be filed pursuant to the above said notification notwithstanding the earlier recommendation made by the second respondent." Learned senior counsel appearing for Jindal submitted that the State Government had acted on the basis of the *Ziaulla Sharieff's* case and empowered the Director of Mines and Geology to hear applications that were filed prior to the issuance of the notification dated 15.03.2003 and were pending on the date of the said notification. Whether such direction saves the State Government's decision in considering the Jindal's application which was made well prior to the notification dated 15.03.2003.

31. In order to determine whether it is Section 11(4) or the first proviso to Section 11(2), it is relevant to understand the intention of the legislature in enacting Section 11 of the MMDR Act and Rules 59 and 60 of MC Rules as being part of single statutory scheme governing the grant of reconnaissance permits,

prospecting licences and mining leases. The amendments to MMDR Act in 1999 which inserted and re-drafted Section 11 had their origin in the Report of the Committee to Review the Existing Laws and Procedure for Regulation and Development of Minerals set up by the Ministry of Mines, Government of India, submitted in January, 1998. We are concerned about para 2.1.21 of the Report which reads as under:

> "... The concept of first-come, first-serve has become necessary in view of the fact that the Act does not provide for inviting applications through advertisement for grant of PL/ML in respect of virgin areas. No doubt, there is provision in Rule 59 of MCR for advertisement of an area earlier held under PL/ML with provision for relaxation." In this background, the Committee recommended the introduction of the proviso to Section 11(2) permitting calling for applications by way of a notification. There is a distinction between virgin areas and areas covered under Rule 59 and Section 11(2) ought to be interpreted to cover virgin areas alone."

If we consider Section 11 with the aid of the said Report, it makes it clear that Section 11(1) provides preferential right to the holder of reconnaissance permits or a prospecting licencee who has identified mineral resources in the area allotted to him for grant of a mining lease, subject to certain conditions specified in the proviso appended thereto. The over-riding character of the priority given to the successful prospecting licencee or reconnaissance permit-holder is clear from the fact that each of the subsequent sub-sections in Section 11 is made subject to Section 11(1).

32. It is also clear that the main provision in Section 11(2) gives preference to a prior applicant for grant of reconnaissance permit, prospecting licence or mining lease over later applicants where the State Government has not issued any notification. The analysis of the Report makes it clear that the main provision in Section 11(2) applies to "virgin areas". It further makes it clear

that to the extent that an area that is previously held or reserved would require a notification for it to become available. The first proviso to Section 11(2) carves out an exception to the preferential right based on priority of applications in point of time referred to in the main provision. It makes it clear that where the State Government subsequently issues a notification inviting applications for grant, the prior and subsequent applications to the notification would be considered as if they were filed on the same day and no priority in order of time would be given. The second proviso requires the State Government to examine the matters set out in Section 11(3) while considering the applications for grant.

33. The Committee's Report, particularly, para 2.1.21 which we extracted in the earlier paras, makes it clear that this provision was inserted because the Act does not provide for advertisement of virgin areas and the State Government was perfectly within the rights to issue an advertisement inviting applications even for virgin areas. In this regard, it is useful to mention that this Court had suggested an almost identical change in the un-amended Section 11 in *Indian Metals and Ferro Alloys Ltd.* vs. *Union of India & Ors.,* 1992 Supp. 1 SCC 91 at page 127 para 35.

> **"35.** Now, to turn to the contentions urged before us: Dr Singhvi, who appeared for ORIND, vehemently contended that the rejection of the application of ORIND for a mining lease was contrary to the statutory mandate in Section 11(2); that, subject only to the provision contained in Section 11(1) which had no application here, the earliest applicant was entitled to have a preferential right for the grant of a lease; and that a consideration of the comparative merits of other applicants can arise only in a case where applications have been received on the same day. It is no doubt true that Section 11(2) of the Act read in isolation gives such an impression which, in reality, is a misleading one. We think that the sooner such an impression is corrected by a

> statutory amendment the better it would be for all concerned. On a reading of Section 11 as a whole, one will realise that the provisions of sub-section (4) completely override those of sub-section (2). This sub-section preserves to the S.G. a right to grant a lease to an applicant out of turn subject to two conditions: (*a*) recording of special reasons and (*b*) previous approval of the C.G. It is manifest, therefore, that the S.G. is not bound to dispose of applications only on a "first come, first served" basis. It will be easily appreciated that this should indeed be so for the interests of national mineral development clearly require in the case of major minerals, that the mining lease should be given to that applicant who can exploit it most efficiently. A grant of ML, in order of time, will not achieve this result."

Even under ordinary principles of statutory interpretation, the first proviso to Section 11(2) embraces the field that is covered by the main provision. [Vide *Abdul Jabar* vs. *State of J&K.,* AIR 1957 SC 281 (para 8) and *Ram Narain Sons* vs. *Asst. CST*, 1955 (2) SCR 483 at 493].

Accordingly, we are of the view that the notification calling for applications referred to in the first proviso to Section 11(2) applies only to virgin areas.

34. It is the claim of Jindal and Kalyani that the proviso to Section 11(2) of the Act sets out a plenary rule for consideration of applications for mining leases where the State Government has invited applications for mineral concessions by notification in the official gazette and the applications pending on the date of notification must be considered simultaneously with applications filed in response to the notification and within the notification period. It is also their claim that since there is no provision in the rules empowering the State Government to issue notification inviting applications for mineral concessions apart from Rule 59(1), it is asserted by Jindal and Kalyani that a notification inviting applications for mineral concessions in the proviso to Section 11(2) must necessarily relate only to a

notification under Rule 59(1) inviting applications for mineral concessions in previously held or reserved lands. Therefore, according to them, the proviso's stipulation that applications for mineral concessions pending on the date of the said notification inviting applications must be considered, must necessarily apply to applications pending in receipt of previously held lands. It is also contended that the proviso to Section 11(2) and Rule 59(1) use identical phraseology when referring to areas (available for grant). It was pointed out that since this language is not present in Section 11(4), this suggests strongly that Rule 59(1), the proviso to Section 11(2), Section 11(3) and Rule 35 form a composite code dealing with the consideration of applications for mineral concessions over lands thrown open for grant by way of notification under Rule 59(1) and that Section 11(4) does not apply to such applications.

35. We have already held that Section 11(3) specifies the matter relevant for purposes of second proviso to Section 11(2). We also referred to the Committee's Report. In accordance with the recommendation in the said Report, Section 11(3)(d) was added as part of the substitution of Section 11 in the year 1999. Sub-section (d) provides that "the investment which the applicant proposes to make in the mines and in the industry based on minerals" and it speaks about investment proposed to be made and not past investments. Thus it confines the concept of "captive consumption of minerals to proposed investment and not past investments". Even the residuary clauses in Section 11(3)(e) are limited to "matters as may be prescribed", which would necessarily mean matters prescribed by rules. This is fortified by decision of this Court in *BSNL Ltd. & Anr. vs. BPL Mobile Cellular Ltd. & Ors.,* (2008) 13 SCC 597, para 45.

36. We have already quoted sub-section (4) of Section 11 which contemplates a situation where a notification is issued inviting applications for an area for grant. In contrast to the first proviso to Section 11(2), it provides that all applications received pursuant to a notification shall be considered simultaneously

without assigning any priority in point of time, and after taking into account the matters specified in Section 11(3). Section 11(4), in effect, covers exactly the same field as the first and second proviso to Section 11(2) read along with Section 11(3) with one difference, i.e., unlike the first proviso to Section 11(2), it provides for consideration of only those applications that are made pursuant to the notification and not those made prior to the notification. Notification under Section 11(4) is consistent with Rule 59(1) read with Rule 60 insofar as applications received prior to the notification would not be entertained. The first proviso to Section 11(2) was being added to cover virgin areas, then provided for the addition of Section 11(4), in order to ensure that the notification referred to in Rule 59(1) together with Rule 60 would not render *ultra vires* the MMDR Act. In view of the same, the contention on behalf of Jindal and Kalyani that the first proviso of Section 11(2) would cover notifications under Rule 59(1) is unacceptable because this would render Section 11(4) otiose and redundant. In *J.K. Cotton Spinning & Weaving Mills co. Ltd.* vs. *State of U.P.,* AIR 1961 SC 1170 and *O.P. Singla & Anr.* vs. *Union of India & Ors.* (1984) 4 SCC 450, this Court held that a provision in a statute must not be so interpreted as to reduce another provision to a "useless lumber" or a "dead letter". If we accept the said position, it would result in anomalous consequences of rendering Rule 60 *ultra vires* the first proviso to Section 11(2). In fact, this has been highlighted by the Central Government in their affidavit filed before the High Court.

37. In addition to what we have stated, it is relevant to note that Section 11(5) again carves out an exception to the preference in favour of prior applicants in the main provision of Section 11(2). It permits the State Government, with the prior approval of the Central Government, to disregard the priority in point of time in the main provision of Section 11(2) and to make a grant in favour of a latter applicant as compared to an earlier applicant for special reasons to be recorded in writing. It also gives an indication that it can have no application to cases in which a notification is issued because, in such a case, both the

first proviso to Section 11(2) and Section 11(4) make it clear that all applications will be considered together as having been received on the same date. In view of our interpretation, the proceedings of the Chief Minister and the recommendation dated 06.12.2004 are contrary to the Scheme of the MMDR Act as they were based on Section 11(5) which had no application at all to applications made pursuant to the notification dated 15.03.2003.

38. We have already extracted Rules 59 and 60 and analysis of those rules confirms the interpretation of Section 11 above and the conclusion that it is Section 11(4) which would apply to a Notification issued under Rule 59(1). Rule 59(1) provides that the categories of areas listed in it including, *inter alia*, areas that were previously held or being under a mining lease or which has been reserved for exploitation by the State Government or under Section 17A of the Act, shall not be available for grant unless (i) an entry is made in the register and (ii) its availability for grant is notified in the Official Gazette specifying a date not earlier than 30 days from the date of notification. Sub-rule (2) of Rule 59 empowers the Central Government to relax the conditions set out in Rule 59(1) in respect of an area whose availability is required to be notified under Rule 59 if no application is issued or where notification is issued, the 30-days black-out period specified in the notification pursuant to Rule 59(1)(i)(ii) has not expired, shall be deemed to be premature and shall not be entertained. As discussed earlier, Section 11(4) is consistent with Rules 59 and 60 when it provides for consideration only of applications made pursuant to a Notification. On the other hand, the consideration of applications made prior to the Notification, as required by the first proviso to Section 11(2), is clearly inconsistent with Rules 59 & 60. In such circumstances, a harmonious reading of Section 11 with Rules 59 and 60, therefore, mandates an interpretation under which Notifications would be issued under Section 11(4) in the case of categories of areas covered by Rule 59(1). In those circumstances, we are unable to accept the argument of learned senior counsel for

Jindal and Kalyani with reference to those provisions.

39. The Division Bench has clearly erred in concluding that applications made prior to the notification under Rule 59(1) which are premature and cannot be entertained under Rule 60 would revive upon issuance of the Notification. This conclusion goes against basic principles of statutory interpretation. We have already pointed out the effect of Rule 60 which is couched in negative language that is mandatory in nature. Further, if that was the intention of the Legislature, there was no reason for the Legislature to take pains to state in Rule 60(b) that an application made during the black-out period of 30 days specified in the Notification also would be premature and could not be entertained. Accordingly, the interpretation placed by the Division Bench on Rule 60 would result in reading in a proviso at the end of Rule 60 to the effect that once the 30-days black-out period specified in the Notification contemplated by Rule 59(1)(ii) is over, premature applications would revive. After taking such pains to make it clear that the applications would not be entertained until the end of the 30-days period, surely the Legislature itself would have inserted such a proviso at the end of Rule 60 if that were its intention.

40. In *Amritlal Nathubhai Shah & Ors. vs. Union Government of India & Anr.,* (1976) 4 SCC 108 (para 7), this Court observed as follows:

> "….. Rule 60 provides that an application for the grant of a prospecting licence or a mining lease in respect of an area for which no such notification has been issued, inter alia, under Rule 59, for making the area available for grant of a licence or a lease, would be premature, and "shall not be entertained and the fee, if any, paid in respect of any such application shall be refunded." It would therefore follow that as the areas which are the subject-matter of the present appeals had been reserved by the State Government for the purpose stated in its notification, and as those lands did not

become available for the grant of a prospecting licence or a mining lease, the State Government was well within its rights in rejecting the applications of the appellants under Rule 60 as premature. The Central Government was thus justified in rejecting the revision applications which were filed against the orders of rejection passed by the State Government."

41. Even thereafter, this Court has consistently taken the position that applications made prior to a Notification cannot be entertained. In our view, the purpose of Rule 59(1), which is to ensure that mining lease areas are not given by State Governments to favour persons of their choice without notice to the general public would be defeated. In fact, the learned single Judge correctly interpreted Section 11 read with Rules 59 and 60. The said conclusion also finds support in the decision of this Court in *State of Tamil Nadu vs. M.S. Hindstone & Ors.,* (1981) 2 SCC 205 at page 218, where it has been held in the context of the rules framed under the MMDR Act itself that a statutory rule, while subordinate to the parent statute, is otherwise to be treated as part of the statute and is effective. The same position has been reiterated in *State of U.P.* vs. *Babu Ram Upadhya*, (1961) 2 SCR 679 at 701 and *Gujarat Pradesh Panchayat Parishad & Ors.* vs. *State of Gujarat & Ors.*, (2007) 7 SCC 718. The Division Bench did not advert to these aspects as analyzed by the learned single Judge. On the other hand, the Division Bench accepted Jindal's contention that if Rule 60 is interpreted to render applications made prior to Rule 59(1) Notification *non est*, it would make Rule 59(2) unworkable because persons normally apply for mining lease areas along with an application for relaxation under Rule 59(2). This conclusion is clearly misplaced. It is only the request under Rule 59(2) of any person for relaxation in respect of an area that is considered and not the application for grant. Only after the relaxation under Rule 59(2) by the Central Government of the requirement of Notification under Rule 59(1) that applications could be considered for grant of mining lease. The decision relied on by the learned senior

counsel for Jindal in *TISCO* (supra), (paras 42, 44 and 47), that applications made by certain parties were considered after a relaxation under Rule 59(2) cannot be taken as laying down any law. It is also seen that consideration of the applications made by various parties in the *TISCO's* case was pursuant to the directions issued by this Court and not independently by the State Government under Section 11 of the Act. As a matter of fact, the issue whether premature applications revived for consideration after the relaxation under Rule 59(2) was neither expressly raised nor decided in the *TISCO's* case. In the light of the above discussion about Section 11(2) alongwith Rules 59 and 60, it should be interpreted that Section 11(2) is to cover virgin areas alone. In view of the same, the Jindal's application made prior to the Notification cannot be entertained along with the applications made pursuant to the Notification dated 15.03.2003 because it is Section 11(4) which covers the said Notification along with Rule 59(1) and not the first proviso to Section 11(2) as contended by the respondents.

Issue (c)

Whether the order of the High Court of Karnataka in *Ziaulla Sharieff's (supra)* permit the consideration of the Jindal's application dated 24.10.2002 which was made prior to the notification dated 15.03.2003.

42. We have already discussed this issue. In addition to the same, perusal of the order of the High Court in Writ Petition No. 35915 of 2001 shows that the State Government was directed to consider only the application of the MSPL and the applications filed by the impleading applicants and others pursuant to the Notification dated 15.03.2003 in accordance with law and in terms of the provisions of the MMDR Act and MC Rules. In other words, the High Court did not issue any direction to consider all applications made prior to the notification. To put it clear, there was no *mandamus* from the High Court to consider prior applications. The word "others" qualify the phrase "pursuant to" and not the class of applicants who had applied even prior to

the "Held Area Notification" dated 15.03.2003. As a matter of fact, the High Court had merely directed the State Government to consider the applications in accordance with the provisions of the MMDR Act and MC Rules. Even otherwise, the said order was passed without going into the specific provisions in the Act or Rules. Further, the order does not deal with the interpretation of Section 11 or Rules 59 and 60. Hence, the order of the High Court of Karnataka in *Ziaulla Sharieff's case* does not permit the consideration of Jindal's application dated 24.10.2002 which was made prior to the notification dated 15.03.2003.

Issue (d):

Whether Rule 35 of the MC Rules justify the recommendation of the State Government and the proceedings of the Chief Minister in favour of the Respondents – Jindal & Kalyani?

> *"Rule 35. Preferential rights of certain persons* – Where two or more persons have applied for a reconnaissance permit or a prospecting licence or a mining lease in respect of the same land, the State Government shall, for the purpose of sub-section (2) of section 11, consider besides the matters mentioned in clauses (a) to (d) of sub-section (3) of section 11, the end use of the mineral by the applicant. "

We have already adverted to the proceedings of the Chief Minister which heavily relied on Rule 35 to justify the recommendation in favour of the respondents – Jindal and Kalyani on the premise that it is intended to give preference to those who have made existing investments in industries based on iron ore and both of them qualify on this consideration. From a plain reading of Rule 35, it is clear that the rule permits the State Government to differentiate between the "end use" of the minerals for the purpose of sub-section (2) of Section 11 in addition to the matters in Section 11(3). In the case on hand, all the parties, namely, MSPL, Sandur, Jindal and Kalyani

expressed their intention to use iron ore from the mines for producing steel and, therefore, the same "end use" requirement is satisfied.

43. Rule 35, at best, permits the State Government to differentiate between different "end uses", for example, the use of iron ore to produce sponge iron instead of steel, or the use of gold in jewellery as compared to medicines. Further, Rule 35 does not differentiate between "proposed" and "existing" end use. Therefore, it could have enabled the State Government to take into account the claim of the respondents – Jindal and Kalyani, whose past investments would not have qualified on the "proposed" investment criterion under Section 11(3)(d), in addition to MSPL and Sandur. This could have been a basis to exclude those with proposed investments in steel plants from consideration.

44. It is also relevant to point out that Rule 35 specifies one additional factor apart from the factors set out in Section 11(3). The plain language of Rule 35 requires its application only in cases covered by Section 11(2) and not by Section 11(4). Therefore, to the extent that it is Section 11(4) that covers Notification under Rule 59(1) and not Section 11(2), in this way also, the State Government committed an error in relying on Rule 35 to exclude the appellants, i.e., MSPL and Sandur. To justify the recommendation in favour of the respondents-Jindal and Kalyani, in the proceedings of the Chief Minister, State heavily relied on Rule 35 on the premise that it is intended to give preference to those who have made existing investments in industries based on iron ore and that the respondents – Jindal and Kalyani, qualify on this consideration. However, as discussed above, Rule 35 only permits the State Government to take additional factor of the "end use" of the minerals and not the existing investments made by the applicants. Moreover, relying on the existing investments made, the respondents also does not satisfy the requirements under Section 11(3)(d) which talks solely about proposed investments to be made and not the

existing ones.

Issue (e):

Whether the criterion of captive consumption referred to in the TISCO's case has no application to the present case because it is not one of the factors referred to in Section 11(3) or even in Rule 35.

45. The criterion of captive consumption referred to in *TISCO's* case (supra) does not have any application in this case, which we will refer in the later part of this paragraph. Section 11(4) and even the second proviso to Section 11(2) provide that the State Government may grant, *inter alia*, a mining lease after taking into consideration the matters specified in Section 11(3). Section 11(3)(d) specifies "the investment which the applicant proposes to make in the mines and in the industry based on the minerals" as one of such matters and on a plain interpretation, it is clear that only the proposed investment is a relevant factor. If the Legislature had intended that it should include past investments also, the use of the word "proposed" is superfluous, which could never be the case. Learned senior counsel appearing for the respondents have not pointed out any other provision in the MMDR Act or the MC Rules permitting grant of mining lease based on past commitments or for captive purposes in existing industries.

46. As observed in the earlier paragraphs, the strong reliance placed by the respondent-Jindal on the decision of this Court in ***TISCO's*** case (supra) (Paras 9,15,20,25,27,34,54,56 & 57) is misplaced. This case concerned solely on the interpretation of Section 8(3) of the MMDR Act in the context of a second renewal of a mining lease in favour of TISCO, and not a fresh grant. It is, in this context the phrase "interest on mineral development" in Section 8(3) was interpreted to include captive requirements. On the other hand, the case of fresh grant is covered by Section 11 of the MMDR Act. Paragraph 54 of the *TISCO's* case (supra) makes it clear that the case concerned is

chromite whose known reserves were not abundant, whereas iron ore is in abundance. Even otherwise, this judgment is of no assistance even on Rule 59(1) of the MC Rules since it was a case of relaxation by the Central Government under Rule 59(2), as is clear from paragraph 15 of the judgment.

47) It is useful to mention that subsequent to the decision in *TISCO* (supra)**,** this Court in *Indian Charge Chrome Ltd. & Anr.* vs. *Union of India & Ors.*, (2006) 12 SCC 331 (Paras 20 & 26) held that considerations of captive mining cannot be the controlling factor for grant of lease.

Issue (f):

Whether factors such as past commitments made by the State Government to applicants who have already set up steel plants is not a relevant matter for consideration for grant of lease.

48. As discussed earlier, the State Government is denuded of all legislative and executive power under Entry 23 of List-II read with Article 162 after passing of the MMDR Act which are as under:-

"**Entry 23, List II:** Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union."

"Article 162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by

this Constitution or by any law made by Parliament upon the Union or authorities thereof."

It is clear that the State Government is purely a delegate of Parliament and a statutory functionary, for the purposes of Section 11(3) of the Act, hence it cannot act in a manner that is inconsistent with the provisions of Section 11(1) of the MMDR Act in the grant of mining leases. Furthermore, Section 2 of the Act clearly states that the regulation of mines and mineral development comes within the purview of the Union Government and not the State Government. As a matter of fact, the respondents have not been able to point out any other provision in the MMDR Act or MC Rules permitting grant of mining lease based on past commitments. As rightly pointed out, the State Government has no authority under the MMDR Act to make commitments to any person that it will, in future, grant a mining lease in the event that the person makes investment in any project. Assuming that the State Government had made any such commitment, it could not be possible for it to take an inconsistent position and proceed to notify a particular area. Further, having notified the area, the State Government certainly could not thereafter to honour an alleged commitment by ousting other applicants even if they are more deserving on the merit criteria as provided in Section 11(3).

49. In the case of *State of Assam & Ors. vs. Om Prakash Mehta & Ors.,* AIR 1973 SC 678, this Court observed that the MMDR Act and MC Rules contain the complete code in respect of the grant and renewal of prospecting licences as well as mining leases in lands belonging to Government. In *Quarry Owners Association* (supra), this Court again reaffirmed the notion that both the Central as well as the State Government act as a mere delegates of Parliament while exercising the powers under the Act and Rules. [Vide *M.A. Tulloch* (supra), *Baijnath Kedio* (supra), *Kesoram's* case (supra), and *Bharat Cooking Coal Ltd.* (supra)]. From this, it becomes amply clear that the State Government has divested of legislative and executive

powers with respect to mines and minerals development. In addition to the same, *Anjum M.H. Gaswala* (supra), *Captain Sube Singh* (supra), *Singhara Singh's* case (supra), this Court repeatedly held that the field of granting mining leases is covered by express statute and rules and the grants must be made in accordance with the provisions of the Act and Rules and no other consideration. From a perusal of the above settled legal position, it becomes clear that the State Government cannot grant mining leases keeping in mind any considerations apart from the ones mentioned in the MMDR Act and MC Rules. In those circumstances, no extraneous considerations such as past commitments made by the State Government to Jindal and Kalyani who have already set up steel plants can be entertained by the State Government while granting mining leases and must abide by the Act and Rules.

Issue (g):

Whether the recommendation in favour of Jindal and Kalyani saved by operation of law of equity?

50. The Law of Equity cannot save the recommendation in favour of Jindal and Kalyani because it is a well settled principle that equity stands excluded when a matter is governed by statute. This principle was clearly stated by this Court in the cases of *Kedar Lal* vs. *Hari Lal Sea*, (1952) SCR 179 at 186 and *Raja Ram* vs. *Aba Maruti Mali* (1962) Supp. 1 SCR 739 at 745. It is clear that where the field is covered expressly by Section 11 of the MMDR Act, equitable considerations cannot be taken into account to assess Jindal and Kalyani, when the recommendation in their favour is in violation of statute. It was pointed out that Kalyani does not have a commitment from the State Government regarding its iron ore needs. In the proceedings of the State Government, there is only a statement that it may apply for a lease. No doubt, Jindal has emphasized that it has already set up its steel plant based on the commitments made by the State Government to grant a mining lease and it is in need of iron ore for these steel plants. As

observed earlier, commitments made by the State Government cannot be a relevant factor for grant of lease in the teeth of the consideration set out in Section 11(3). If that was to be the sole criterion, the State Government ought not to have notified the area vide 'Held Area Notification' dated 15.03.2003.

51. It was also pointed out that Jindal has been mining a lease area of 85.50 hectares of Mysore Minerals Limited, a Public Sector Undertaking through a joint venture in terms of the commitment made by the State Government. In addition, the State Government has made a recommendation for grant of mining lease in favour of Jindal and its sister concerns in the following areas:

(i) 188.128 hectares in favour of M/s JSW Steel Limited in Donimalai Range, Sandur Taluk, Bellary District.

(ii) 181.70 hectares in favour of M/s. Vijaynagara Minerals Pvt. Ltd. In Donimalai Range, Sandur Taluk, Bellary District.

(iii) 184.14 hectares in favour of M/s. South West Mining Ltd. In Donimalai Range, Sandur Taluk, Bellary District.

(iv) 200.73 hectares in favour of M/s JVSL in Kumaraswamy range of Sandur Taluk, Bellary District, which si the subject matter of the present SLP.

As a matter of fact, MSPL had filed an affidavit in this regard before the Division Bench. It is not clear whether Jindal has specifically denied the specific grants. By drawing our attention to certain factual details, it was contended that Jindal has so much iron ore and it actually exported iron ore for which reliance was made to its annual reports during the years 2002-03 to 2005-06. On the other hand, it is the claim of the MSPL that in accordance with Section 11(3)(d) it had proposed to set up a steel plant for which it required iron ore. It was also brought to

our notice that it had received permission from the State Government in this regard. With reference to the allegation that MSPL has a mining lease over an area of 722.94 hectares, it was pointed out that in actual it has a lease over an area of 347.22 hectares only. On 05.06.2009, MSPL filed an affidavit before the Division Bench stating that it holds only a single mining lease granted over five decades ago and the major proportion of which has been afforestated. It is also their grievance that the iron ore reserves in this lease have almost been exhausted over a period of 58 years, since 1952. The remaining iron ore cannot support a steel plant of the size that is being set up by MSPL. Since the entire field of granting mining lease is covered by MMDR Act and MC Rules, the State Government cannot use any consideration apart from the ones mentioned in the Act and Rules.

Issue (h):

About the impugned judgments of the single Judge and Division Bench:

52. In view of our conclusion, the Division Bench has erred in concluding that the Jindal's application made prior to the Notification can be entertained along with the applications made pursuant to the said Notification because it is not Section 11(4) which covers the said Notification under Rule 59(1) but the first proviso to Section 11(2). As a matter of fact, the Division Bench did not even mention Section 11(4) in its reasoning apart from stray references even though the conclusion of the learned single Judge hinged on how Section 11(4) would be rendered otiose and redundant if the first proviso to Section 11(2) was taken as governing the consideration of applications under a Notification pursuant to Rule 59(1).

53. The Division Bench has also faulted in arriving at the conclusion that the applications made prior to Notification under Rule 59(1) which are premature and cannot be entertained under Rule 60 would revive upon issuance of the Notification which is clearly not the case. As pointed out earlier, had that been the

intention of the Legislature, there was no reason for the Legislature to take pains under Rule 60(b) that an application made during the period of 30 days specified in the Notification also would be premature and could not be entertained. If the decision of the Division Bench is taken to its logical conclusion, then it would result in reading in a proviso at the end of Rule 60 to the effect that once the 30 days' period specified in the Notification contemplated by Rule 59(1) sub-clause (ii) is over, premature applications would revive. After taking such pains to make it clear that the application would not be entertained until the end of 30 days' period, surely the Legislature itself would not have inserted such proviso in Rule 60 if that were its intention. If such premature applications are allowed to be entertained, it would result in the State Government giving out mining leases to favoured persons without notice to the general public.

54. The Division Bench has also accepted Jindal's contention that if Rule 60 is interpreted to render applications made prior to Rule 59(1) Notification *non est*, in that event, it would make Rule 59(2) unworkable because persons will normally apply mining lease areas along with an application for relaxation under Rule 59(2). In view of our earlier reasons, this conclusion is clearly misplaced. It is only the request under Rule 59(2) for relaxation in respect of an area that is considered and not the application for grant. It is only after the relaxation under Rule 59(2) by the Central Government of the requirement of the Notification under Rule 59(1) that the applications could be considered for grant of mining lease.

55. Though the learned single Judge in his order dated 07.08.2008 quashed the communication/recommendation of the State Government dated 06.12.2004 proposing to grant mining lease to Jindal and Kalyani, however, the learned single Judge traveled much beyond the reliefs sought for in the writ petition and quashed the entire Notification No. CI.16:MMM.2003 dated

15.03.2003. In our view, while approving earlier part of his order and quashing the communication/recommendation of the State Government dated 06.12.2004, the other observations/ directions are not warranted in the light of the provisions of the Act and the Rules. The said observations/directions are deleted.

Issue (i):

Whether it is advisable to remit it to the Central Government:

56. Learned senior counsel appearing for Jindal and Kalyani requested that inasmuch as the Central Government has already given its approval under Section 5 of the MMDR Act in their favour during the pendency of the writ petition, if this Court feels that fresh decision is to be arrived, the same may be remitted to the Central Government. In the earlier part of our judgment, we have pointed out that the Central Government considers only the materials forwarded by the State Government along with its recommendation. As rightly pointed out, if the recommendation of the State Government cannot be upheld in law, all consequential orders including the subsequent approval by the Central Government are also liable to be quashed. It is useful to refer *Barnard* vs. *National Dock Labour Board* (1953) 1 All E.R. 1113 at 1120 para 1, *McFoy* vs. *United Africa Co.* (1961) All E.R. 1169, *Pavani Sridhara Rao* vs. *Govt. of A.P & Ors.* (1996) 8 SCC 298 (para 5) and *State of Kerala* vs. *Puthenkavu N.S.S. Karayogam & Anr.*, (2001) 10 SCC 191 (para 9). If the very same recommendation of the State Government is sent back to the Central Government on the administrative side in its role as an approving authority under Section 5(1) without setting aside the impugned judgment, it is more likely that the Central Government would simply follow its previous order. In that event, the Central Government would be influenced by the judgment passed by the Division Bench upholding the grant made in favour of Jindal and Kalyani. Such an exercise would be in the nature of post-decisional hearing which would be impermissible. [Vide *H.L. Trehan & Ors.* vs. *Union of India & Ors.*, (1989) 1 SCC 764

(paras 12 & 13) *K.I. Shephard & Ors.* vs. *Union of India & Ors.*, (1987) 4 SCC 431 (para 16) and *Shekhar Ghosh* vs. *Union of India & Anr.*, (2007) 1 SCC 331]. It is also brought to our notice that as on date the Central Government hears revision petitions through an Executive Officer and without participation of a Judicial Member. It is also pointed out that the exact procedure of the revisional Tribunal has kept changing over the last few months. It is clear that it would not be an independent and efficacious alternative forum in terms of the guidelines laid down by the Constitution Bench in *Union of India* vs. *R. Gandhi, President, Madras Bar Association,* JT 2010 (5) SC 553. As observed by three Judge Bench of this Court in *Indian Charge Chrome Ltd.* (supra), when there was no valid recommendation by the State Government for the grant of lease, there cannot be any valid approval of the Central Government relying on the defective recommendation. We have already concluded that the recommendation of the State Government dated 06.12.2004 is not valid with reference to the provisions of MMDR Act and the Rules, hence the invalid recommendation cannot be looked into by the Central Government. Further, proviso to Section 5(1) itself provides only for the Central Government either to grant or reject its approval to the State Government's recommendation in the case of mining lease for a mineral such as iron ore in the First Schedule. In our view, such consideration on the administrative side does not involve consideration of all the applicants based on their mining lease applications and after giving an opportunity of hearing. Inasmuch as the Central Government does not have all relevant materials before it, it may not be in a position to substitute itself for the State Government and, if not, it would be proper, in fact, it would be inconsistent with the provisions of the MMDR Act and the Rules to frame the issue on the administrative side of the Central Government. Even otherwise, inasmuch as we have heard the matter at length and we satisfy that there is a flaw in the recommendation of the State Government which requires reconsideration, we reject the request for remitting the matter to the Central Government for its decision.

Conclusion:

57. In the light of the above discussion, the impugned order of the Division Bench of the High Court dated 05.06.2009 in Writ Appeal No. 5084 of 2008 and allied matters as well as the decision of the State Government dated 26/27.02.2002 and the subsequent decision of the Central Government dated 29.07.2003 are quashed. We direct the State Government to consider all applications afresh in light of our interpretation of Section 11 of the Act and Rules 35, 59 and 60 of MC Rules and make a recommendation to the Central Government within a period of four months from the date of receipt of the copy of this judgment. It is made clear that we have not expressed anything on the eligibility or merits of any of the parties before us and our conclusion as to the decision of the State Government is based on the interpretation of the statutory provisions mentioned above for which we adverted to certain factual details of the parties. The State Government is free to consider the applications and take a decision one way or other in accordance with law, as discussed above, within the time scheduled.

58. All the appeals are allowed to the extent mentioned above. No costs.

N.J. Appeals partly allowed.