M/S. COAL INDIA LIMITED AND ORS.
v.
ALOK FUELS (P) LTD. THROUGH DIRECTOR
(Civil Appeal No. 8034 of 2010)

SEPTEMBER 15, 2010

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

Coal – Coal Distribution – Mis-utilization and black marketing of allotted coal – Coal supplied to different consumers like respondents through Fuel Supply Agreement (FSA) at prices notified by Coal India Ltd. – Respondents had entered into an FSA with BCCL, a subsidiary of Coal India Ltd. – FIR lodged by CBI alleging that respondents were involved in a criminal conspiracy leading to breach of the terms and conditions of FSA – It was alleged that instead of utilizing the allotted coal in their respective plants as required under the FSA, the respondents sold the same in open market at higher prices – Subsequently, BCCL suspended the supply of coal to respondents – Respondents filed writ petitions challenging the suspension of coal supply – High Court passed interim orders directing resumption of coal supply to the respondents on the ground that no material was placed by the BCCL to show that the respondents were involved in any kind of black marketing or mis-utilization of the allotted coal – Justification of – Held: Not justified – The High Court failed to appreciate that the FIR was lodged by CBI and, therefore, CBI and not BCCL was in possession of material in support of the allegations made in the FIR – Such material could not be placed before the Court because the CBI was not impleaded as a respondent in the writ petitions filed by the respondents – BCCL is a public authority; and if the FIR lodged by CBI created serious doubts that the allotted coal could be diverted or sold in the open market instead of being utilized in the plants of respondents, BCCL was within

its rights to suspend the supplies of coal to the respondents till the doubts were cleared in appropriate proceedings – Orders of High Court set aside – Orders of High Court set aside Penal Code, 1860 – s.120-B r/w ss.420, 467, 471 – Prevention of Corruption Act, 1988 – s.13(2) r/w s.13(d).

Coal was supplied to different consumers such as the respondents through Fuel Supply Agreement (FSA) at prices notified by Coal India Ltd. The respondents had entered into an FSA with BCCL, a subsidiary of Coal India Limited. The Central Bureau of Investigation (CBI) lodged FIR alleging that the respondents were involved in a criminal conspiracy leading to the breach of the terms and conditions of FSA. It was alleged that instead of utilizing the allotted coal in their respective plants as required under the FSA, the respondents sold the same in open market at higher prices. Subsequently, upon advice of Coal India Ltd., BCCL suspended the supply of coal to respondents.

The respondents filed writ petitions challenging the suspension of coal supply. The High Court passed interim order directing resumption of coal supply to the respondents on the ground that no material was placed by the BCCL to show that the respondents were involved in any kind of black marketing or mis-utilization of the allotted coal. Subsequently, Coal India Limited advised the BCCL to suspend supply of coal to the respondents and accordingly BCCL suspended supply of coal to the respondents.

Aggrieved, the respondents filed the writ petitions in the High Court praying for quashing the communications suspending the supply of coal to the respondents under FSA and also praying for interim orders directing BCCL to resume supply of coal. The Single Judge of the High Court passed interim order directing resumption of

supply of coal to the respondents on the ground that no material was placed by the BCCL to show that there was any kind of black marketing or mis-utilization of the allotted coal by the respondents. The interim order was upheld by the Division Bench of the High Court.

Allowing the appeals, the Court

HELD:1.1. The Single Judge and the Division Bench of the High Court were not right in directing BCCL to resume the supplies of coal to the respondents. What the Single Judge and the Division Bench of the High Court failed to appreciate is that the FIR containing the allegations of mis-utilization of the allotted coal and sale of the allocated coal by the respondents in the open market was lodged by the CBI and, therefore, the CBI and not the BCCL was in possession of information or materials with regard to such mis-utilization of the allotted coal or sale of the coal in the open market by the respondents. As a matter of fact, in the charge-sheet filed after investigation in the Court of Special Judge, CBI cases, it is stated that a search was conducted at the plant premises of the respondents by the CBI officials in presence of independent witnesses during which the plants of the respondents were found to be non-functional and the names of employees / workers as per the Attendance Register as well as other documents relating to sale of finished goods as produced by the respondents were found to be fake and fabricated as full particulars, addresses etc. were not provided in the records in respect of such employees / workers engaged and purchasers of finished goods and thus the quantity of coal issued to respondent-companies were not utilized in their plants but sold in black-market. It is thus clear that there were materials with the CBI in support of the allegations made in the FIR against the respondents that they were not utilizing the allotted coal in their plants but

were selling the same in black-market, but these materials could not be placed before the Court because the CBI was not impleaded as a respondent in the writ petitions filed by the respondents. [Para 13]

1.2. In the counter-affidavit filed in the High Court in reply to the writ petitions filed by the respondents, Coal India Limited and BCCL have pleaded that under Clause 4.4 of FSA the respondents were required to utilize the entire quantity of coal allotted to them in their respective plants and had undertaken not to sell / divert/ transfer the coal for any purpose whatsoever and as the FIR lodged by the CBI disclosed breach of this clause of FSA, Coal India Limited and BCCL had to suspend the supplies of coal to prevent further diversion of coal by the respondents and this decision was taken pending a final decision regarding termination of FSA in terms of Clause 15 thereof. Thus the case of the appellants before the High Court was that suspension of supply of coal has been ordered to prevent further diversion of coal by the respondents. The Coal India Limited and BCCL are Government Companies of the Government of India and are bound by the policy decisions of the Government of India, Ministry of Coal, and since under the New Coal Distribution Policy, mis-utilization of allotted coal and black-marketing of such coal by the respondents was to be checked, the Coal India Limited and BCCL did not act arbitrarily or unreasonably to suspend the supplies of coal under FSA to the respondents, if they entertained a serious doubt on the basis of the FIR lodged by the CBI that the supplies of coal, if made to the respondents, may be mis-utilized by the respondents and may be sold in the open market. [Para 14]

1.3. One relevant consideration which the Coal India Limited and BCCL as public authorities have to consider

is whether continuation of supply of coal to the respondents may not lead to mis-utilization or black-marketing of the coal by the respondents, which are prohibited under FSA and the policy decision of the Government, considering the allegations made by the CBI in the FIR. This relevant aspect has not been considered by either the Single Judge of the High Court while passing the impugned interim order or by the Division Bench of the High Court while dismissing the LPAs against the impugned interim order of the Single Judge. [Para 15]

Kumari Shrilekha Vidyarthi v. State of U.P. **(1991) 1 SCC 537 and** *Sterling Computers Ltd. v. M/s M & N Publications Limited and Others* **(1993) 1 SCC 445 – referred to.**

Ashoka Smokeless Coal India (P) Ltd. and Ors. v. Union of India and Ors. **(2007) 2 SCC 640 – referred to.**

1.4. BCCL has the right to suspend supplies of coal to the respondents where it has doubts that the respondents may mis-utilize the allotted coal and divert or sell the same in open market because, as would be clear from Clause 4.4 of the FSA and the new Coal Distribution Policy, the very object of FSA as well as policy of the Government is to allot coal to respondents for utilization in their plants and not for any other purpose. Therefore, if the FIR lodged by the CBI, which is a premier investigation agency of the Central Government, created serious doubts that the allotted coal may be diverted or sold in the open market instead of being utilized in the plants of respondents, BCCL would be within its rights to suspend the supplies of coal to the respondents till the doubts are cleared in appropriate proceedings. [Para 16]

Case Law Reference:

(2007) 2 SCC 640	**referred to**	**Para 8**

(1991) 1 SCC 537	**referred to**	**Para 15**
(1993) 1 SCC 445	**referred to**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8034 of 2010.

From the Judgment & Order dated 6.10.2009 of the High Court of Jharkhand at Ranchi in Writ Petition (C) No. 2948 of 2009.

WITH

C.A. Nos. 8035, 8036, 8041, 8042, 8039, 8040 & 8037-38 of 2010.

Jaideep Gupta, M.L. Varma, S.B. Upadhyay, Anupam Lal Das, Abhishek Kumar, Gaurav Agrawal, Manish Kumar Saran, Rajendra Krishna, Ratan Kumar Chaudhary, Santosh Mishra, Dharmendra Kumar Sinha for the appearing parties.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. Delay in filing Special Leave Petitions arising out of CC Nos. 5440, 5452 and 5459 of 2010 is condoned.

2. Leave granted.

3. These appeals are against the interim orders dated 06.10.2009 passed by the learned Single Judge of the High Court of Jharkhand in W.P.(C) Nos.2948 of 2009, 3536 of 2009 and 3080 of 2009 and the final order dated 07.01.2010 of the Division Bench of the Jharkhand High Court in L.P.A Nos. 484 of 2009, 485 of 2009, 486 of 2009 and 523 of 2009. Since common issues of fact and law arise for decision in this batch of cases, we are disposing of these appeals by this common judgment.

4. The relevant facts very briefly are that the respondents were granted linkage of different quantities of coal fo utilization in the manufacture of smokeless fuel in their plants. On 18.10.2007, the Government of India, Ministry of Coal discontinued the traditional linkage system and in its place adopted a new coal distribution policy under which coal was to be supplied to different consumers through a Fuel Supply Agreement (for short `FSA') at notified prices to be fixed and declared by Coal India Limited. In accordance with this new policy, Bharat Coking Coal Limited (for short the `BCCL'), a subsidiary of Coal India Limited, entered into FSA with the respondents for supply of coal. Clause 4.4 of FSA provided that the total quantity of coal supplied to the respondents under the agreement is meant for use in the plant of the respondents and the respondents shall not sell or divert or transfer the coal for any purpose whatsoever and in the even they engage or plan to engage into any such re-sale or trade, BCCL shall terminate the FSA forthwith without any liabilities or damages whatsoever payable to the respondents. On 07.06.2009, the Central Bureau of Investigation (for short the `CBI') registered First Information Report (FIR) against 10 consumers including the respondents alleging inter alia that the 10 consumers entered into a criminal conspiracy with Shri Udayan Bhattacharya, the then General Manager (S&M) of BCCL and in furtherance thereof, lifted 11,94,940 tonnes of coal and instead of utilizing the same in their respective plants, sold the same in the open market at higher prices and as a result BCCL has suffered a loss of Rs.4,36,15,300/- approximately and the accused have made corresponding wrongful gain to themselves. In the FIR, the CBI further stated that the facts disclosed the commission of offences punishable under Section 120-B read with Sections 420, 467, 471 of the Indian Penal Code (for short `IPC') and Section 13(2) read with Section 13(d) of the Prevention of Corruption Act, 1988 by Shri Udayan Bhattacharya and the proprietors of different consumer firms and, therefore, a criminal case be registered and the investigation be taken up. The Chairman of the Coal India Limited thereafter advised the

Chairman-cum-Managing Director of BCCL to suspend supply of coal to the firms named in the FIR including the respondents and accordingly BCCL suspended supply of coal to the respondents by a wireless message dated 13.06.2009.

5. Aggrieved, the respondents filed the Writ Petitions in the High Court of Jharkhand at Ranchi praying for quashing the communications suspending the supply of coal to the respondents under FSA and also praying for interim orders directing BCCL to resume supply of coal. On 06.10.2009, the learned Single Judge of the Jharkhand High Court passed the impugned interim orders directing resumption of supply of coal to the respondents on the ground that there was no material placed by the BCCL to show that there was any kind of black marketing done by the respondents or any kind of mis-utilization of the allotted coal by them. The appellants herein challenged the interim orders dated 06.10.2009 of the learned Single Judge before the Division Bench in the LPAs. By order dated 07.01.2010 the Division Bench dismissed the LPAs with the liberty to the appellants to file applications for vacating the interim orders as soon as the appellants are able to procure adverse material against the respondents and in the alternative passed orders terminating FSA with the respondents.

6. Mr. Anupam Lal Das, learned Counsel for the appellants, submitted that the learned Single Judge of the High Court by directing resumption of supply of coal to the respondents had granted a final relief to the respondents by interlocutory orders and this was not permissible in law. He further submitted that the only reason given by the learned Single Judge for passing the interlocutory order directing resumption of supply of coal was that there were no materials other than the FIR lodged by the CBI to show that any kind of black marketing was done or any kind of mis-utilization of allotted coal was made by the respondents. He submitted that the FIR lodged by a premier investigating agency like the CBI and the chequered history of the respondents before the FIR

were sufficient materials to suspend the supply of coal to the respondents. He further submitted that in any case investigation into the allegations made in the FIR has already been completed by the CBI and charge sheet has been filed against the respondents which vindicate the stand taken by the appellants that the respondents were diverting coal meant for their plants for sale in the open market.

7. Mr. Das further submitted that two of the consumers to whom the supply of coal was similarly suspended, namely, M/s Sushila Chemicals Pvt. Ltd. and M/s Magadh Smokeless Fuel Co. moved the Patna High Court in two separate Writ Petitions and the learned Single Judge of the Patna High Court passed a common order dated 26.08.2009 allowing the Writ Petitions with a finding that the investigation of criminal case or allegations of misuse of coal is no ground for suspension of coal supply under FSA, but the appellants filed LPA Nos. 1265 of 2009 and 1266 of 2009 before the Division Bench of the Patna High Court and the Division Bench held that in larger public interest resumption of supply of coal could not be ordered so long as the appellants do not consider the show cause of the Writ Petitioners and taken a final view on merits. He submitted that similarly some other consumers, namely, M/s Pratap Fuel Industries and M/s National Fuels Industry moved the Allahabad High Court in Civil Miscellaneous Writ Petition Nos. 33576 of 2009 and 36430 of 2009 against the suspension of supply of coal under FSA and the Division Bench of the Allahabad High Court held that the order suspending the supply of coal to the two consumers passed by the appellants herein needed no interference by the Court in its extraordinary jurisdiction and instead directed the appellants herein to consider the explanations of the two consumers furnished in reply to show cause notices dated 16.07.2008 and take a final decision in the matter. He submitted that although the orders passed by the Patna High Court and the Allahabad High Court were cited before the Division Bench of the Jharkhand High Court, the same had not been referred to or dealt with in the

impugned orders passed by the Division Bench of the Jharkhand High Court in the LPAs. He submitted that an anomalous situation now prevails with regard to supply of coal to the 10 consumers against whom the CBI has lodged the FIR. Those consumers who moved the Patna High Court and the Allahabad High Court are not getting the supply of coal under FSA, whereas those consumers who moved the Jharkhand High Court and in whose favour the Jharkhand High Court has passed orders would be entitled to supply of coal under FSA, though the two classes of consumers are similarly situated.

8. Mr. Das cited the observations of this Court in *Ashoka Smokeless Coal India (P) Ltd. & Ors. Vs. Union of India & Ors.* [(2007) 2 SCC 640] in Para 188 at Page 703 on the need to control black marketing and mis-utilization of coal. He submitted that it is pursuant to these observations of this Court that the new coal distribution policy has been framed to discontinue the Linkage System which could not check the menace of black marketing and diversion of coal to the open market and supply of coal on strict terms and conditions stipulated in FSA to the consumers has been contemplated to ensure proper utilization of the coal in the plants. He submitted that this is why in Clause 4.4 of the FSA it is clearly provided that the total quantity of coal supplied to the respondents under the agreement is meant for use in the plants of the respondents and the respondents shall not sell/divert and/or transfer the coal for any purpose whatsoever and in the event they engage or plans to engage into any such resale or trade, the BCCL shall terminate the FSA forthwith without any liabilities and damages whatsoever payable to the respondents. He submitted that therefore the BCCL can suspend supply of coal to the respondents if the respondents have not been able to establish that the coal already supplied to the respondents has been used in the plants of the respondents. He submitted that Clause 13 of FSA, which provides that if the respondents fail to pay any amount including any interest due to the BCCL towards purchase price of the coal the BCCL can suspend supply of

coal to the respondents, is not exhaustive of the contingencies in which the BCCL can suspend supply of coal to the respondents. He submitted that the learned Single Judge and the Division Bench of the Jharkhand High Court have lost sight of these provisions of FSA made in the public interest while passing the impugned orders.

9. Mr. M.L. Varma, learned Senior Counsel appearing for the respondent M/s Alok Fuels (P) Ltd. submitted that the case of the respondent before the High Court was that supplies of coal to the respondent was suspended arbitrarily and in violation of Article 14. He submitted that the industry of the respondent was functional as would be evident from the report of the General Manager, District Industry Centre before the Punjab & Haryana High Court in Civil Writ Petition No. 9863 of 2008. He further submitted that no materials were produced by the appellants before the learned Single Judge or the Division Bench despite opportunity being given to the appellants to produce materials against the respondent. He further submitted that no opportunity has been given to the respondent to explain and rebut the materials now found and filed alongwith the charge sheet against the respondents by the CBI.

10. Mr. Ranjeet Kumar, learned Senior Counsel, appearing for the respondent M/s Faridabad Industries, on the other hand, supported the impugned orders passed by the learned Single Judge and the Division Bench of the High Court and submitted that besides the FIR lodged by the CBI, no other material whatsoever was placed by the appellants before the High Court to show that the respondents M/s Faridabad Industries diverted coal from its plant and sold the same in the open market. He submitted that due opportunity was given by the learned Single Judge of the High Court by the order dated 15.07.2009 to the appellants about materials which were in their possession on the date on which supply was directed to be suspended but despite such opportunity, the appellants did not

produce any material whatsoever before the High Court to show that the respondent M/s Faridabad Industries has resorted to any black marketing or sale in the open market or had diverted coal from its plant. He submitted that supply of coal to the respondent M/s Faridabad Industries was very essential for its industry and business and suspension of supply of coal to the industry of the respondent could not be allowed by the Court for an indefinite period of time and therefore the learned Single Judge of the High Court had rightly passed the interlocutory order directing the appellants to resume supply of coal to the respondents.

11. Mr. U.U. Lalit, learned Senior Counsel appearing for the respondent M/s Ajay & Company Fuel Product adopted the submissions of Mr. Ranjeet Kumar and further submitted that it will be clear from Para 2 of the Additional Affidavit filed on behalf of the appellant on 10.05.2010 in SLP (C) No. 11307 of 2010 that prior to the new coal distribution policy introduced w.e.f. 18.10.2007, there were 230 national consumers and 94 Cokeries and Cokery-cum-Washery units drawing coal from BCCL, but after introduction of this new policy on 18.10.2007, only five consumers other than private cokery units were found suitable for execution of FSA under the new coal distribution policy. He submitted that the respondent M/s Ajay & Company Fuel Product was one of these five consumers found suitable for execution of FSA and at this stage a stand cannot be taken by the appellants that M/s Ajay & Company Fuel Product was not suitable for supply of coal under FSA.

12. Mr. S.B. Upadhyay, learned Senior Counsel, appearing for the respondent M/s M.G.M. Contrade Pvt. Ltd. adopted the arguments of Mr. Ranjit Kumar and further submitted that Clause 13 of the FSA executed by BCCL in favour of M/s. M.G.M. Contrade Pvt. Ltd., stipulated that BCCL could suspend supplies of coal to the respondent if the respondent fails to pay any amount including any interest to BCCL under FSA. He submitted that the supply of coal to the

respondent therefore could not be suspended on any ground other than the failure on the part of the respondent to pay any amount or interest due to the BCCL under FSA. He submitted that suspension of supply of coal by the petitioner to the respondent pursuant to the FIR lodged by the CBI is, therefore, in breach of Clause 13 of the FSA. He referred to the observations of this Court in Para 189 in the case *Ashoka Smokeless Coal India (P) Ltd. & Ors. Vs. Union of India & Ors.* (Supra) that inspection should be carried out by the officers appointed by the Chairman cum Managing Director of the company concerned within whose jurisdiction the unit is located before entering into any agreement for supply of coal to ensure the genuineness of the unit. According to Mr. Upadhyay, since FSA has been executed in favour of the respondent after all such inspection and scrutiny, the appellants cannot at this stage take the stand that the unit of the respondent is not genuine.

13. We have considered the submissions of learned counsel for the parties and we find that the only reason why the learned Single Judge of the High Court has by the impugned interim orders directed the appellants to resume supplies of coal under FSA to the respondents is that BCCL has not placed any material before the Court to show that there was any kind of black-marketing of coal done by the respondents or any kind of mis-utilization of the allotted coal by them and this is also the reason given by the Division Bench of the High Court for dismissing the LPAs filed by the appellants against the impugned interim orders passed by the learned Single Judge. What the learned Single Judge and the Division Bench of the High Court failed to appreciate is that the FIR containing the allegations of mis-utilization of the allotted coal and sale of the allocated coal by the respondents in the open market was lodged by the CBI and therefore the CBI and not the BCCL was in possession of information or materials with regard to such mis-utilization of the allotted coal or sale of the coal in the open market by the respondents. As a matter of fact in the charge-sheet which has been filed after investigation in the Court of

Special Judge, CBI cases, Dhanbad, it is stated that a search was conducted at the plant premises of the respondents in June 2009 by the CBI officials in presence of independent witnesses during which the plants of the respondents were found to be non-functional and the names of employees / workers as per the Attendance Register as well as other documents relating to sale of finished goods as produced by the respondents were found to be fake and fabricated as full particulars, addresses etc. were not provided in the records in respect of such employees / workers engaged and purchasers of finished goods and thus the quantity of coal issued to the respondent-companies were not utilized in their plants but sold in black-market. It was thus clear that there were materials with the CBI in support of the allegations made in the FIR against the respondents that they were not utilizing the allotted coal in their plants but were selling the same in black-market, but these materials could not be placed before the Court because the CBI was not impleaded as a respondent in the writ petitions filed by the respondents.

14. We further find that in the counter-affidavit filed in the High Court in reply to the writ petitions filed by the respondents, Coal India Limited and BCCL have pleaded that under Clause 4.4 of FSA the respondents were required to utilize the entire quantity of coal allotted to them in their respective plants and had undertaken not to sell / divert / transfer the coal for any purpose whatsoever and as the FIR lodged by the CBI disclosed breach of this clause of FSA, Coal India Limited and BCCL had to suspend the supplies of coal to prevent further diversion of coal by the respondents and this decision was taken pending a final decision regarding termination of FSA in terms of Clause 15 thereof. Thus the case of the appellants herein before the High Court was that suspension of supply of coal has been ordered to prevent further diversion of coal by the respondents. The Coal India Limited and BCCL are Government Companies of the Government of India and are bound by the policy decisions of the Government of India,

Ministry of Coal, and since under the New Coal Distribution Policy formulated pursuant to the observations of this Court in *Ashoka Smokeless Coal India (P) Ltd. & Ors. Vs. Union of India & Ors.* (Supra), mis-utilization of allotted coal and black-marketing of such coal by the respondents was to be checked, the Coal India Limited and BCCL did not act arbitrarily or unreasonably to suspend the supplies of coal under FSA to the respondents, if they entertained a serious doubt on the basis of the FIR lodged by the CBI that the supplies of coal, if made to the respondents, may be mis-utilized by the respondents and may be sold in the open market.

15. It is settled by a series of decisions of this Court starting from *Kumari Shrilekha Vidyarthi v. State of U.P.* [(1991) 1 SCC 537] that even in the domain of contractual matters, the High Court can entertain a writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law. *I Sterling Computers Ltd. v. M/s M & N Publications Limited and Others* [(1993) 1 SCC 445] in para 28, however, this Court held:

> "Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones."

Obviously, one such relevant consideration which the Coal India Limited and BCCL as public authorities have to consider is whether continuation of supply of coal to the respondents may not lead to mis-utilization or black-marketing of the coal by the respondents which are prohibited under FSA and the policy decision of the Government considering the allegations made by the CBI in the FIR on the basis of the reliable information received. This relevant aspect has not been considered by either the learned Single Judge or the High Court while passing the impugned interim orders or by the Division Bench of the High Court while dismissing the LPAs against the impugned

interim orders of the learned Single Judge.

16. It is true as has been contended on behalf of the respondents that Clause 13(1) of FSA provides that in the event respondents fail to pay any amount including any interest due to BCCL under FSA within a period of 30 days of the same falling due, BCCL shall have the right to suspend supplies of coal to the respondents, but Clause 13(1) does not stipulate that in no other contingency BCCL can suspend supplies of coal under FSA to the respondents. Moreover, Clause 13(1) of FSA enumerates the three options available to BCCL in case the dues towards the price of coal and interest is not paid by the respondents and it does not provide for the different contingencies in which BCCL can suspend the supplies of coal to the respondents. In our considered opinion BCCL will also have the right to suspend supplies of coal to the respondents where it has doubts that the respondents may mis-utilize the allotted coal and divert or sell the same in open market because, as would be clear from Clause 4.4 of the FSA and the new Coal Distribution Policy decision dated 18.10.2007, the very object of FSA as well as policy of the Government is to allot coal to respondents for utilization in their plants and not for any other purpose. Therefore, if the FIR lodged by the CBI, which is a premier investigation agency of the Central Government, created serious doubts that the allotted coal may be diverted or sold in the open market instead of being utilized in the plants of respondents, BCCL would be within its rights to suspend the supplies of coal to the respondents till the doubts are cleared in appropriate proceedings.

17. We, however, find that BCCL has initiated such proceedings by issuing show cause notices dated 16.07.2009 to the respondents to explain why FSA executed in favour of the respondents should not be cancelled on the basis of the FIR lodged by the CBI containing the allegations that the respondents were involved in a criminal conspiracy leading to the breach of terms and conditions of FSA. If the respondents

have furnished their explanations, BCCL may consider the same and take a decision whether or not to resume supplies of coal in accordance with law.

18. We, therefore, hold that the learned Single Judge and the Division Bench of the High Court were therefore not right in directing BCCL to resume the supplies of coal to the respondents and accordingly set-aside the impugned orders dated 06.10.2009 of the learned Single Judge and dated 07.01.2010 of the Division Bench of the High Court and allow these appeals with no order as to costs.

B.B.B. Appeals allowed.

V. AYYANNA

v.

GOVT. OF A.P. AND ORS.

(Civil Appeal No. 3352 of 2007)

SEPTEMBER 23, 2010

[J.M. PANCHAL AND DR. MUKUNDAKAM SHARMA, JJ.]

Service Law – Inter-se seniority – Seniority on basis of qualification – G.O.Ms. No. 85 dated 21.01.1978 providing for merger of various posts including that of the Basic Health Worker to Multipurpose Health Assistant – Appellant was working as Basic Health Worker which post carried a lesser pay-scale than that of Multipurpose Health Assistant – Essential qualification for appointment to post of Health Assistant was a certificate of Sanitary Inspector Training Course (SITC) – Appellant did not have the SITC certificate, therefore, although his post was merged with that of the Multipurpose Health Assistants, he was not given the same pay-scale till he had acquired the aforesaid certificate – Appellant acquired SITC certificate only subsequently – Principle laid down by Tribunal in two orders that Basic Health Workers, who were designated as Health Assistants, shall count their seniority in the category of Health Assistants from 21.01.1978/01.01.1980 or from the date of passing the SITC, whichever is later – Seniority list prepared in terms thereof, challenged by appellant before the Tribunal in another round of litigation – Tribunal declined to interfere – Order affirmed by High Court – Justification of – Held: Justified – The orders passed by the Tribunal in the earlier litigation had become final and binding and the final seniority list was prepared in compliance thereof – Possession of a SITC certificate was an essential qualification, and, as such, the appellant could get his seniority only from the date he acquired such a certificate.

The State Government, in order to have a rationalized structure of posts, issued G.O.M. No. 85 dated 21.01.1978 merging various posts including that of the Basic Health Worker to Multipurpose Health Assistant. The appellant was working as a Basic Health Worker which post was carrying a lesser pay-scale than that of the Multipurpose Health Assistant.

Under the then existing rules framed by the Government which was in operation and in vogue as on 21.01.1978, the qualification for appointment to the post of Health Assistant was intermediate pass with a certificate of Sanitary Inspector Training Course (SITC). Since at the relevant time, the appellant did not have the said qualification as he did not possess a certificate of the aforesaid nature, therefore, although his post was merged with that of the Multipurpose Health Assistants, he was not given the same pay-scale till he had acquired the aforesaid qualification or possessing a SITC certificate. The appellant acquired SITC certificate only subsequently.

After issuance of the aforesaid notification and creation of one cadre of Health Assistants, dispute arose as regards the inter-se seniority in the cadre of Multipurpose Health Assistant Workers. The issue was decided by the State Administrative Tribunal in a R.P. and separately in an O.A. In both the orders, the Tribunal held that the Basic Health Workers and others who were not required to pass Sanitary Inspector Training Course for regularization in their service but who were designated as Health Assistant on passing the SITC shall count their seniority in the category of Health Assistants from 21.01.1978/01.01.1980 or from the date of passing the SITC, whichever is later, the inter se seniority among them being determined on the basis of their length of service

in the lower category of Basic Health Workers etc. Consequent thereupon, a seniority list was prepared, in terms of which the appellant became entitled to get his seniority in the aforesaid cadre from the date he obtained the SITC certificate and not from a prior date.

The appellant challenged the legality and validity of the seniority list before the Tribunal in another round of litigation. The Tribunal dismissed the applications on the ground that the principle of fixation of seniority in the cadre of Health Assistants was already settled in view of the decision in the earlier R.P. and O.A. which had since become final and binding and, therefore, no interference was called for. The order was affirmed by the High Court.

Dismissing the appeal, the Court

HELD:1. The facts of the case make it crystal clear that the orders which were passed by the Tribunal in the earlier litigation had become final and binding and the final seniority list was prepared in compliance thereof. The effect of the said final seniority list is that the appellant would get his seniority in the cadre of Health Assistant from the date he has obtained the SITC certificate and not from a prior date. Possession of a SITC certificate is an essential qualification, and, as such, the appellant could not have claimed his seniority from a retrospective date. He could get his seniority only from the date when he acquired such a certificate in terms of the provisions of the rules. The findings recorded by the Tribunal, which reiterated the earlier orders passed by the Tribunal, are just and proper and cannot be said to be in any manner to be arbitrary. [Paras 13, 14]

2. In terms of the circular issued by the Government, the appellant although appointed initially to the category of Health Assistant, could not be so appointed on a

regular basis till he had passed the SITC and, therefore, his seniority will have to be counted from the date when he obtained such a certificate or from 21.01.1978/ 01.01.1980, whichever is later, and he could not have claimed for a seniority position prior to the effective date as he was not eligible to hold such a post. [Para 15]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3352 of 2007.

From the Judgment and Order dated 3.11.2003 of the Andhra Pradesh High Court of Judicature at Hyderabad in W.P. No. 18386 of 2003.

A.T.M. Rangaramanujam, K.L. Sastry, Amit Kumar Srivastava and R.V. Kameshwaran for the Appellant.

R. Sundarvardhan, Manoj Saxena, Rajnish Kumar Singh, Rahul Shukla, T.V. George and Bachita Baruah for the Respondent.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. This appeal is preferred by the appellant challenging the legality of the judgment and order dated 03.11.2003 passed by the Andhra Pradesh High Court in W.P. No. 18386 of 2003 whereby the High Court has affirmed the judgment and order of the Andhra Pradesh Administrative Tribunal at Hyderabad dated 12.12.2002. By the said judgment and order, the State Administrative Tribunal dismissed several Original Applications filed by the applicants, including the appellant herein.

2. There were number of feeder categories under the rules framed by the State Government in G.O.Ms. No. 3845 dated 17.11.1964. The appellant and other similarly situated persons were initially appointed during the years 1971-1975. Sometime in the year 1978, the Government with the intention of having a rationalized structure of cadres of some posts, merged various

categories of posts to constitute a single cadre of Health Assistants, consequent upon which, the Government of India issued a G.O.M. No. 85 dated 21.01.1978, merging 10 categories including the post of Lab Assistants, Surveillance Workers, Health Sub-Inspectors Grade-II, Microscopist, Lab Technician, Basic Health Worker, Field Assistants and Health Assistants of posts to that of Health Assistant's post. It is also to be clarified at this stage that Basic Health Workers, Superior Field Workers, Malaria Surveillance Workers were drawing lesser scale of pay than that of the pay-scale attached to the post of Multipurpose Health Assistants at the relevant time. It is also required to be stated that the basic qualification required for appointment to the post of Multipurpose Health Assistant was that the candidate must possess the academic qualification of intermediate and must have a Sanitary Inspector Training Course [for short 'SITC'] Certificate, which was in vogue on the date of G.O.Ms. No. 85, dated 21.1.1978. The aforesaid G.O.Ms. stipulated that Basic Health workers, Malaria Surveillance Workers and others would continue to draw their own scale of pay till they acquire the SITC certificate and get converted as Health Assistants.

3. The appellant herein was not having a SITC certificate qualification as on 21.01.1978 and he acquired the said SITC certificate subsequently.

4. After the issuance of the aforesaid notification and creation of one cadre of Health Assistants, a seniority list was prepared in the cadre of Multipurpose Health Assistant Workers. The said seniority list in that cadre came to be challenged before the State Administrative Tribunal attacking the principle of fixation of seniority on the basis of qualifications. Pursuant to the aforesaid challenge, the Tribunal decided the said issue in R.P. No. 2860 of 1987 and batch and separately in O.A. No. 5410 of 1994 and batch. In terms of the order passed by the Tribunal, the respondents proceeded to prepare a seniority list dated 03.09.1998.

5. The appellant herein and some other persons, without seeking any review of the earlier orders passed by the Tribunal in R.P. No. 2860 of 1987 and batch and O.A. No. 5410 of 1994 and batch, which had incidentally become final and binding and pursuant to which the aforesaid seniority list was prepared in the year 1998, challenged not only the aforesaid seniority list, but also the principle laid down by the Tribunal in the earlier orders passed in R.P. No. 2860 of 1987 and batch and O.A. No. 5410 of 1994 and batch. The State Administrative Tribunal, after considering the issues raised by the appellant herein and others, dismissed the said petition on the ground that the principle of fixation of seniority in the cadre of Health Assistants was already settled in view of the decision in the aforesaid R.P. and O.A. which had since become final and binding and, therefore, no interference was called for.

6. Being aggrieved by the said order, the appellant herein and others filed various Writ Petitions before the High Court which were taken up together, and by a common judgment and order dated 03.11.2003, High Court dismissed all the Writ Petitions including that of the appellant herein. Being aggrieved by the said judgment and order of the High Court, present appeal by way of a Special Leave Petition is filed on which we heard the learned counsel appearing for the parties.

7. Counsel appearing for the appellant submitted before us that the appellant, pursuant to the G.O.Ms. No. 85 dated 21.01.1978, is entitled to get his seniority in the category of Multipurpose Health Assistant from the date on which their services were regularized in the category of Basic Health Worker / Field Worker / Malaria Surveillance Worker, etc. He also submitted that the very principle settled by the Tribunal in R.P. No. 2860 of 1987 and batch and O.A. No. 5410 of 1994 and batch is illegal and contrary to law. It was his further submission that seniority should always be counted from the date of appointment and, therefore, giving the benefit of

seniority from an artificial date is arbitrary and required to be set aside and quashed.

8. Counsel appearing for the respondent, however, refuted the aforesaid allegations and submitted that the criteria of fixation of seniority having been settled by the State Tribunal in R.P. No. 2860 of 1987 and batch and O.A. No. 5410 of 1994 and batch, and the appellant having not taken any steps to get the same set aside and quashed by filing a separate petition before the Tribunal, the said principle, which has become final and binding, cannot be challenged at such a distant stage. It was also submitted that the appellant was working in the scale lower than that of Multipurpose Health Assistant and, therefore, he cannot ask for his seniority from the date of issuance of the notification by the State Government creating single cadre effective from 21.01.1978, but he would be entitled to get his seniority once he acquired the qualification of acquiring the SITC certificate, which was one of the essential qualifications for appointment to the said post.

9. In the light of the aforesaid submissions of the counsel appearing for the parties, we have considered the records in depth. The appellant was working as Basic Health Worker which was carrying a lesser pay-scale than that of the Multipurpose Health Assistant. The aforesaid post to which the appellant was appointed and on which he was working as on 21.01.1978, did not belong to or was equivalent to the post of Health Assistant. However, the State Government, in order to have a rationalized structure of posts, merged various categories of posts to constitute a single cadre of Health Assistants. Consequently, the Government also issued the aforesaid G.O.Ms. No. 85 dated 21.01.1978 merging various posts including that of the Basic Health Worker to Multipurpose Health Assistant. It may be stated at this stage that under the then existing rules framed by the Government which was in operation and in vogue as on 21.01.1978, the qualification for appointment to the post of Health Assistant was intermediate

pass with a certificate of Sanitary Inspector Training Course. The appellant did not have the said qualification as he did not possess a certificate of the aforesaid nature, therefore, although his post was merged with that of the Multipurpose Health Assistants, he was not given the same pay-scale till he had acquired the aforesaid qualification or possessing a SITC certificate. The aforesaid actions were taken by the respondents pursuant to the specific stipulations in the notification itself which stated that Basic Health Workers, Malaria Surveillance Workers and others would continue to draw their own scale of pay till they acquire SITC certificate and get converted as Health Assistants. The appellant was not having SITC certificate qualification as on 21.01.1978 and he had acquired SITC certificate subsequently.

10. State Government subsequently issued revised rules in G.O.Ms. No. 273, Health dated 24.04.1989 as far as the post of Multipurpose Health Assistant is concerned. The said rules were given retrospective effect from 01.04.1983 and an order was also issued on 30.03.1982 by the State Government to prepare a seniority list in the feeder categories as per G.O.Ms. No. 85 dated 21.01.1978.

11. The follow-up action taken by the State Government was challenged by some of the employees by filing R.P. No. 1530/1985. The State Tribunal disposed of the said R.P. by its judgment dated 05.07.1986. Subsequent thereto, another judgment was rendered by the said Tribunal in R.P. No. 2860/1987 and batch which was delivered on 25.09.1987 in which various directions were issued to Respondents for preparation of the seniority list. Subsequently, OAs No. 5410/94 and batch were filed seeking a direction to the Respondents to implement the judgment dated 25.09.1987. The above OAs were disposed of on 28-11-1995 issuing directions to the State Govt. in terms of the directions issued earlier in the judgment dated 25.09.1987 in R.P. No. 2860/1987 and batch. In both the judgments, i.e. the judgment dated 25.09.1987 in R.P. No.

2860/1987 and batch and the judgment dated 28.11.1995 in OAs No. 5410/94 and batch, it was categorically held that Basic Health Workers and others who were not required to pass Sanitary Inspector Training Course for regularization in their service but who were designated as Health Assistant on passing the SITC shall count their seniority in the category of Health Assistants from 21.01.1978/01.01.1980 or from the date of passing the SITC, whichever is later, the *inter se* seniority among them being determined on the basis of their length of service in the lower category of Basic Health Workers etc.

12. Consequent upon the directions given in the aforesaid judgments, a seniority list was prepared on 03.09.1998, the legality and validity of which was challenged before the Tribunal and also before this Court.

13. The aforesaid facts make it crystal clear that the orders which were passed by the Tribunal in the earlier litigation had become final and binding and the final seniority list was prepared in compliance thereof. The effect of the said final seniority list is that the appellant would get his seniority in the aforesaid cadre from the date he has obtained the SITC certificate and not from a prior date. It is needless to point out, and also made clear hereinbefore, that possession of a SITC certificate is an essential qualification, and as such, the appellant could not have claimed his seniority from a retrospective date. He could get his seniority only from the date when he acquired such a certificate in terms of the provisions of the rules.

14. As the principles stated say that the persons who have been re-designated as Health Assistants on passing the SITC certificate would count their seniority in the cadre as Health Assistant from 21.01.1978/01.01.1980 or from the date of passing the SITC certificate whichever is later, the Tribunal upheld the aforesaid position and held that the appellant would be entitled to get his seniority on the aforesaid principle, i.e.,

from 20.01.1978/01.01.1980 or from the date of passing the SITC certificate, whichever is later. The aforesaid findings recorded by the Tribunal, which reiterated the earlier orders passed by the Tribunal on 25.09.1987 and 28.11.1995, appear to be just and proper and cannot be said to be in any manner to be arbitrary.

15. In terms of the circular issued by the Government, the appellant although appointed initially to the category of Health Assistant, could not be so appointed on a regular basis till he had passed the SITC and therefore, his seniority will have to be counted from the date when he obtained such a certificate or from 21.01.1978/01.01.1980, whichever is later, and he could not have claimed for a seniority position prior to the effective date as he was not eligible to hold such a post.

16. Considering the facts and circumstances of the case, we are of the considered opinion that the judgment and order passed by the High Court affirming the judgment and order passed by the Tribunal is legal and valid and that there is no infirmity in the said orders.

17. Consequently, we find no merit in this appeal, which stands dismissed but we leave the parties to bear their own costs.

B.B.B. Appeal dismissed.

MUMBAI INTERNATIONAL AIRPORT PVT. LTD.
v.
M/S. GOLDEN CHARIOT AIRPORT AND ANR.
(Civil Appeal No. 8201 of 2010)

SEPTEMBER 22, 2010

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

Approbate and Reprobate*: Shifting of stands – Licence granted to run a restaurant for limited period – Notice issued for vacating the licenced premises after expiry of licenced period – Suit for declaration and injunction by licencee on the ground that the licence was irrevocable – Civil court returned the plaint holding that it did not have pecuniary jurisdiction to hear the case – In appeal, licencee dropped the prayer that licence was irrevocable – Suit revived and decreed on the ground that terms of licence provided for applicability of the provisions of Public Premises Act, 1971 – Proceedings before Estate Officer – Estate Officer directing licencee to vacate the premises – Licencee's plea before Supreme Court that the licence was irrevocable – Held: A litigant cannot change and choose its stand to suit his convenience and prolong a civil litigation on prevaricated pleas – The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel – The licencee took a stand before High Court that the licence was revocable and got the benefit as a result of taking such stand in as much as it got the suit revived and tried and got the benefit of an interim order in the said proceedings – As a result of the said stand, the suit went on before the civil court from 2001 to 2004 and in view of the interim protection, licencee ran the restaurant during that period – The licencee on a complete volte-face of its previous stand cannot urge its case of irrevocable licence before the Estate Officer and before the Supreme Court – Even otherwise, the licence by its very term was revocable – Since*

licencee took inconsistent stands, and thereby prolonged litigation for more than a decade and did not pursue its proceedings honestly in different fora, therefore, its appeal is dismissed with costs assessed at Rs.5,00,000/- – Doctrine of estoppel – Leave and licence – Plea – Costs.

***Leave and licence**: Licence – Revocable licence – Held: Whether a contractual licence is revocable or not, depends on the express terms of the contract – A contractual licence is normally revocable, except in certain circumstances that are expressly provided for in Easement Act, 1882 – On facts, plea of licencee that it invested money in construction of restaurant on the oral assurance by the officers of Airport Authority (AAI) about extension of licence so as to make it irrevocable was of no legal consequence – No such assurance was proved, even if it is proved, such assurance did not and would not bind the AAI – Being a statutory corporation, AAI was totally bound by the Act and the Regulations framed under the Act – Plea of discrimination on the ground that cases of other licencees were extended whereas in the case of licencee, the licence was not extended, not factually correct as its licence was also extended twice – Airports Authority of India Act, 1994 – Airports Authority of India (Amendment) Act, 2003 – Airports Authority of India (Contract) Regulations 2003 – Regulation 3(2) – Constitution of India, 1950 – Article 14 – Easement Act, 1882 – s.52.*

***Constitution of India, 1950**: Article 14 – Plea of discrimination – Held: Can only be raised if a person has a right in law, to be treated in a particular way, but that treatment is denied to him, whereas others are given the same treatment.*

***Public Premises (Eviction of Unauthorised Occupants) Act, 1971**: s.3 – Power of Central Government to appoint Estate Officer u/s.3 – Notification dated 1.7.1997 published in the Official Gazette by Central Government for*

appointment of several persons as Estate Officers for the purpose of the 1971 Act – By a further notification dated 15.5.07, published in the Official Gazette, previous notification amended and for the words 'Airport Director', the words 'Deputy General Manager (Land Management)' substituted – Estate Officer who decided the case of the licencee was promoted and brought to Mumbai as Deputy General Manager (Land Management) – Therefore, by virtue of his designation as Deputy General Manager (Land Management), he was a valid Estate Officer – Airports Authority of India Act, 1994.

The contesting respondent entered into a licence agreement with the Airport Authority of India (AAI) for running a restaurant covering 5000 sq. ft., in front of Mumbai Airport. The licence was valid for a period of three years, from 27.11.1995 to 26.11.1998. The provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the rules framed thereunder were made applicable to the licence agreement. After the initial grant of the said licence, the same was, under request of the contesting respondent, extended upto 26.5.2000. On 4.5.2000, AAI sent notice to the contesting respondent to vacate and hand over physical possession of the licenced premises by 26.5.2000. On 15.5.2000, the contesting respondent filed a suit praying for cancelling the notice dated 4.5.2000 and for permanent injunction restraining AAI from evicting, demolishing or removing the restaurant premises of contesting respondent without adopting the due process of law. The contesting respondent prayed in the suit that the AAI granted an irrevocable licence and, therefore, it has no right to terminate, cancel or revoke the licence. The City Civil Court returned the plaint under Order 7 rule 10, CPC, *inter alia*, on the ground that it did not have the pecuniary jurisdiction to hear the case in view of the declaration

prayed for. Aggrieved by the said order, the contesting respondent filed an appeal before the High Court. When the said appeal came up for hearing, it was represented by the contesting respondent that they would drop the prayer for the declaration that the licence was irrevocable. On such stand taken by the contesting respondent, the High Court remanded the matter to the City Civil Court granting liberty to the contesting respondent to move proper application for amendment of the plaint. After the remand, the City Civil Court decreed the suit holding that the terms of the licence showed that both the parties had agreed to submit themselves to the provisions of 1971 Act and, therefore, AAI was bound to follow the due process of law for evicting the contesting respondent from the suit premises in terms of 1971 Act. Thereafter, the proceedings were initiated before the Estate Officer.

The contesting respondent made repeated requests to AAI for extension of licence. Further hearings before the Estate Officer were conducted and on 12.01.05, after completion of the hearing and closing of the summary proceedings, the contesting respondent addressed a letter contending that the hearing of the matter be deferred until AAI communicated its decision on its request for the extension of the licence. On 18.3.2005, the Estate Officer rejected the request of the contesting respondent. Aggrieved, the contesting respondent filed the writ petition which was dismissed as withdrawn.

On 7.3.2006, the Estate Officer passed an order holding that the contesting respondent was in unauthorized occupation of the licenced premises, which was a public premises and it was liable to be evicted.

In view of the policy for privatization of airports, on 4.4.2006, Mumbai International Airport Private Ltd. (MIA) was granted the exclusive right and authority for a period

of 30 years by AAI to undertake some of the functions of AAI. Pursuant to such right, most of the immovable properties of AAI including the licenced premises were leased to MIA. Meanwhile, the contesting respondent filed an appeal before the City Civil Court against the order of the Estate Officer. In the said appeal, MIA was not party.

In 2007, MIA took out a chamber summons before the City Civil Court for impleading itself as a party in the appeal which was allowed and ultimately the appeal of the contesting respondent was dismissed. The contesting respondent filed a writ petition in the High Court without making MIA a party. On 26.7.2008, the High Court passed an *ex parte ad* interim order directing the parties to maintain *status quo*. The impleadment application of MIA was allowed. On 4.3.2009, the High Court allowed the writ petition and remanded the matter to the Estate Officer for fresh decision on the ground that the order of the Estate Officer was null and void for his failure to consider the case himself as he had verbatim reproduced the entire order of his predecessor with few cosmetic changes. The matter was remanded to the Estate Officer and on 17.3.2009, the hearing was adjourned since SLPs were filed by MIA and AAI challenging the order dated 4.3.2009. Subsequently, during the pendency of the SLPs, a representation was made before the Supreme Court on 29.1.2010 that there was no Estate Officer for hearing the matter. The Supreme Court directed AAI to appoint an Estate Officer under the 1971 Act. On 11.2.2010, the Court was informed that one Mr. K.K Gupta, Deputy General Manager (Land Management) was appointed as the Estate Officer under Section 3 of the 1971 Act, to hear the case of the contesting respondent. In view of that, parties were directed to appear before the Estate Officer. On 29.4.2010, the Estate Officer passed the final order directing the

contesting respondent to vacate the premises and to pay damages for unauthorized occupation of the premises by payment of compensation and municipal taxes. The contesting respondent filed appeal before the City Civil Court challenging the same. The matter was placed before the Supreme Court on 11.5.2010 and on that date the counsel for the contesting respondent took a stand that the proceedings pending before the Supreme Court arising out of the two SLPs had become infructuous. The Supreme Court held that the proceedings taken up by it did not become infructuous and also directed transfer of the appeal pending before the City Civil Court to the Supreme Court. When the matter was taken up by the Supreme Court, it was contended by the contesting respondent that there was an oral assurance for an extension of the licence to the extent that it would be an irrevocable licence and relying on such oral extension, the contesting respondent made substantial investment for constructing the restaurant; that the licence was irrevocable; that the Estate Officer did not give the contesting respondent a proper hearing; and that Mr. K.K Gupta was not authorized to discharge the functions of an Estate Officer in accordance with Section 3(a) of the 1971 Act.

Allowing the appeals, the Court

HELD: 1. The case of the contesting respondent before all the forums was that though the licence period commenced on and from 27.11.95, the restaurant was made operational on 1.1.97. The initial period of licence was upto 26.11.98. Therefore, on its own showing, the contesting respondent completed the construction of the restaurant by 1.1.1997, which was well within the initial licence period, which was upto 26.11.98. Admittedly thereafter, there were two extensions of the licence

period upto 26.5.2000. Therefore, the construction having been completed and the restaurant being operational by 1.1.1997, there was no occasion for the contesting respondent to urge that it invested money in the construction of the restaurant on the oral assurance by the officers of the AAI about extension of the licence so as to make it irrevocable. The Airports Authority of India (Contract) Regulations 2003 have been framed by the AAI with the previous approval of the Central Government. The regulations are statutory. The said Regulations specify that contracts by AAI are required to be sealed with the common seal of AAI. They further provide that contracts are to be made with the previous approval of the Central Government and AAI. Regulation 3(2) also state that all contracts shall be finalized by the execution of a Deed of Agreement, Deed of Licence, Indenture or like instrument, duly signed by AAI and the party concerned, and the said instruments or deeds are to be executed on non-judicial paper of appropriate stamp value when necessary. Having regard to the said statutory framework, the case of the contesting respondent that it was orally assured of extension of licence by some officer of AAI is of no legal consequence. No such assurance was proved, even if it is proved, such assurance did not and would not bind the AAI. Being a statutory corporation, it was totally bound by the Airports Authority of India Act, 1994 and the Regulations framed under the Act. [Paras 40, 46-49]

2. It is well known that a mere licence does not create any estate or interest in the property with which it is concerned. Normally a licence confers legality to an act, which would otherwise be unlawful. A licence can be purely personal, gratuitous or contractual. Whether a contractual licence is revocable or not, would obviously depend on the express terms of the contract. A

contractual licence is normally revocable, except in certain circumstances that are expressly provided for in the Indian Easement Act, 1882. In the instant case, the licence by its very term was revocable. The stand of the contesting respondent that its licence is irrevocable as it has invested money in the premises and made construction is directly contrary to the stand which it took before the High Court and which was recorded in the High Court's order dated 12.7.01. When the City Civil Court returned the plaint filed by the contesting respondent, it came up in appeal against the said order before the High Court, wherein it expressly gave up its claim of irrevocable licence in order to revive the suit. On such stand, the High Court remanded the suit for trial before the City Civil Court. It is, therefore, clear that the contesting respondent took a stand before a court of law and also got the benefit as a result of taking such stand in as much as it got the suit revived and tried, and got the benefit of an interim order in the said proceedings. As a result of the said stand, the suit of the contesting respondent went on before the City Civil Court from 2001 to 2004 and in view of the interim protection, the contesting respondent ran the restaurant during that period. The contesting respondent on a complete volte-face of its previous stand cannot urge its case of irrevocable licence before the Estate Officer and before the Supreme Court. A litigant cannot change and choose its stand to suit its convenience and prolong a civil litigation on prevaricated pleas. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in Indian jurisprudence also. [Paras 50, 52-55]

C. Beepathumma & Ors. v. V.S. Kadambolithaya & Ors. **1964 (5) SCR 836;** *M/s New Bihar Biri Leaves Co. & Ors. v. State of Bihar & Ors.* **(1981) 1 SCC 537, relied on.**

Benjamin Scarf v. Alfred George Jardine **(1881-82) 7 Appeal Cases 345;** *Tinkler v. Hilder* **(1849) 4 Exch 187;** *Clough v. London and North Western Rail Co.* **(1861-73) All ER;** *Harrison v. Wells* **1966 (3) All ER 524;** *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* **(1964) Appeal Cases 993;** *Dwijendra Narain Roy v. Joges Chandra De* **AIR 1924 Cal 600, referred to.**

Muskett v. Hill **(1839) 5 Bing (NC) 694;** *Heap v. Hartley* **(1889) 42 Ch. Div. 461, referred to.**

3. The complaint of the contesting respondent that Mr. K.K. Gupta, while acting as Estate Officer and deciding the proceedings, failed to observe the principles of natural justice, by not summoning the officers of AAI, is without any substance. The Estate Officer gave adequate reasons for not summoning the officers of AAI by holding that beyond 26.5.2000, there was no written extension of the licence period. The Estate Officer rightly held that when written documents were there, any oral assurance, which purported to contradict the written documents need not be considered. The Estate Officer held that it has to decide whether the contesting respondent is in unauthorized occupation of the public premises within the meaning of the 1971 Act. That being the sole purpose of his enquiry, the Estate Officer thought, and rightly so, that its enquiry cannot be widened by including a plea of discrimination under Article 14 raised by the contesting respondent. Apart from that, the plea of discrimination raised by the contesting respondent on the ground that cases of other licensees have been extended whereas in its case, the licence has not been extended is not factually correct in as much as the licence of the contesting respondent was also extended twice. In any event, a plea of discrimination can only be raised in aid of a right. If a person has a right in law, to be treated in a particular way, but that treatment is denied to him, whereas others are given the same

treatment, a plea of discrimination can be made out. The contesting respondent has no right in law, to get its licence extended. Therefore, one cannot have a plea of negative equality under Article 14. There may be very many administrative reasons for extending the period of licence of other licensees, but that does not give rise to a valid plea of discrimination, when admittedly the contesting respondent has no right in law to get an extension. [Paras 66-69]

4. Section 3 of the 1971 Act provides for the power of the Central Government to appoint an Estate Officer. The Ministry of Civil Aviation and Tourism, Department of Civil Aviation, issued a notification dated 1.7.1997, appointing several persons as Estate Officers for the purpose of the 1971 Act. That notification was published in the Official Gazette. By a further notification dated 15.5.07, published in the Official Gazette, the Central Government amended its previous notification and for the words 'Airport Director', the words 'Deputy General Manager (Land Management)' were substituted. While issuing a notification under Section 3, the Central Government has to name a person or an individual as an Estate Officer. The appointment of such Estate Officer is by designation only. Mr. K.K. Gupta who functioned as an Estate Officer and decided the case of the contesting respondent was promoted and brought to Mumbai as Deputy General Manager (Land Management). This was admitted in the affidavit of the contesting respondent. Therefore, Mr. K.K. Gupta by virtue of his designation as Deputy General Manager (Land Management) discharged his function as a valid Estate Officer. [Paras 70-73]

5. The contesting respondent has blown hot and cold by taking inconsistent stand, and has therefore prolonged several proceedings for more than a decade.

It did not pursue its proceedings honestly in different fora. Therefore, the appeal is dismissed with costs assessed at Rs.5,00,000/- to be paid by the contesting respondent in favour of the Supreme Court Mediation Center. [Paras 74-75]

Case Law Reference:

(1839) 5 Bing (NC) 694	**referred to**	**Para 51**
(1889) 42 Ch. Div. 461	**referred to**	**Para 51**
(1881-82) 7 Appeal Cases 345	**referred to**	**Para 56**
(1849) 4 Exch 187	**referred to**	**Para 57**
(1861-73) All ER	**referred to**	**Para 58**
1966 (3) All ER 524	**referred to**	**Para 59**
(1964) Appeal Cases 993	**referred to**	**Para 60**
AIR 1924 Cal 600	**referred to**	**Para 61**
1964 (5) SCR 836	**relied on**	**Para 63**
(1981) 1 SCC 537	**relied on**	**Para 64**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8201 of 2010.

From the Judgment & Order dated 4.3.2009 of the High Court of Judicature at Bombay in Writ Petition No. 5591 of 2008.

WITH

C.A. No. 8200 of 2010.

G.E. Vahanvati AG, C.A. Sundaram, Chander Uday Singh, Shyam Diwan, Farid Karachiwala, Amar Dave, Ashish Jha, Meenakshi Chatterjee, Abhishek Gupta (for "Coac"), Praveen Jain, T.S. Sindhu, Mukesh Kumar, K.P. Singh, V.K. Sharma (for

M.V. Kini & Associates), Gp. Capt. Karan Singh Bhati, Aishwarya Bhati, Rashid Khan, Vinay J. Hegde, Rakesh Sinha for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. These two appeals, one by Mumbai International Airport Pvt. Ltd. and another by Airport Authority of India, seek to impugn the judgment of the High Court dated March 4, 2009.

3. The relevant facts of the case are that M/s Golden Chariot Airport (hereinafter referred to as "the contesting respondent") succeeded in a tendering process for running a deluxe grade-I restaurant, covering a space of about 5000 sq. ft., in the car park zone in front of Terminal 1A of the Mumbai Airport. Pursuant to the said bid of the contesting respondent, a Licence Agreement dated 16.1.96, was entered into between the Airport Authority of India (hereinafter AAI) and the contesting respondent.

4. Some of the clauses of the said Licence Agreement are relevant as one of the arguments advanced by the contesting respondent, before the Estate Officer, the High Court and this Court is that the licence is irrevocable. It has also been urged by the contesting respondent, that apart from the Licence Agreement, there has been an oral extension of the licence and the contesting respondent was assured that it is irrevocable, and on the basis of such assurance, it has invested considerable money in building the restaurant.

5. From the first clause of the Licence Agreement it is clear that the licence is valid for a period of three years, from 27.11.95 to 26.11.98. Apart from the first clause, there are several other clauses in the licence, like clauses 23, 24, 26, 27 and 29 in the General Terms and Conditions, which are a part of the Licence Agreement. The aforesaid clauses are set out:

"23. In the event of the Licensee being prohibited from selling one or more articles in the premises because of Government Laws/Rules/Regulations/Orders, the Authority shall not be liable for any loss suffered by the Licensee in such an event the Licensee shall not be entitled to any reduction in the fees payable to the Authority or permission for sale of additional items.

24. The Licensee shall deposit duplicate keys of the premises with the Authority whenever the Airport Director demands and permit the Authority to make use of the keys during the emergency. The Licensee shall not remove or replace the lock on the outdoor or change the locking device on the said outer door of the shop.

25. xxx

26. On expiry of the period or on termination of the licence by the Authority on account of any breach on the part of the Licensee, the Licensee shall deliver the possession of the premises in good condition and peaceful manner along with furniture, fittings, equipments and installations, if any, provided by the Authority. Further, Licensee shall remove his/their goods and other materials from the premises immediately, failing which Authority reserves its right to remove such goods/materials at the cost and risk of the Licensee and demand payment for such removal. If such payment is not made within 10 days, Authority shall be at liberty to dispose off the goods/materials of the Licensee by public auction to recover the cost. The Licensee shall not be entitled to raise any objection in such an eventuality.

27. The licence herewith granted shall not be construed in any way as giving or creating any other right or interst in the said space building(s)/land/garden/tank/ premises to or in favour of the Licensee but shall be construed to be only as a licence in terms and conditions herein contained.

28. xxx

29. The provision of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the rules framed thereunder which are now in force or which may hereafter came into force shall be applicable for all matters provided in the said Act."

6. It is clear from what is extracted above that the licence is not irrevocable. Apart from that it is clear that the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and the Rules framed thereunder have been made applicable to the Licence Agreement. It is not in dispute that after the initial grant of the said licence, the same was, under request of the contesting respondent, extended upto 26.5.2000. Before the extended period could expire, a notice dated 4.5.2000 was sent by the Senior Commercial Manager on behalf of AAI to the contesting respondent, requesting it to vacate and hand over physical possession of the licensed premises on expiry of the extended licence on 26.5.2000.

7. Instead of doing so, the contesting respondent filed, on 15.5.2000, a suit in the Bombay City Civil Court being suit No. 3050/2000, praying for canceling the notice dated 4.5.2000 and for permanent injunction restraining AAI from evicting, demolishing, or removing the restaurant premises of the contesting respondent without adopting the due process of law. In the said suit, the contesting respondent prayed for a declaration that the AAI has granted an irrevocable licence and AAI has no right to terminate, cancel or revoke the licence. The exact prayer to the aforesaid effect is as under:

(a) "For a declaration of this Hon'ble Court thereby declaring that the defendants have granted an irrevocable licence in favour of the plaintiffs in respect of the said restaurant business situated at the car park of Terminal 1A of Santa Cruz Airport Mumbai, and that the same is

subsisting valid and in full force and effect and further that the defendants have no right to terminate, revoke and/or cancel the same and/or interfere with the peaceful running of the said business of the plaintiffs at least till such time as the said land, beneath the said restaurant is not required for Airport related development purpose."

8. On such suit being filed, the Bombay City Civil Court returned the plaint under Order VII Rule 10 of Civil Procedure Code (for short "CPC"), inter alia, on the ground that the City Civil Court does not have the pecuniary jurisdiction to hear the case in view of the declaration prayed for.

9. Aggrieved by the said Order, the contesting respondent preferred an appeal before the Bombay High Court. When the said appeal came up for hearing on 12.7.01, it was represented by the contesting respondent that they will drop the prayer in Clause (a) of the plaint, which is the prayer for the declaration that the licence is irrevocable. On such stand being taken by the contesting respondent before the Bombay High Court, there was a consensus between the parties, and the High Court was pleased to pass the following Order:

"……the impugned order is set aside without examining the merits or demerits of the impugned order and the matter is question is remitted back to the City Civil Court, Bombay granting liberty to the Plaintiff to move proper application for amendment of the plaint so as to enable him to delete prayer clause (a), and other pleadings raised in support thereof in the plaint…….

10. In view of the aforesaid Order of the High Court, the matter was remanded to the Bombay City Civil Court. The City Civil Court decreed the suit by a judgment dated 11.2.04. In the said judgment, the Bombay City Civil Court held that on a reading of clauses 16, 29 and 30 of the Licence Agreement it was clear that both parties had agreed to submit themselves to the provisions of the Public Premises (Eviction of

Unauthorized Occupants) Act, 1971 (hereinafter referred to as the 1971 Act) and Rules framed thereunder. The Court thus held that the AAI were bound to follow the due process of law for evicting the contesting respondent from the suit premises, as given under the 1971 Act.

11. Accordingly, proceedings were initiated before the Estate Officer on 27.09.04 and notices were issued by the Estate Officer under Sections 4, 5, 5A, 5B and 7 of the 1971 Act to the contesting respondent. Hearings were conducted on 26.10.04 and 8.11.04.

12. On 13.11.04, the contesting respondent addressed a letter to AAI for extension of licence with respect to the licensed premises till AAI required it for airport development purposes. Further hearings before Estate Officer were conducted and on 12.01.05, after completion of the hearing and closing of the summary proceedings, the contesting respondent addressed a letter contending that the hearing of the matter be deferred until AAI communicated its decision on the letter dated 13.11.04. The contesting respondent once again addressed a letter dated 11.02.05 to the Estate Officer reiterating the same request and urged the Estate Officer to reopen the case to enable the contesting respondent to lead evidence in the matter. On 18.03.05, the Estate Officer heard the case of the contesting respondent and rejected the same.

13. Aggrieved, the contesting respondent filed a writ petition (No. 2900/2005) before the Bombay High Court. On 30.06.05, the Bombay High Court dismissed the writ petition by passing the following order:

> "Allowed to withdraw the liberty to make a fresh application which shall be decided, in accordance with law. All questions, including the questions of tenability, are left open."

14. Meanwhile, the Estate Officer Mr. V.K. Monga was

transferred and a new Estate Officer Mr. Narinder Kaushal was appointed. Mr. Kaushal forwarded a copy of the record of proceedings to Mr. Monga by a letter dated 11.08.05. Mr. Monga, by letter dated 12.09.05, forwarded a draft summary of the proceedings.

15. Even after withdrawal of the writ petition, a letter dated 28.12.05 was written by the advocate of the contesting respondent referring to the withdrawn writ petition, and requesting the Estate Officer for an adjournment of proceedings in view of its previous letter dated 13.11.04.

16. On 7.3.06, the Estate Officer passed a detailed Order in EO Case No.6/2004, holding inter alia that the contesting respondent was in unauthorized occupation of the licensed premises, which was a public premises and it was liable to be evicted from the said premises under Section 5 of the 1971 Act with effect from 27.05.2000.

17. Aggrieved thereby, the contesting respondent filed an appeal under Section 9 of the 1971 Act before the Bombay City Civil Court (M.A. No. 39/2006), which was dismissed by the Bombay City Civil Court on 24.7.2008.

18. It may be mentioned here that between 2003 to 2006, Union of India, through its Ministry of Civil Aviation, came out with a policy for privatization of airports. Resultantly, the Airports Authority of India Act, 1991 was amended by the Airports Authority of India (Amendment) Act, 2003. Accordingly, Mumbai International Airport Private Ltd. (MIA) was incorporated on 2.03.06 with the object of operating, maintaining, developing, designing, constructing, upgrading, modernizing and managing the Mumbai Airport and to enter into contracts with third parties for the said purpose.

19. On 4.04.06, MIA entered into an Operation, Management and Development Agreement (OMDA) whereby AAI granted MIA the exclusive right and authority (for 30 years

commencing from 3.05.06) to undertake some of the functions of the AAI such as operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Mumbai Airport.

20. Pursuant to the OMDA, AAI entered into a Lease Agreement dated 26.04.06, by which most of the immovable properties of AAI at the Mumbai Airport, including the licensed premises, were leased to the MIA.

21. In 2007, MIA took out a Chamber Summons before the Bombay City Civil Court for impleading itself as a party in the appeal filed by the contesting respondent (Appeal No.39/2006). The appeal of the contesting respondent and the Chamber Summons of MIA were heard by the Bombay City Civil Court. By its Order dated 24.07.08, the Bombay City Civil Court dismissed the appeal of the contesting respondent and allowed the Chamber Summons of MIA.

22. After the dismissal of its appeal by the City Civil Court, the contesting respondent filed a writ petition (No. 5591/2008) in the Bombay High Court, without making MIA a party. On 26.07.08, the Bombay High Court passed an ex-parte ad-interim Order directing the parties to maintain status quo. On 28.07.08, MIA filed a civil application for impleadment in the writ proceedings before the High Court and on 6.08.08 the High Court allowed the same.

23. The Bombay High Court passed the impugned Order on 4.03.09 whereby it allowed the writ petition and set aside the judgment of the Bombay City Civil Court dated 24.07.08. The High Court held that the order of the Estate Officer Mr. Kaushal was null and void for his failure to consider the case himself as he had verbatim reproduced the entire order of Mr. Monga with a few cosmetic changes. The High Court thus remanded the matter to the Estate Officer for a fresh decision in accordance with law.

24. After the impugned Order of the High Court dated 4.3.09, whereby the matter was remanded to the Estate Officer, hearing took place on 14.5.09 by the new Estate Officer Mr. Y. Kumaraswamy. Hearings before Mr. Kumaraswamy were adjourned as by 17.3.09, challenging the order of the High Court dated 4.3.09, an SLP (6556/2009) was filed by MIA, and soon thereafter, another SLP challenging the same order of the High Court was filed by AAI on 28.3.09.

25. In view of such SLPs being filed before this Court, hearing before Mr. Kumaraswamy stood adjourned.

26. Both the aforesaid SLPs, now converted into appeals, were tagged by an order of this Court dated 8.5.09, passed in SLP No. 11663/2009 and thereafter were heard together. In the meantime, Mr. Kumaraswamy retired and one Mr. Keshav Sharma, General Manager (Communication & Land Management) was appointed the new Estate Officer.

27. Subsequently, during the pendency of the proceedings before this Court, it transpires on a representation made before this Court on 29.1.10, that there was no Estate Officer for hearing the matter. This Court, therefore, directed AAI by its Order of the same date to appoint an Estate Officer under the provisions of the Act of 1971, within a period of 10 days and directed the matter to be posted for further hearing on 11.2.10.

28. On 11.2.10, this Court was informed that Mr. K.K Gupta, Deputy General Manager (Land Management) has been appointed the Estate Officer under Section 3 of the 1971 Act, to hear the case of the contesting respondent in place of Mr. Keshav Sharma. In view of such representation being made before this Court, this Court directed the parties to appear before the Estate Officer on 17.2.10, with a request that the Estate Officer was to fix a date of hearing and then to hear the parties and pass an appropriate Order in accordance with law on or before 30.4.10. It was also made clear that the Order of the Estate Officer would be made available to the parties within

the next two days. The parties were given liberty, if so advised, to challenge or support the Order of the Estate Officer in the pending proceeding before this Court and which was posted before this Court on 7.5.10.

29. It appears that on 29.4.10, the Estate Officer, after hearing the parties, passed a final order directing the contesting respondent to vacate the premises. It also directed the contesting respondent to pay damages for unauthorized occupation of the premises by payment of compensation and municipal taxes.

30. Aggrieved by the said Order, the contesting respondent filed a miscellaneous appeal before the Bombay City Civil Court, challenging the abovementioned Order of the Estate Officer.

31. The matter was placed before this Court on 11.5.10 and on that date learned Counsel for the contesting respondent took a stand that the pending proceedings before this Court arising out of the two SLPs had become infructuous. The impugned Order of the Bombay High Court dated 4.3.09 was no longer holding the field. Instead of that, the present Order dated 29.4.10 of the Estate Officer is the operative order and against that already an appeal has been filed by the contesting respondent before the Bombay City Civil Court.

32. Counsel for both AAI and MIA opposed the aforesaid stand and contended that the proceedings before this Court had not become infructuous and as this Court has retained its seisin over the matter as this Court directed the Estate Officer to decide the proceedings under the 1971 Act within a time frame but kept the proceedings before it pending.

33. This Court further gave liberty to the parties in its Order dated 11.2.10, to challenge the ultimate Order of the Estate Officer in the pending proceedings before this Court.

34. The Court after hearing the parties, held that the

proceedings before this Court had not become infructuous. Since the order of this Court dated 11.5.10 has a bearing on the issues, the same is set out:

"Heard learned counsel for the parties.

Today when the matters were taken up before this Court, this Court was informed by Mr.Mukul Rohtagi, learned senior counsel for the petitioners that pursuant to the order of this Court dated 11.02.2010 the Estate Officer has decided the matter and passed an order dated 29.04.2010. Impugning the said order, the respondents have filed an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 before the Principal Judge, Bombay City Civil Court, Mumbai. Mr.Rohtagi submitted that such filing of appeal before the aforesaid judicial authority in view of the directions contained in that order amounts to an act of contempt. He further submitted that in any event, the said filing of appeal circumvented the order of this Court dated 11.02.2010. Mr.Shyam Divan, learned senior counsel appearing on behalf of the respondents, on the other hand, contended that his client has filed the said appeal in view of the statute made by the Parliament and his client has exercised that right. According to him, such right of appeal cannot be taken away by any order of this Court. In support of his argument, he cited several decisions of this Court.

Mr.Rohtagi, learned senior counsel also in support of his submission cited several decisions and submitted that this Court passed the order in order to prevent conflict of decisions and also considering the facts and circumstances and the question of public interest involved in this case namely the urgency of expanding Bombay Airport and the right of the respondents to run their restaurant in the said Airport.

This Court, however, by balancing the equity had

passed the said order and the said order does not decide the questions that are raised in the SLPs which are pending and over which this Court retains its seisin. We are of the view that by the order which has been passed namely the order dated 11.02.2010, the right of the respondents to file an appeal has not been taken away. This Court preserved the right of the respondents and also permitted them to challenge the order that may be passed by the Estate Officer by filing an appropriate additional affidavit before this Court.

In view of the above, this Court directs that the appeal which has been filed by the respondents (Misc.Appeal No.50 of 2010) before the Principal Judge, City Civil Court, Mumbai be transferred to this Court. The record of the said appeal may form part of these SLPs. The petitioners are at liberty to file any additional affidavit in answer to the appeal filed by the respondents. The respondents may also file reply to the same. Such filing must be completed by the parties by 09.07.2010.

The matter may be placed for further consideration before this Court on 14.07.2010."

35. Then the matter was taken up before this Court on 29.7.10 and the learned Counsel for the contesting respondent submitted that Mr. K.K Gupta was not authorized to discharge the functions of an Estate Officer in accordance with Section 3(a) of the 1971 Act. To respond to such a stand, the learned Counsel for AAI took some time to produce the necessary notifications showing the appointment of the Estate Officer.

36. Thereafter, the matter was heard. Before this Court, the learned Counsel for the contesting respondent, apart from raising the aforesaid contention that Mr. K.K Gupta was not validly appointed as an Estate Officer, raised various other contentions.

37. It was first contended that there was an oral assurance for an extension of the licence to the extent that it will be an irrevocable licence. Relying on such oral extension, the contesting respondent made substantial investment for constructing the restaurant. The second contention was that the licence was irrevocable. The third contention was that the Estate Officer did not give the contesting respondent a proper hearing.

38. Learned Counsel of both AAI and MIA strongly opposed the aforesaid contentions raised on behalf of the contesting respondent.

39. This Court unfortunately is unable to uphold the contentions raised by the contesting respondent in view of the following reasons.

40. The case of the contesting respondent before all the forums is that though the licence period commenced on and from 27.11.95, the restaurant was made operational on 1.1.97. The initial period of licence was upto 26.11.98. Therefore, on its own showing, the contesting respondent completed the construction of the restaurant by 1.1.97, which was well within the initial licence period, which was upto 26.11.98. Admittedly thereafter, there have been two extensions of the licence period upto 26.5.2000. Therefore, the construction having been completed and the restaurant being operational by 1.1.97, there is no occasion for the contesting respondent to urge that it invested money in the construction of the restaurant on the oral assurance by the officers of the AAI about extension of the licence so as to make it irrevocable.

41. In fact no oral assurance of extension of licence is contemplated in the facts of this case. Such a contention is wholly misconceived.

42. The AAI is a statutory body constituted under Section 3 of the Airport Authority of India Act, 1994 (AAI Act). Under Section 3(2) of the AAI Act, it is a body corporate with power

to hold and dispose of both movable and immovable property and to contract.

43. The power of the AAI to enter into contracts has been conferred under Section 20 read with Section 21 of AAI Act. As per Section 20, the AAI is competent to enter into contracts (subject to the provisions of Section 21) which may be necessary to discharge its functions under the AAI Act.

44. Section 21 of AAI Act lays down the mode of executing contracts on behalf of AAI. The Section requires that every contract on behalf of AAI is to be made by the Chairperson or any other member/officer who has been empowered to do so. Further, the contracts, which have been specified in the Regulations, have to be sealed with the common seal of AAI.

45. Sub-section (2) of Section 21 of AAI Act provides that the form and manner of the contract shall be such as may be specified by the Regulations.

46. The relevant Regulations have been framed by the AAI with the previous approval of the Central Government and in exercise of the power conferred on it under Section 42(1) read with Section 42(2)(e) and (4), read with Section 21 of the AAI Act, 1994 and the regulations are called the Airports Authority of India (Contract) Regulations 2003. Obviously the regulations are statutory.

47. The said Regulations specify that contracts by AAI are required to be sealed with the common seal of AAI. They further provide that contracts are to be made with the previous approval of the Central Government and AAI.

48. *Regulation 3(2) also state that all contracts shall be finalized by the execution of a Deed of Agreement, Deed of Licence, Indenture or like instrument, duly signed by AAI and the party concerned,* and the said instruments or deeds are to be executed on non-judicial paper of appropriate stamp value when necessary.

49. Having regard to the aforesaid statutory framework, the case of the contesting respondent that it was orally assured of extension of licence by some officer of AAI is of no legal consequence. No such assurance has been proved, even if it is proved, such assurance does not and cannot bind the AAI. Being a statutory corporation, it is totally bound by the Act and the Regulations framed under the Act.

50. The very idea of a licence being irrevocable is a bit of a contradiction in terms. From the clauses of the licence referred to above, it is clear that by its terms the licence is revocable. It is well known that a mere licence does not create any estate or interest in the property with which it is concerned. Normally a licence confers legality to an act, which would otherwise be unlawful. A licence can be purely personal, gratuitous or contractual. Whether a contractual licence is revocable or not, would obviously depend on the express terms of the contract. A contractual licence is normally revocable, except in certain circumstances that are expressly provided for in the Indian Easement Act, 1882.

51. A licence has been defined in Section 52 of the Indian Easement Act, 1882 as a right to do or continue to do in or upon the immovable property of the grantor something, which, in the absence of such right, could be unlawful, but such right does not amount an easement or an interest in the property. [See *Muskett vs. Hill* (1839) 5 Bing (NC) 694, p.707 and *Heap vs. Hartley* (1889) 42 Ch. Div. 461, p.468 (CA)].

52. Following the aforesaid principles and the clauses in the licence agreement, this Court holds that the licence by its very term is revocable. The stand of the contesting respondent that its licence is irrevocable as it has invested money in the premises and made construction is directly contrary to the stand which it took before the Bombay High Court and which was recorded in the High Court's Order dated 12.7.01. It may be noted that when the City Civil Court returned the plaint filed by the contesting respondent it came up in appeal against the said

Order before the Bombay High Court, it expressly gave up its claim of irrevocable licence in order to revive the suit. On such stand being taken, the High Court remanded the suit for trial before the City Civil Court. It is therefore clear that the contesting respondent has taken a stand before a Court of Law and also got the benefit as a result of taking such stand in as much as it got the suit revived and tried and got the benefit of an interim order in the said proceedings. As a result of the aforesaid stand being taken, the suit of the contesting respondent went on before the Bombay City Civil Court from 2001 to 2004 and in view of the interim protection, the contesting respondent ran the restaurant during that period.

53. Now the question is whether the contesting respondent on a complete volte-face of its previous stand can urge its case of irrevocable licence before the Estate Officer and now before this Court?

54. The answer has to be firmly in the negative. Is an action at law a game of chess? Can a litigant change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas?

55. The common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also.

56. The doctrine of election was discussed by Lord Blackburn in the decision of the House of Lords in *Benjamin Scarf vs. Alfred George Jardine* [(1881-82) 7 Appeal Cases 345], wherein the learned Lord formulated "…a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no

further; and whether he intended it or not, if he has done an unequivocal act…the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

57. In *Tinkler vs. Hilder* (1849) 4 Exch 187, Parke, B., stated that where a party had received a benefit under an Order, it could not claim that it was valid for one purpose and invalid for another. (See page 190)

58. In *Clough vs. London and North Western Rail Co.* [(1861-73) All ER, Reprint, 646] the Court referred to Comyn's Digest, wherein it has been stated:- "If a man once determines his election, it shall be determined forever." In the said case, the question was whether in a contract of fraud, whether the person on whom the fraud was practiced had elected to avoid the contract or not. The Court held that as long as such party made no election, it retained the right to determine it either way, subject to the fact that an innocent third party must not have acquired an interest in the property while the former party is deliberating. If a third party has acquired such an interest, the party who was deliberating will lose its right to rescind the contract. Once such party makes its election, it is bound to its election forever. (See page 652)

59. In *Harrison vs. Wells,* 1966 (3) All ER 524, Salmon LJ, in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot approbate and reprobate. The doctrine was further explained by Lord Justice Salmon by holding "it is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forward and seek to evade his obligations under the lease by denying that the purported landlord was the landlord". (See page 530)

60. In *Kok Hoong vs. Leong Cheong Kweng Mines Ltd.,* (1964 Appeal Cases 993), the Privy Council held that "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting

others apart from himself, in such circumstances the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned." (See page 1018)

61. Justice Ashutosh Mookerjee speaking for the Division Bench of Calcutta High Court in *Dwijendra Narain Roy vs. Joges Chandra De,*(AIR 1924 Cal 600), held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

62. It may be mentioned in this connection that all the proceedings pursued by the contesting respondent in which it took the plea of irrevocable licence was virtually in clear contradiction of its stand which it took before the Bombay High Court on 12.7.01 where it had given up the plea of 'irrevocable licence'. It is on this plea that its suit again became triable by the Bombay City Civil Court and all subsequent proceedings pursued by the contesting respondent followed thereafter.

63. This Court has also applied the doctrine of election in *C. Beepathumma & Ors. vs. V.S. Kadambolithaya & Ors.*, 1964 (5) SCR 836, wherein this Court relied on Maitland as saying: "That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it." (Maitlands Lectures on Equity, Lecture 18). This Court also took note of the principle stated in White & Tudor's Leading Case in Equity volume 18th edition at p.444 – wherein it is stated, "Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one

that he should not enjoy both…That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

64. In *M/s New Bihar Biri Leaves Co. & Ors. vs. State of Bihar & Ors.,* (1981) 1 SCC 537, this Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim, *qui approbat non reprobat* (one who approbates cannot reprobate), applies in our laws too.

65. Therefore the conduct of the contesting respondent in view of its inconsistent pleas is far from satisfactory. By taking such pleas, the contesting respondent has succeeded in enjoying the possession of the premises for the last 10 years even after the expiry of its licence on 26.5.2000.

66. The complaint of the contesting respondent that Mr. K.K. Gupta, while acting as Estate Officer and deciding the proceedings, failed to observe the principles of natural justice, by not summoning the officers of AAI, is without any substance. The Estate Officer has given adequate reasons for not summoning the officers of AAI by holding that beyond 26.5.2000, there is no written extension of the licence period. The Estate Officer held, and in our view rightly, that when written documents are there, any oral assurance, which purports to contradict the written documents need not be considered. Apart from that, this Court has already recorded that in the facts of the case and in the context of the statutory dispensation discussed above, there is no scope for an oral extension of licence. Therefore, the reasoning given by the Estate Officer, for not calling the officers of AAI to prove the case of oral extension of licence of the contesting respondent, is sound and

does not call for any interference by this Court even when it acts as an appellate authority.

67. The Estate Officer also declined to issue directions for inspection of documents, as prayed for by the contesting respondent on valid grounds. The Estate Officer held that it has to decide whether the contesting respondent is in unauthorized occupation of the public premises within the meaning of the 1971 Act. That being the sole purpose of his enquiry, the Estate Officer thought, and rightly so, that its enquiry cannot be widened by including a plea of discrimination under Article 14 raised by the contesting respondent.

68. Apart from that, this Court also does not find any merit in the plea of discrimination raised by the contesting respondent, by contending that cases of other licensees have been extended whereas in its case, the licence has not been extended. Such a plea is not factually correct in as much as the licence of the contesting respondent was also extended twice. In any event, a plea of discrimination can only be raised in aid of a right. If a person has a right in law, to be treated in a particular way, but that treatment is denied to him, whereas others are given the same treatment, a plea of discrimination can be made out.

69. We have already discussed that the contesting respondent has no right in law, to get its licence extended. Therefore, one cannot have a plea of negative equality under Article 14. There may be very many administrative reasons for extending the period of licence of other licensees, but that does not give rise to a valid plea of discrimination, when admittedly the contesting respondent has no right in law to get an extension.

70. Now the last point that remains is the authority of Mr. K.K Gupta to function as an Estate Officer. This is a point more of desperation than of substance.

71. Under Section 3 of the 1971 Act, the Central Government's power to appoint an Estate Officer is provided.

72. From the compilation of notifications that have been filed in this case by the learned Attorney General, appearing for AAI, it transpires that the Ministry of Civil Aviation and Tourism, Department of Civil Aviation, issued a notification dated 1.7.97, appointing several persons as Estate Officers for the purpose of the 1971 Act. That notification was published in the Official Gazette. By a further notification dated 15.5.07, published in the Official Gazette, Central Government amended its previous notification and for the words 'Airport Director', the words 'Deputy General Manager (Land Management)' were substituted.

73. It has not been argued by the learned Counsel for the contesting respondent that while issuing a notification under Section 3, the Central Government will have to name a person or an individual as an Estate Officer. The appointment of such Estate Officer is by designation only. It is not in dispute that Mr. K.K. Gupta, who functioned as an Estate Officer and decided the case of the contesting respondent, was promoted and brought to Mumbai as Deputy General Manager (Land Management). This is admitted in the affidavit of the contesting respondent. Therefore, Mr. K.K. Gupta by virtue of his designation as Deputy General Manager (Land Management) discharged his function as a valid Estate Officer. There can be no dispute about his authority to do so since by the subsequent notification dated 15.5.07, the words 'Airport Director' have been substituted for words 'Deputy General Manager (Land Management)'. Hence, there is no substance in these contentions of the contesting respondent.

74. This Court even acting as an Appellate Authority does not discern any error in the Order dated 29.4.10 of the Estate Officer. The appeal filed by the contesting respondent before the City Civil Court, Mumbai and transferred to this Court is therefore dismissed.

75. However, from the facts discussed above, it is amply demonstrated that the contesting respondent has blown hot and cold by taking inconsistent stand, and has therefore prolonged several proceedings for more than a decade. This Court is constrained to hold that it did not pursue its proceedings honestly in different fora. Therefore, the appeal, being Misc. Appeal No. 50 of 2010, filed by the contesting respondent before the Principal Judge, City Civil Court, Mumbai, which was transferred to this Court by this Court's order dated 11.05.2010 and formed part of these appeals, is dismissed with costs assessed at Rs.5,00,000/- to be paid by the contesting respondent in favour of the Supreme Court Mediation Center within a period of two months from date.

76. The civil appeals filed by Airport Authority of India and Mumbai International Airport are allowed. All interim orders are vacated.

D.G. Appeals allowed.

JAI SINGH AND ORS.

v.

MUNICIPAL CORPORATION OF DELHI AND ANR.

(Civil Appeal No. 8233 of 2010)

SEPTEMBER 23, 2010

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

Constitution of India, 1950 – Article 227 – Scope and ambit of – Discussed – Eviction petition, on the ground of sub-letting without written consent – Allowed by Rent Controller – Order upheld by Tribunal – Writ petition under Article 227 by MCD – High Court set aside the concurrent findings recorded by the Rent Controller and the Tribunal and quashed the orders passed by them – Justification of – Held: Not justified – The writ petition filed by MCD was liable to be dismissed on the ground of delay and laches alone – Even otherwise, exercise of power under Article 227 by the High Court, in the peculiar facts of this case was improper – The entire proceedings adopted by MCD were a subterfuge to avoid the execution proceedings in a decree which had become final between the parties – The High Court erroneously undertook investigation into issues which did not even arise in the lis – It traveled beyond the well defined contours of its jurisdiction under Article 227 – Rent Control – Delhi Rent Control Act, 1958 – ss.14(1)(b) and 39(1) – Delay/laches.

The appellants claiming themselves to be the landlords in respect of premises in question filed eviction petition under Section 14(1)(b) of Delhi Rent Control Act, 1958. They alleged that the premises were let out to respondent No.2 (DTC); that DTC sublet/assigned the premises in favour of respondent No.1 (MCD) and parted with possession in favour of MCD without the written consent of the appellants and, therefore, both DTC and

MCD were liable for eviction. The Assistant Rent Controller (ARC) allowed the eviction petition holding that DTC had sublet the premises to MCD. DTC lost in appeal before the Additional Rent Control Tribunal (ARCT) as also in appeal before the High Court.

Meanwhile, MCD too had appealed against the order of ARC before ARCT and then before the High Court. Following the order passed by the High Court in the appeal filed by DTC, the appeal filed by MCD was also dismissed by a co-ordinate Bench of the High Court, but then the said order was recalled, whereafter MCD moved an application with a prayer that its appeal be treated as a petition under Article 227 of the Constitution. The said application was disposed off by the High Court, whereafter MCD filed a petition under Article 227 of the Constitution, on which the High Court quashed the orders passed by the ARC and ARCT.

Disposing of the appeals, the Court

HELD:1.1. Under Article 227 of the Constitution, the High Court has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution. However, greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be

within the well recognized constraints. It can not be exercised like a 'bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. The High Court cannot lightly or liberally act as an appellate court and re-appreciate the evidence. Generally, it can not substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi judicial tribunals. The power to re-appreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice. [Para 13]

1.2. In the instant case, the High Court traveled beyond the limits of its jurisdiction under Article 227 of the Constitution. Both ARC and ARCT had acted within the limits of the jurisdiction vested in them. The conclusions reached cannot be said to be based on no evidence. All relevant material has been taken into consideration. Therefore, there was hardly any justification for the High Court to undertake an investigation into issues which did not even arise in the *lis*. [Para 14]

1.3. Reference to the orders of ARC and ARCT only demonstrate that the High Court was not justified in observingthat there has been 'serious dereliction of duty' or that there has been 'blatant violation of the fundamental principles of law and justice' by the ARC and ARCT. It cannot be said that both ARC and ARCT considered the facts in a very mechanical way, or that the orders passed by ARC and ARCT exhibited any patent

illegality writ large on the face of the orders or that ARC and ARCT ignored the sequence of events in the facts and circumstances of the case. [Para 21]

1.4. The High Court ought not to have exercised the extra ordinary jurisdiction under Article 227 of the Constitution in the peculiar circumstances of this case. A perusal of the order passed by the High Court (on the application filed by MCD praying that its appeal be treated as a petition under Article 227 of the Constitution) clearly shows that the application was disposed of on the statement made by the counsel for MCD that MCD should file a fresh petition under Article 227 of the Constitution if the same is permissible under law. Therefore, the aforesaid order cannot be treated as an order passed by the High Court permitting MCD to file a petition under Article 227 of the Constitution. However using the aforesaid order of the High Court as an excuse, MCD filed the petition under Article 227 of the Constitution challenging the orders passed by the ARC and the ARCT. The High Court failed to bestow proper attention to the objections taken by the appellants to the maintainability of the writ petition on the ground of delay and laches. Proceedings under Article 227 can be initiated in the absence of the availability of an alternative efficacious remedy. In the present case, MCD had consciously withdrawn RCSA which had been filed under Section 39(1) of the Delhi Rent Control Act. The appeal had been filed against the order of the ARCT. The High Court committed a patent error of jurisdiction in entertaining the writ petition under Article 227 of the Constitution which was unconscionably belated. The objection raised by the appellants to the entertainment of the writ petition under Article 227, on the ground of delay and laches was brushed aside by the High Court on two wholly untenable grounds, i.e:- (i) the orders passed by the ARC and ARCT suffered from patent illegality on the face of the orders and

ii) the MCD was *bonafide* prosecuting a case in the wrong court, due to mistake of law. Both reasons stated by the High Court in support of its conclusions, are contrary to the facts on the record. [Paras 22, 23]

1.5. It is apparent that the entire proceedings adopted by MCD after the dismissal of the RCSA filed by DTC were a subterfuge to avoid the execution proceedings in a decree which had become final between the parties. In the application seeking conversion of RCSA to a petition under Article 227 of the Constitution, it was categorically stated by MCD that the aforesaid RCSA was not maintainable. The aforesaid statement is a clear admission that the appeal filed by the MCD did not involve a substantial question of law. [Para 24]

1.6. Having made an admission that no substantial question of law was raised in the RCSA, withdrawal of the same could not possibly have been used as a justification for filing a petition under Article 227 of the Constitution. If the RCSA was devoid of any substantial question of law, the petition under Article 227, based on the same facts, would be equally devoid of any substantial question of law. This categoric admission of the MCD was ignored by the High Court whilst recording the finding that the orders of ARC and ARCT were passed "in blatant violation of fundamental principles of law and justice." This apart in the peculiar facts of this case, it could not be held that MCD had been bona fide prosecuting a case in the wrong court. It was seeking a remedy provided under Section 39(1) of DRC Act. Even this appeal was filed beyond limitation. It was delayed by 431 days. In the meantime possession of a part of the premises had already been taken by the appellants. Inspite of the objections having been raised to the maintainability of a writ petition under Article 227 of the

Constitution, they were rejected by the High Court. In such circumstances, it was wholly inappropriate for the High Court to entertain the writ petition under Article 227 of the Constitution. [Para 24]

1.7. The High Court has the power to reach injustice whenever and wherever found. However, the High Court committed a serious error of jurisdiction in entertaining the writ petition filed by MCD under Article 227 of the Constitution in the peculiar circumstances of this case. The decision to exercise jurisdiction had to be taken in accordance with the accepted norms of care, caution, circumspection. The issue herein only related to a tenancy and subletting. There was no lis relating to the ownership of the land on which the superstructure or the demised premises had been constructed. The whole issue of ownership of plot is the subject matter of a civil suit in the High Court. The High Court, therefore, ought not to have given any opinion on the question of ownership. The High Court traveled beyond the well defined contours of its jurisdiction under Article 227 of the Constitution. [Paras 25, 26]

Estralla Rubber v. Dass Estates (P) Ltd. **2001 (8) SCC 97, relied on.**

Madras Bangalore Transport Co. [West] v. Inder Singh & Ors. **AIR 1986 SC 1564;** *Resham Singh v. Raghbir Singh & Anr.* **1999 (7) SCC 263 and** *Bharat Sales Ltd. v. Life Insurance Coropration of India* **1998 (3) SCC 1, referred to.**

Case Law Reference:

AIR 1986 SC 1564	**referred to**	**Para 7**
1999 (7) SCC 263	**referred to**	**Para 10**
1998 (3) SCC 1	**referred to**	**Para 10**

2001 (8) SCC 97 relied on Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8233 of 2010.

From the Judgment & Order dated 23.3.2009 of the High Court of Delhi at New Delhi in CM (M) No. 516 of 2007.

WITH

C.A. No. 8234 of 2010.

Altaf Ahmed, Ranjit Kumar, Bhargava V. Desai, Rahul Gupta, Nikhil Sharma for the Appellants.

Madhu Tewatia, Sidhi Arora, P. Parmeswaran, Dr. Monika Gusain, Hariom Yaduvanshi, Hemant Malhotra, Manish Pitale, Wasi Haider, C.S. Ashri, Vishnu B. Saharya (for Saharya & Co.) for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. In this special leave petition, the petitioners have challenged the judgment of the Delhi High Court in a Writ petition under Article 227 of the Constitution of India, CM (M) No.516 of 2007, dated 23rd March, 2009, whereby the High Court has quashed and set aside the order passed by the Additional Rent Control Tribunal ["ARCT" for short] dated 12th March, 2001, upholding the order passed by the Additional Rent Controller ["ARC" for brevity].

2. Heard counsel. Leave granted.

The facts, as noticed by the High Court, are that the appellants are claiming themselves to be the landlords in respect of premises constructed on the plot of land No.2, Block B, transport area of Jhandewalan Estate, Desh Bandhu Gupta Road, Karol Bagh, New Delhi.

3. In the eviction petition, it was stated that the premises

were let out to respondent No.2, Delhi Transport Corporation [for short "DTC"], on a monthly rental of Rs.3500/-. DTC has sublet/assigned the premises in favour of respondent No.1, Municipal Corporation of Delhi [for short "MCD"] and parted with possession in favour of MCD without the written consent of the appellants. Therefore, both DTC and MCD were liable for eviction. The High Court has noticed the sequence of events since the transport services were being run by Gwalior Northern India Transport Company (for short "GNIT") to the time when DTC stepped into its shoes. The appellants claimed that the tenancy of the premises was with DTC. MCD had, however, claimed that the legal possession was retained by MCD; rent was being paid by MCD to DTC.

4. The ARC by an order dated 11th November, 1989, upon consideration of the rival contentions, held:

> "19. Admittedly it is respondent No.2 (MCD) who is in possession of the premises in question. It is also admitted that respondent No.2 (MCD) pays a sum of Rs.3500/- as rent to respondent No.1 (DTC) by way of cheques. It is not the case of the respondent that any written consent of the petitioners was obtained in this regard. Therefore, it has to be held that respondent no.1 (DTC) has either sublet, assigned or otherwise parted with the possession of the tenanted premises illegally to respondent No.2 (MCD). It is well settled that in voluntarily *(sic)* transfers are also included with the meaning of sub-letting etc. in Section 14(1)(b) DRC Act.".

5. The order passed by the ARC was upheld by the ARCT with the following observations:

> "15. After having heard up the matter in all its possible aspects I do not find any infirmity or illegality in the finding of the learned trial court by holding that there exists relationship of landlord and tenant between the parties and since the exclusive possession of the premises was handed over by the erstwhile tenant to the Municipal Corporation of Delhi, i.e., respondent No.2 which is itself a separate and independent legal entity, it amounts to sub-letting."

6. The High Court set aside the concurrent findings recorded by the ARC and ARCT with the following observations:

> "The orders passed by learned ARC and the learned ARCT categorically show that neither the learned ARC nor learned ARCT has devolved upon the facts of the case and nor had even considered the concept of tenancy and sub tenancy in this case in the peculiar circumstances of this case."

7. The High Court held that this is not a case of sub-letting as Delhi Transport Services (for short "DTS"), Delhi Transport Undertaking (for short "DTU"), MCD and DTC were the creation of statute. The premises had come to them after it was acquired by Union of India (UOI) from GNIT on nationalization of the business. There was no parting with possession by DTC to MCD, therefore, it was not sub-letting. The DTC was incorporated in lieu of DTU as a separate company to facilitate running of transport business. Mere payment of Rs.3500/- per month by MCD to DTC does not show sub-letting or parting with possession. Relying on a judgment of this Court in *Madras Bangalore Transport Co. [West] Vs. Inder Singh & Ors.* [AIR 1986 SC 1564], the High Court has held that:

> "In the case in hand, the situation, is much better. The alleged original tenant GNIT stood acquired by a Legislative Act and the premises went to DTS. DTS was converted to DTU and DTU was further converted into DTC. The premises remained in occupation of the same entity which changed its form from one to another. Thus it cannot be said that it was a case of sub-letting under any circumstances. The orders passed by learned ARC and learned ARTC are liable to be set aside for non application

of law and non consideration of facts at all."

8. The objection raised by the appellants to the entertainment of the petition under Article 227, on the ground of laches, has been rejected with the following observations:

"The respondent in this case has strongly objected to entertaining the petition on the ground of limitation. The petitioner has filed this petition under Article 227 of the Constitution of India. In exercise of this power, interfering with the orders of the Court of Tribunal has to be done where this Court finds that there was a serious dereliction of duty and blatant violation of the fundamental principles of law and justice and where, the order caused grave injustice and needs to be corrected. Although the petitioner herein had not been vigilant in prosecuting the appeal below but that cannot prevent his Court from correcting the patent illegality writ large on the face of the orders of the ARC and Tribunal below. Both the ARC and ARCT passed orders without considering the facts of the case in a very mechanical manner. Neither the learned ARC nor learned ARCT had taken into account the sequence of facts brought before them regarding acquisition of the entire assets of GNIT and conversion of DTS to DTU and then to DTC by the Legislative Act and the order has been passed merely on the ground that amount of Rs.3500/- was being remitted by the MCD to DTC. The Courts below did not even consider the issue as to who was the tenant and how MCD became the sub-tenant of respondent once the premises was owned by Union of India and the leasehold rights of the entire land vested in Union of India. This Court can set aside the findings and the orders of the Tribunal below if there was no evidence at all to justify the findings and the findings were perverse. The order can also be set aside if no reasonable or prudent person can possibly come to such a conclusion despite the fact that the petition was not brought before this Court by the petitioner soon after the passing of the order. In Badlu and

another Vs. Shiv Charan and Others [(1980) 4 SCC 401], Supreme Court observed that the delay caused in prosecuting the case in bona fide and good faith in wrong court due to mistake of law or facts can be condoned, I, therefore, consider that petition is not liable to be dismissed on the ground of delay, nor learned ARCT was justified in dismissing the application. Learned ARCT went wrong in dismissing the application of the petitioner for condonation of delay. The order of learned ARCT on this count also is liable to set aside. It is ordered accordingly."

9. Mr. Altaf Ahmad, learned senior counsel appearing for the appellants submits :

1. The exercise of power under Article 227 of the Constitution of India, by the High Court, in the peculiar facts of this case was improper.

2. The petition was liable to be dismissed on the ground of delay and laches alone.

3. Even otherwise, the High Court exceeded its jurisdiction by acting as an appellate court.

4. The High Court erroneously decided the question of ownership of the premises which was not even an issue in the proceedings, under Article 227 of the Constitution of India.

5. Even on facts, the findings are contrary to the material on record.

10. On the other hand, Ms. Madhu Tewatia, learned counsel appearing for the respondents submits that the High Court was fully justified in exercising its jurisdiction under Article 227 of the Constitution to correct the patent, factual and legal errors committed by ARC and ARCT. She has emphasised the entire history of transformation of GNIT into DTC. According to the learned counsel, there was no landlord and tenant

relationship between the predecessor of the appellants and GNIT. The payment of Rs.3500/- per month was a misnomer. The plot vested in the Government under the agreement dated 23rd April, 1948, therefore, GNIT was incompetent to transfer any perpetual lease to Bharat Singh. The amount of Rs.3500/- was being paid to Bharat Singh as compensation for the amount spent by him on behalf of GNIT for construction of the depot. She further submits that the land vested in DDA, i.e., Government. Therefore, Rent Controller had no jurisdiction. In any case, the appellants have failed to prove that there has been any parting with possession, without the written consent of the landlord. The ARC and ARCT ignored vital documents in concluding that there has been subletting by DTC to MCD. In fact, MCD has retained the legal possession all along. The payment of Rs.3500/- was only being routed through DTC, as a matter of convenience. On the question of delay and laches, it is submitted that the High Court had converted the RCSA to a petition under Article 227. The delay has been condoned as the MCD had been bona fide pursuing the wrong legal remedy. The High Court in a petition under Article 227 of the Constitution of India had the jurisdiction to undo the injustice caused to the MCD by the orders of ARC and ARCT. In support of her submissions, learned counsel relied on a number of judgments of this Court, viz. , on subletting: *Resham Singh Vs. Raghbir Singh & Anr.* [1999 (7) SCC 263]; *Bharat Sales Ltd. Vs. Life Insurance Coropration of India* [1998 (3) SCC 1] and on jurisdiction of the High Court under Article 227 of the Constitution of India, *Estralla Rubber Vs. Dass Estates (P) Ltd.* 2001 (8) SCC 97.

11. Mr. Ahmad, in reply submits that the sub-tenant DTC, cannot be permitted to plead a case which even the tenant could not have pleaded.

12. We have anxiously considered the submissions of the learned counsel.

13. Before we consider the factual and legal issues

involved herein, we may notice certain well recognized principles governing the exercise of jurisdiction by the High Court under Article 227 of the Constitution of India. Undoubtedly the High Court, under this Article, has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi judicial tribunals, exercise the powers vested in them, within the bounds of their authority. The High Court has the power and the jurisdiction to ensure that they act in accordance with well established principles of law. The High Court is vested with the powers of superintendence and/or judicial revision, even in matters where no revision or appeal lies to the High Court. The jurisdiction under this Article is, in some ways, wider than the power and jurisdiction under Article 226 of the Constitution of India. It is, however, well to remember the well known adage that greater the power, greater the care and caution in exercise thereof. The High Court is, therefore, expected to exercise such wide powers with great care, caution and circumspection. The exercise of jurisdiction must be within the well recognized constraints. It can not be exercised like a 'bull in a china shop', to correct all errors of judgment of a court, or tribunal, acting within the limits of its jurisdiction. This correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice. The High Court cannot lightly or liberally act as an appellate court and re-appreciate the evidence. Generally, it can not substitute its own conclusions for the conclusions reached by the courts below or the statutory/quasi judicial tribunals. The power to re-appreciate evidence would only be justified in rare and exceptional situations where grave injustice would be done unless the High Court interferes. The exercise of such discretionary power would depend on the peculiar facts of each case, with the sole objective of ensuring that there is no miscarriage of justice.

14. In our opinion, the High Court in this case, has traveled beyond the limits of its jurisdiction under Article 227 of the Constitution. Both ARC and ARCT had acted within the limits

of the jurisdiction vested in them. The conclusions reached cannot be said to be based on no evidence. All relevant material has been taken into consideration. Therefore, there was hardly any justification for the High Court to undertake an investigation into issues which did not even arise in the lis.

15. The appellants had filed a simple eviction petition before the ARC, under Section 14(1)(b) of Delhi Rent Control Act, 1958 (in short "DRC Act"). They had stated that DTC was their tenants in premises as the entire plot No.2 with the construction thereon at Jhandewalan known as Karol Bagh Depot, as per plan attached. Monthly rent was stated to be Rs.3500/-. It was claimed that DTC has sublet the premises to MCD, without permission of the landlord. Therefore, both DTC and MCD were liable for eviction.

16. Both DTC and MCD took identical pleas. Their defence was that the appellants are neither the owners nor the landlords of the demised premises. They claimed that Late Bharat Singh (LBS) had agreed to construct the depot for and on behalf of GNIT. He was receiving Rs.3500/- p.m. for the money spent on construction. Therefore, the term rent is a misnomer. Allegations of subletting were denied. The business of GNIT was nationalized and taken over by the government vide agreement dated 23rd April, 1948. The plot was mutated in the name of Government of India. Thereafter, Delhi Road Transport Corporation Act, 1950, was enforced. Under this Act, Delhi Transport Services (DTS) was established. From then the onward DTS was in occupation and started paying the rent of Rs.3500/- till the enactment of DMC Act, 1957. Under this Act, the transport service in Delhi was given to Delhi Transport Undertaking (DTU), which was made a wing of MCD. Since then MCD started releasing Rs.3500/- to LBS through its wing, DTU. After the death of LBS, the amount has been paid to the appellants, without any objection. On passing of Delhi Road Transport Laws (Amendment) Act, 1971, Delhi Transport Corporation, came into existence as a statutory body. But the

possession of the demised premises remained with MCD. As DTC had taken the place of DTU, the rent amount, thereafter, was routed through DTC. Therefore, there was no subletting. In any event, since the property vests in Government of India, Delhi Rent Control Act would not be applicable.

17. Taking into consideration the aforesaid claims of the parties, the ARC concluded that there is no dispute with regard to construction and ownership of the depot by LBS. The appellants are successors of LBS. The issues as crystallized by the ARC are as follows:-

> "(i) The tenant has sublet, assigned or otherwise parted with possession.
>
> (ii) It may be in respect of the whole or any part of the premises.
>
> (iii) Such subletting etc has taken place on or after the 9th day of June, 1952.
>
> (iv) Such subletting etc has taken place without obtaining the consent in writing of the landlord.
>
> (v) The first and the foremost ground that requires to be seen is whether relationship of landlord and tenant exist between the petitioners and respondent No.1 or not."

Thereafter in Para 9 ARC observes :-

> "Whether relationship of landlord and tenant was contemplated or not is the most important fact which has to be seen."

18. Thereafter, ARC proceeds to consider the implications of the agreement dated 10th November, 1944, wherein LBS agreed to develop the plot of land. He is referred to as the prospective purchaser. The lease with GNIT was provided for,

LBS was to pay all taxes. GNIT had to pay 10% p.a. of the entire cost of the building. GNIT were to execute a ten year lease. Rent of Rs.3500/- was regularly paid. The ARC noticed that Government of India had moved the Rent Controller, New Delhi for fixation of fair rent in June, 1950. The Rent Controller, after conducting an enquiry had fixed the agreed rent as the fair rent. An appeal against the order of Rent Controller, New Delhi dated 26th December, 1950 was dismissed by the learned District Judge at Delhi by an order dated 3.5.1951. Not only this, ARC notices that during the course of present proceedings, rent was deposited in court for the period 1.4.93 to 30.11.93, by DTC. Therefore, they can not now be permitted to say that MCD is the tenant, in possession. In such circumstances, the ARC held that DTC has sublet the premises to MCD.

19. Thereafter, MCD challenged the aforesaid order before the ARCT in RCA No.9 of 2001. The aforesaid appeal was beyond limitation by 431 days. It appears that even though the ARCT did not find any substance in the reasons given by the MCD for seeking condonation of delay, the appeal was still considered on merits. ARCT discussed at length the negligent attitude of the MCD in pursuing the proceedings in the court of ARC. Ultimately, the ARC was left with no alternative but to proceed against the MCD ex-parte on 25th of August, 1999. It was observed by the ARCT that the delay was wholly unjustified as well as wholly unexplained. We may notice the observations made by the ARCT which are as follows:

> "Now, looking to the appellant's stand through another angle, I find that the appellant and respondent/DTC are both governmental organization and it does not stand to mind that respondent/DTC or its representative would not intimate the appellant/MCD about its not being represented to some advocate or about its having been proceeded ex-parte. The case was admittedly on last state and it appears that the appellant took chance and stayed

> out of the scene and has now come up with this hopelessly delayed appeal with a cock and bull story which does not seem to be any way bonafide, reasonable and acceptable to mind. Strangely enough, the appellant even did not disclose in the application as to on which date or month, the court bailiff had gone to the demises premises, and this lengthy delay of about 431 days (or 393 days after excluding the time taken in obtaining the certified copies) has remained completely unexplained. The application for seeking condonation of delay, thus, is found to be without any sufficient or reasonable ground and needs to be dismissed. Order as such with the dismissal of the appellant is application for condonation of delay – this appeal meets the same fate."

Having observed as such, the ARCT considered the appeal on merits on the assumption that the application of MCD for condonation of delay has been allowed, though it had not been allowed. The ARCT thereafter considered the entire gamut of facts and circumstances in detail. The ARCT noticed the submissions made by the learned counsel for the MCD and considered each submission in detail.

20. It was submitted that ARC had failed to distinguish the three expressions: sublet, assigned and otherwise parted with possession. This was answered as follows:

> "I feel that the submissions made by learned counsel Sh.Chachra do not gather any support from the records because the learned ARC has dealt with insufficient details of the needed requirements and it was only thereafter that he came to a conclusion of the respondent/DTC having sublet, assigned or otherwise parted with the possession of the demised premises in favour of this appellant. For attracting the applicability of a ground of eviction u/s 14(1)(b) of the Act, it has either to be direct circumstance of subletting which ordinarily may not be possible to be detected since it is, in most cases, a secret deal between

the tenant and the alleged sub-tenant or it is the assignment where under the tenant has to divest himself of all the rights that he had as a tenant or parting with possession which circumstances postulates the parting with legal possession also i.e. the tenant surrenders his legal right of are-entry to the premises. This mischief of Section 14(1)(b) of the Act is complete if any of the three expressions gets established. It is certainly no necessary and nor has it been so held by any of the pronouncements of any superior courts that pleadings on this aspect must state in specific terms that it either sublet or assignment or parting with possession. In case a party succeeds in establishing the first expression sublet the to my mind. It goes to establish that even the other two expressions assignment and parting with possession stand proved because the moment a tenant indulge a third person as his tenant (sub-tenant) qua the demised premises-he (tenant) squarely assigns and also parts with possession in both ways as he divests himself of all the rights as he had as a tenant and part with possession to delivering and only physical possession but also fully surrendering his legal possession over the tenanted premises. The impugned judgment did discuss evidence with a clear angle that the appellant had been parting rent of Rs.3,500/- per month to respondent / DTC every month. The respondent DTC was admittedly not in possession any way of the demised premises as the appellant's own stand on this point is admittedly the same. In case, the first expression sublet has been established, almost in an admitted style, through various acts admitted documents and stands taken in various court proceedings, the other two expressions would also go hand in hand and the Ld. ARC was not any way required to state as to under which of the three expressions, parties case felt Evidence or specific admissions through deeds and conduct find duly discussed through various admitted or proved documents and these negates the plea of the appellant that the evidence had not been discussed by the Ld. Trial

Court. I feel the impugned judgment carries all these necessary details and these need not be repeated here any further."

ARCT thereafter considered in detail the relationship of landlord and tenant between LBS and various statutory entities, in succession. The transformation of GNIT, through DTS to DTC was duly noticed, and dilated upon. It was noticed that DTC which was a government undertaking, was a successor in interest of a private transport company. It was further noticed that the "land underneath the superstructure / the demised premises might or might not belong to the government and the superstructure was built around May, 1948 by predecessor-in-interest of respondents 1 to 3 and an amount of Rs.3,500/- per month was agreed to be paid being a fair return against the investment made towards construction of superstructure". The submission that Rs.3,500/- per month was paid as compensation for construction of the superstructure was considered and rejected with the observations :-

"The submission of appellant's Ld. Counsel that the amount was agreed to be paid only with a vie to compensate the predecessor-in-interest of respondents 1 to 3 and was not the rental of the super-structure does not seem to be carrying any weight and to my mind this submission cannot stand because the moment, we speak of compensation – it indicates to some specific amount of a specific period by which the liability would be deemed to have been discharged. It never means a flowing steam of payments to continue till infinity. It has got to be the rental only and it was also to understand, taken and acted upon by the parties as is clearly and unambiguously indicated from the admitted stand of respondent/DTC. The respondent / DTC had in its written statement admitted this amount as rent though at other point it denied it being so. Really, respondent / DTC could not suppress the truth and at times, it honestly leaned towards it and described this sum

of Rs.3,500/- as monthly rental. Paras(a), (f) and (k) of brief facts of the written statement of respondent/DTC clearly reflect the above stand. In para (e), the words used are and would give it on rental basis to GNIT. The words used in para (f) are that Sh. Bharat Singh constructed a depot on plot No. 2 and rented out the same structure to GNIT at a monthly rental of Rs.3,500/-. Para (k) states… and the GNIT company continued paying a rent of Rs.3,500/- per month to Sh. Bharat Singh for the amount he had invested on the super-structure and also for the amount he had financed to GNIT company. These terms are no misnomers and actually they pump out the real intent of the parties under which respondent / DTC started making payments of monthly rentals to respondents 1 to 3 their predecessor-in-interest".

21. We have been constrained to make elaborate reference to the orders of ARC and ARCT only to demonstrate that High Court was not justified in observing that there has been 'serious dereliction of duty' or that there has been 'blatant violation of the fundamental principles of law and justice' by the ARC and ARCT. We also cannot accept the observations of the High Court that both ARC and ARCT have considered the facts in a very mechanical way, or that the orders passed by ARC and ARCT exhibited any patent illegality writ large on the face of the orders. We also do not agree that the ARC and ARCT ignored the sequence of events through which GNIT was substituted by DTC. The entire sequence of metamorphosis of GNIT into DTC have been elaborately explained and dilated upon.

22. We are of the considered opinion that the High Court ought not to have exercised the extra ordinary jurisdiction under Article 227 of the Constitution in the peculiar circumstances of this case. We may briefly indicate the reasons for saying so:-

(i) Initially the appellants filed a petition for eviction against DTC and MCD. They had clarified that

MCD has been impleaded only to avoid multiplicity of proceedings.

(ii) Decree of eviction was passed. DTC lost in appeal, lost in RCSA in the High Court. However, the High Court clarified it shall have no bearing on the appeal filed by MCD. The order dated 31/01/2001, passed by the High Court in CM (M) No.31 of 2001 reads as under:-

"There is a concurrent findings of facts and law against the petitioner. It is not for this Court to substantiate for judgment over the judgment of the Court below through the proceedings under Article 227 of the Constitution of India.

Dismissed.

I am informed that the MCD has challenged the impugned order before the Rent Control Tribunal. Dismissal of this petition shall have no bearing on the determination of the Appeal filed by the MCD. "

Following the aforesaid order, RCSA No: 17/2001 & CMs 74-75/2001 filed by the MCD was also dismissed vide order dated 03/09/2004, with the following observations:-

"It appears that the order of the Additional Rent Controller was challenged before the Tribunal, which order has been adjudicated upon by other bench of this court which uphold the order of the Additional Rent Controller. In view of the matter, I see no reason to entertain this appeal. SAO 17/ 2001 is accordingly dismissed."

In our opinion the aforesaid order was unexceptional since the pleas taken by the DTC and MCD before the Additional Rent Controller were identical. Therefore, it was in fitness of things that the subsequent coordinate bench also dismissed the appeal filed by MCD. The aforesaid order was however recalled without any justification with the following observations:-

"Heard counsel for the parties and have gone through the order dated September 03, 2004 as also January 30, 2001. It appears to me that while disposing of RCSA 17/2001 reference has been made purely CM(M) 31/2001. What escaped notice was that the order dated January 30, 2001 in CM(M) would have no bearing on the determination of the appeal by the Municipal Corporation of Delhi."

Thereafter MCD, moved CM 4639/2007 with the prayer that the appeal be treated as a petition under Article 227 of the Constitution of India as the appeal is not maintainable. The application was disposed off by the following order dated 30/3/2007:-

"Counsel for the appellant has moved CM No: 4639/2007 praying that this appeal be treated as a petition under Article 227 of the Constitution of India as the appeal is not maintainable. He further submits that the appellant should file a fresh petition under Article 227 of the Constitution of India or under any other law if the same is permissible under law. On instruction from the respondent who is present in Court, counsel will not proceed with the execution petition for a period of 15 days from today. Subject to this condition as prayed by counsel for the appellant RCSA 17/01 is dismissed as withdrawn.

CM 4639/07 also stands disposed off."

A perusal of the aforesaid order clearly shows that the application was disposed off on the statement made by the learned counsel for MCD that the appellant (MCD) should file a fresh petition under Article 227 of the Constitution of India *if the same is permissible under law. (emphasis supplied)*

Therefore, the aforesaid order cannot be treated as an order passed by the High Court permitting MCD to file a petition under Article 227 of the Constitution of India. However using the aforesaid order of the High Court as an excuse, MCD filed the

petition under Article 227 of the Constitution of India on 09/04/2007, being CM (Main) No. 57/2007, challenging the order which was passed by the ARC dated 11/11/1989 and the order passed by ARCT dated 12/3/2001. At this stage, in our opinion, the High Court failed to bestow proper attention to the objections taken by the appellants to the maintainability of the writ petition on the ground of delay and laches. Proceedings under Article 227 can be initiated in the absence of the availability of an alternative efficacious remedy. In the present case, MCD had consciously withdrawn RCSA which had been filed under Section 39(1) of the Delhi Rent Control Act. The appeal had been filed against the order of the ARCT dated 12.3.2001. However, the objection on the ground of delay and laches was brushed aside by the High Court on two wholly untenable grounds, i.e:-

(i) The orders passed by the ARC and ARCT suffered from patent illegality on the face of the orders.

(ii) The MCD was bona fide prosecuting a case in the wrong court, due to mistake of law.

23. We are of the opinion that the High Court committed a patent error of jurisdiction in entertaining the writ petition under Article 227 of the Constitution which was unconscionably belated. Both reasons stated by the High Court in support of its conclusions, are contrary to the facts on the record.

It must be remembered that in these proceedings, the pleas raised by the DTC and MCD before the ARC as well as the ARCT were identical. The order passed by the ARCT has been upheld by a coordinate bench of the High Court. The RCSA No: 17/2001 filed by MCD on identical grounds was thus dismissed by a subsequent coordinate bench. That was indeed in conformity with the high traditions, procedures and practices established by the courts to maintain judicial discipline and decorum. The underlying principle being, to avoid conflicting views taken by coordinate benches of the same court. Except

in compelling circumstances, such as where the order of the earlier bench can be said to be per incurium, in that it is passed in ignorance of an earlier binding precedent/ statutory or constitutional provision, the subsequent bench would follow the earlier coordinate bench.

24. It appears that the entire proceedings adopted by MCD after the dismissal of the RCSA – CM(M) No.31 of 2001, on 31.1.2001 were a subterfuge to avoid the execution proceedings in a decree which had become final between the parties. In the application seeking conversion of RCSA No: 17/ 2001 to a petition under Article 227 of the Constitution of India, it was categorically stated by MCD that the aforesaid RCSA was not maintainable. The aforesaid statement is a clear admission that the appeal filed by the MCD did not involve a substantial question of law. It is apparent from the fact that under Section 39(1) of the DRC Act subject to the provisions of sub-section (2), an appeal lies to the High Court from an order made by the ARCT. Sub-section (2) provides as under :-

> "No appeal shall lie under sub-section (1), unless the appeal involves some substantial question of law."

Having made an admission that no substantial question of law was raised in the RCSA, withdrawal of the same could not possibly have been used as a justification for filing a petition under Article 227 of the Constitution of India. If the RCSA was devoid of any substantial question of law, the petition under Article 227, based on the same facts, would be equally devoid of any substantial question of law. This categoric admission of the MCD was ignored by the High Court whilst recording the finding that the orders of ARC and ARCT were passed "in blatant violation of fundamental principles of law and justice." This apart in the peculiar facts of this case, noticed above, it could not be held that MCD had been bona fide prosecuting a case in the wrong court. It was seeking a remedy provided under Section 39(1) of DRC Act. Even this appeal was filed beyond limitation. It was delayed by 431 days. In the meantime

possession of a part of the premises had already been taken by the appellants. Inspite of the objections having been raised to the maintainability of a writ petition under Article 227 of the Constitution of India, they were rejected by the High Court with the observations noticed in the earlier part of the judgment. In such circumstances, in our opinion, it was wholly inappropriate for the High Court to entertain the writ petition under Article 227 of the Constitution of India.

25. Undoubtedly, the High Court has the power to reach injustice whenever, wherever found. The scope and ambit of Article 227 of the Constitution of India had been discussed in the case of *The Estralla Rubber Vs. Dass Estate (P) Ltd.,* [(2001) 8 SCC 97] wherein it was observed as follows**:**

> "The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to

justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

In our opinion, the High Court committed a serious error of jurisdiction in entertaining the writ petition filed by MCD under Article 227 of the Constitution of India in the peculiar circumstances of this case. The decision to exercise jurisdiction had to be taken in accordance with the accepted norms of care, caution, circumspection. The issue herein only related to a tenancy and subletting. There was no lis relating to the ownership of the land on which the superstructure or the demised premises had been constructed. The whole issue of ownership of plot of land No:2, Block-B, transport area of Jhandewalan Estate, Desh Bandhu Gupta Road, Karol Bagh, New Delhi is the subject matter of a civil suit being Suit No: 361 of 1980 in the High Court of Delhi. The High Court, therefore, ought not to have given any opinion on the question of ownership.

26. We are of the opinion the High Court traveled beyond the well defined contours of its jurisdiction under Article 227 of the Constitution of India.

27. We, therefore, allow this appeal and set aside the impugned judgment and order.

Civil Appeal No. 8234 of 2010 @ Special Leave Petition (C) No.1925 of 2008 :

1. Leave granted.

2. In view of the judgment in Civil Appeal No. 8233 of 2010 @ SLP (C) No. 16995 of 2009, this appeal becomes infructuous and is dismissed as such.

B.B.B. Appeals disposed of.

DEPARTMENT OF TELECOMMUNICATIONS
v.
GUJARAT CO-OPERATIVE MILK MARKETING FEDERATION LTD.
(Civil Appeal No. 8249 of 2010)

SEPTEMBER 24, 2010

[R.V. RAVEENDRAN AND DALVEER BHANDARI, JJ.]

Constitution of India, 1950 *– Article 226 – Judicial review of award passed u/s 7B of Telegraph Act – Scope of – Telephone bill raised – Complaint by the subscriber alleging that the calls charged for, were made from another phone-number – Telephone Department, on verification, found the bills to be correct – Administrative appeal rejected, confirming the demand – Arbitrator also confirming the demand in its award – Award set aside by High Court in exercise of its writ jurisdiction – Letters Patent Appeal also dismissed – On appeal, Held: High Court, in exercise of its power of judicial review, wrongly interfered with the finding of the Arbitrator – Order of the High Court was on assumptions and inferences and not based on evidence – High Court was prejudiced against the Telephone Department – Conduct of Single Judge of High Court in forcing the Department to give up and reduce its claim, is required to be discouraged – Telegraph Act, 1885 – s.7-B.*

The Managing Director of the respondent was the subscriber of a telephone connection. Two of his telephone bills were for large amount. The billing was on account of a large number of international calls i.e. 'party calls' or 'sex talk calls.'

The respondent made complaint. The appellant-Department informed that the bills were correct. The respondent filed administrative appeal. On the direction

of the High Court in a writ petition, the appellant decided the appeal, dismissing the same. The writ petition against the order was disposed of on the ground that alternative remedy of arbitration u/s. 7B of Telegraph Act, 1885 was available. In Letters Patent Appeal, the High Court directed the dispute to be referred to arbitration. The arbitrator held that the bills were proper. The award was further challenged in a writ petition. The Single Judge of the High Court quashed the bills holding that the decision of the arbitrator was not valid because he decided the matter on inferences and presumptions without any evidence; and that the arbitrator was lower in rank than the officer of the appellant-Department, who had decided the administrative appeal. The letters patent appeal against the order was dismissed by the Division Bench of the High Court. Therefore, the instant appeal was filed.

Allowing the appeal, the Court

HELD: 1. There was no ground for the High Court to interfere with the findings arrived at by the Arbitrator in exercising the power of judicial review. By assuming a non-existing appellate jurisdiction and by making wrong assumptions and drawing wrong inferences, the Single Judge of the High Court has interfered with a reasoned arbitral award. The Single Judge of the High Court has ignored the law laid down regarding scope of interference in writ jurisdiction with regard to awards u/s. 7B of the Telegraph Act, 1885. The Single Judge has proceeded as if he was sitting in appeal over the award of Arbitrator. He also assumed, without any basis, that the arbitrator had proceeded on presumptions and inferences, when in fact it is the Single Judge who made assumptions and drew inferences, not based on evidence. [para 8 and 13]

M.L.Jaggi v. Mahanagar Telephones Nigam Ltd. **1996 (3) SCC 119, referred to.**

2.1 The Single Judge was wrong in holding that the award was invalid because it was made by an Arbitrator who was junior in rank, when compared to the officer who passed the appellate order. It is a usual practice for the Government Departments to have the employees of the Department (high level officers unconnected with the contract) as Arbitrators. The mere fact that the Arbitrator is of a rank lower than the officer who rejected the claim of the subscriber would not invalidate the arbitration nor can it be a reason for imputing *bias* to the Arbitrator. [Para 14]

2.2. In the instant case, the Arbitrator had neither dealt with the matter at any point of time nor was he a subordinate of the appellate authority in the concerned telecom district, who decided the matter. Therefore, there was no justification for the Single Judge to hold that the award was invalid merely because the Arbitrator was of a rank lower than that of the officer who passed the appellate order. Moreover, the appeal was decided in pursuance of a direction of the High Court. Again in a subsequent proceeding, the High Court directed that the matter should be referred to arbitration u/s. 7B of the Act and accordingly the dispute was referred to arbitration and the departmental officer functioning as Arbitrator decided the matter. There is nothing irregular or erroneous in the said procedure. [Para 14]

Secretary to Govt. Transport Department v. Munuswamy Mudaliar **–1988 (Supp) SCC 651;** *Indian Oil Corporation Ltd. v. RajaTransport* ***(P) Ltd.*** **– 2009 (8) SCC 520, relied on.**

3. The Single Judge had virtually prejudged the matter and was prejudiced against the appellant. The Single Judge allowed himself to be swayed by the following irrelevant factors in deciding against the

appellant: (i) the respondent had come up before the High Court thrice; and (ii) the department counsel did not agree with the suggestion of the Single Judge to reconsider the bill amounts by issuing a revised bill on the basis of the average of the bills for last six months. The Single Judge proceeded on the basis that the attitude of the Department was adamant and it was indulging in unnecessary litigation. The Department was simply pursuing a legitimate claim. The matter had been decided by a statutory Arbitrator. Therefore, if the Department decided not to give up or reduce its claim, that cannot be held against the Department. The order shows that the Single Judge had tried virtually to force the Department to agree for suggestions which obviously the officers and the counsel for the Department could not agree. Such attitude on the part of the High Court requires to be discouraged. [Para 15]

Case Law Reference:

1996 (3) SCC 119	**Referred to.**	**Para 8**
1988 (Supp) SCC 651	**Relied on.**	**Para 14**
2009 (8) SCC 520	**Relied on.**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8249 of 2010.

From the Judgment & Order dated 23.1.2007 of the High Court of Gujarat at Ahmedabad in Letters Patent Appeal No. 1421 of 2006.

Subhangi Tuli, Manish Kumar, Sudhir Nandrajog for the Appellant.

Nikhil Goel, Sheela Goel for the Respondent.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted.

2. The respondent was the subscriber of telephone bearing No.40193, in Anand Town installed at the residence of its Managing Director (for convenience we will also refer to the Managing Director as the 'subscriber'). The bi-monthly bills in regard to the said telephone were usually around Rs.8500. The appellant served on the respondent the following two bills aggregating to Rs.454,652 :

Bill date	Period of the bill	Amount
1.4.1996	16.1.1996 to 15.3.1996	362,723/-
1.6.1996	16.3.1996 to 15.5.1996	91,929/-

The huge billing was on account of a large number of international calls known as 'party calls' or 'sex talk calls' to number 001-4152-085-234 and several calls to 001-4152-085-220/230/236/239.

3. The respondent made a written complaint dated 25.4.1996 after the receipt of the first bill stating that it had been mischievously and unscrupulously billed for large number of international calls made from some other numbers, but shown as having made from its number. It also complained in the said letter that many a time, when the subscriber lifted the telephone for making calls, he used to hear some ongoing talk. The Divisional Engineer of the appellant after verification informed the respondent by letter dated 21.5.1996 that the bills were correct for the following reasons :

(a) Total line was underground and no portion of the line was exposed;

(b) Absolute control to make a call or not to make a call, was with the subscriber as the phone had dynamic lock facility.

(c) The telephone was working continuously and there was no complaint of the telephone being out of order. (Note : If the line is misused externally, the telephone of the subscriber will be dead with no dial tone).

(d) The bills showed that the calls were made daily over a long period and not on any particular single day.

(e) As the telephone was connected to an electronic exchange, there was no chance of excess metering.

4. The respondent filed an administrative appeal to the General Manager, Kheda Telecom District, Nandiad. However as the bills amounts were not paid, the telephone was disconnected on 29.5.1996. A writ petition (SCA No.4188/1996) filed by the respondent was disposed of by the High Court by order dated 29.7.1997 directing the General Manager of the appellant to examine the appeal filed by the respondent in regard to the bills in question and render a reasoned order after giving a hearing to the respondent. After hearing, the General Manager, Kheda Telecom District, Nadiad made an order dated 12.2.1998 rejecting the appeal and confirming the demands under the two bills, for the following reasons: (i) The subscriber had not made use of the STD/ISD dynamic locking facility which was available through a sophisticated electronic exchange; (ii) all rooms in the residence of the subscriber had plug/socket arrangements and all family members and visitors could use the parallel lines for making ISD calls (in particular 'party line calls') even without the knowledge of the subscriber; (iii) the possibility of any external misuse was ruled out as the Distribution Point Box was located within the campus premises of the respondent which was under around the clock security of the security guards employed by the respondent and no part of the underground cable was exposed; (iv) significantly during the disputed period not even a single complaint was booked

from the telephone; and though in the complaint dated 25.4.1996, it was stated for the first time that many a time when the subscriber lifted the phone to receive the call he heard someone talking on the line, no such complaint was ever made prior to 25.4.1996 to the department; and (v) the disputed ISD calls were 'party line international sex talk calls' which originated from the subscriber's telephone and having regard to the fact that these calls were made in between the calls to other stations in India in such close proximity that there was no chance of possible misuse by any third party or staff of telecom department.

5. Feeling aggrieved, the respondent again approached the High Court by filing another writ petition (SCA No.1416/1998). The said petition was disposed of on the ground of availability of alternative remedy of arbitration under section 7B of the Indian Telegraph Act, 1885 ('Act' for short). The respondent challenged the said order in a Letters Patent Appeal wherein by order dated 21.10.1989 the Division Bench directed the dispute to be referred to arbitration. In pursuance of it, the Central Government in exercise of power under section 7B of the Act appointed Mr. Vineet Bhatia, Deputy General Manager, Telecom East and Arbitrator for Ahmedabad Telecom district as Arbitrator for deciding the dispute.

6. The Arbitrator after hearing made an award dated 4.5.2000 holding that the bills were proper and the respondent had to make complete payment of the said bills. The following summary of the reasoned award is extracted below:

"1. Though STD/ISD dynamic locking facility for the telephone was available, it was not used by the subscriber.

2. There was no possibility of external misuse from distribution point or pillar or from the Main Distribution Frame, as these were under lock and key or around the clock supervision.

3. Even though the subscriber stated that he used to hear some cross talk on the line during the period of the disputed bill, no complaint was registered with the Telephone Department. Therefore the said complaint was apparently an afterthought made up after receiving the first bill for the disputed period.

4. All the rooms in the house of subscriber had plug and socket arrangement and there were two telephone instruments in the house and as such calls could be made from anywhere in the house.

5. The calls preceding/succeeding the disputed calls were admittedly made by the subscriber. Hence no misuse by diversion was possible.

6. The disputed calls were 'international party line calls'. For dialing these numbers there was no need to establish any prior relationship between caller and the called numbers. As such there was no age/sex bar for dialing these numbers and hence could have been done by any of the family members of the subscriber. From the school details of his son, presented by the subscriber vide his letter dated 3.5.2000, it was clear that his final Pre-Board examinations for X Std. were concluded on 03.02.1996 and the disputed calls started from the very next day. As such, the possibility of these calls having made by the son of the subscriber cannot also be ruled out."

7. The said award was challenged by the respondent in a writ petition (SCA No.8734/2000). A learned Single Judge of the High Court allowed the writ petition with costs of Rs.5000 and quashed the bills dated 1.4.1996 and 1.6.1996 and the consequential demand notice dated 4.5.2000. The last para of the order of the learned Single Judge extracted below, demonstrates the manner in which he viewed the entire matter:

"This is a peculiar case showing the adamant attitude on

the part of the respondent authorities. The bill has been issued in the year 1996 and there were about three round of litigations. The Arbitrator who was appointed was subordinate to the General Manager who is bound to be influenced by the decision of the General Manager or could not have taken a contrary view to the order of his superior. Therefore, before the argument was started, an opportunity was given to the counsel for the respondent to reconsider their decision. However the officer as well as the learned counsel, who is an officer of the Court, has not accepted the said suggestion. It was also open to the respondent to issue a revised bill as per the decision of this court or at least average bills for the last six months. It goes without saying that the adamant attitude of such litigants increases the unwanted litigation. Therefore, the respondent shall pay a sum of Rs.5,000/- (Rupees Five Thousand only) by way of costs."

The findings recorded by the learned Single Judge in support of his order, in brief are:

(i) As the appeal against the Bills had been decided by the General Manager, Kheda Telecom District on 12.2.1998 upholding the bills, the Arbitrator should have been a person higher in rank to the General Manager. As the Arbitrator was of a lower rank of a Deputy General Manager, the decision of the Arbitrator was not valid in law and on this ground alone the writ petition had to be allowed.

(ii) The Arbitrator had decided the matter on inferences and presumptions without any evidence. Reference to the existence of parallel telephone lines and subscriber's son being at home after examinations, to infer that he might have misused the telephone was a finding which was without basis in the absence of evidence that the subscriber's son had in fact misused the telephone. Similarly, the assumption by the Arbitrator that any member

of subscriber's family could have used the phone for making 'party line calls' was a casual presumption.

(iii) A complaint dated 25.4.1996 was made by the subscriber stating that the first bill dated 1.4.1996 was excessive. Even assuming that there was misuse of the phone, in the house of the subscriber, when the subscriber came to know about the misuse when the bill was received, he would have restricted or prevented the misuse. That means the next bill dated 1.6.1996 should have been a normal bill. But the said bill was also excessive thereby demonstrating that the mischief calls continued even during the second bill period. This showed that there was a possibility of someone else misusing the number of the subscriber for making ISD calls.

(iv) The complaint dated 25.4.1996 stating that the subscriber sometimes used to hear ongoing talk, when he lifted the phone for making calls, was not properly considered by the Arbitrator.

The Letters Patent Appeal filed by the appellant against the said order of the learned single Judge, has been dismissed by a Division Bench by a brief non-speaking order dated 23.1.2007. The said order is challenged in this appeal.

8. The scope of interference in writ jurisdiction in regard to Arbitral awards under section 7B of the Act was considered by this Court in *M.L.Jaggi v. Mahanagar Telephones Nigam Ltd*. [1996 (3) SCC 119] :

"It is seen that under Section 7-B, the award is conclusive when the citizen complains that he was not correctly put to bill for the calls he had made and disputed the demand for payment. The statutory remedy opened to him is one provided under Section 7-B of the Act. By necessary implications, when the Arbitrator decides the dispute under

Section 7-B, he is enjoined to give reasons in support of his decision since it is final and cannot be questioned in a court of law. The only obvious remedy available to the aggrieved person against the award is judicial review under Article 226 of the Constitution. If the reasons are not given, it would be difficult for the High Court to adjudge as to under what circumstances the Arbitrator came to his conclusion that the amount demanded by the Department is correct or the amount disputed by the citizen is unjustified. The reason would indicate as to how the mind of the Arbitrator was applied to the dispute and how he arrived at the decision. *The High Court, though does not act in exercising judicial review as a court of appeal but within narrow limits of judicial review it would consider the correctness and legality of the award.* No doubt, as rightly pointed out by Mr. V.R.Reddy, Additional Solicitor General, the questions are technical matters. But nonetheless, the reasons in support of his conclusion should be given."

(emphasis supplied)

Though the learned Single Judge referred to the said decision, he has ignored the law laid down therein. The learned Single Judge has proceeded as if he was sitting in appeal over the award of Arbitrator. He also assumed, without any basis, that the Arbitrator had proceeded on presumptions and inferences, when in fact it is the learned Single Judge who made assumptions and drew inferences, not based on evidence. We may briefly refer to them.

9. The learned Single Judge held that the Arbitrator had without any evidence assumed that the son or other family members of subscriber must have used the telephone available on account of plug/socket arrangement in every room as also an extra telephone, parallel lines for making the "international party calls". The basis for the billing is not the said assumption or inference. The basis is the clear evidence consisting of the records of Telecom and the meters which showed that the billed

calls, that is, the international party line calls, were regularly being made from the said telephone. The inference drawn by the Arbitrator that the subscriber's son or other family members must have made the calls from a parallel line by using the plug and socket facility available in various rooms, has to be read in the context of the assertion of the subscriber that he had not made any such party calls. The Arbitrator had three facts before him : (1) that the department records showing that the disputed international party calls were made from the telephone in question regularly; (2) that the subscriber had plug and socket facility in several rooms with an extra telephone which could be used any time by any one in the house; and (3) that the subscriber had not made use of the STD/ISD dynamic lock facility, though available. Therefore when there was an assertion by the subscriber that he had not made any such calls, the Arbitrator merely made an inference from the proved facts that even if the subscriber had not made the calls, it was possible that his family members including his son (who had returned home a day prior to the commencement of 'party calls') could have made such calls by using the plugs and sockets arrangement and parallel lines in several rooms without the knowledge of the subscriber. The Arbitrator was only dealing with a contention by the subscriber that he had not made any such calls and giving his reasons for rejecting such a contention.

10. The learned Single Judge next inferred that even if such calls were being made earlier, after receiving the bill dated 1.4.1996, the subscriber would have naturally restricted any such calls; and the fact that even after receipt of the first bill, there were such 'party calls' as was evident from the second bill, made it improbable that the subscriber's phone was used for making such 'party calls' and therefore it had to be inferred that someone else was mischievously using the said telephone connection for making unauthorised ISD calls. This inference is also contrary to facts. The first bill dated 1.4.1996 was for the period 16.1.1996 to 15.3.1996. Though the second bill

dated 1.6.1996 was subsequent to complaint dated 25.4.1996, the said bill related to the period 16.3.1996 to 15.5.1996, major portion of which was prior to 25.4.1996. Further, the second bill was only for Rs.91,929/- as against the first bill for Rs.3,62,723/-. The amount of the second bill and the period for the second bill demonstrates that after receipt of first bill and complaint, there was in fact some kind of control and reduction in such phone calls. Therefore the inference by the learned Single Judge was absolutely baseless.

11. The finding of the learned Single Judge that the Arbitrator had not given importance to the complaint in the letter dated 25.4.1996 that he had heard cross talk on the line is also incorrect. The Arbitrator has dealt with this matter. The simplest explanation is the existence of plug-socket facility and parallel lines. If the parallel line was being used and the subscriber lifted the receiver, he would certainly hear the conversation or talk, which was not from any external source, but from the very same telephone.

12. The last assumption by the learned Single Judge was with reference to an affidavit filed by the Telecom Department in some criminal proceeding against some departmental employee unconcerned with this case, admitting that its employee had tampered with the instruments for making international calls, and as a result the department had to grant rebates to several subscribers. But that cannot be a ground for granting rebate in this case, as no irregularity was found in this case. The fact that in some case, some departmental employee had committed some tampering, is not a ground for inferring that there must have been tampering in this case. The High Court has inferred that the fault was with the department because it refused to refer the matter for CBI for investigation. The learned Single Judge has observed:

> "It is also required to be noted that the petitioner had requested for an investigation into the matter by Central Bureau of Investigation. According to the petitioner, if such

an investigation is resorted to, it would unearth the mischief and it was further stated that the petitioner was ready and wiling to bear the costs thereof. Even this was not accepted by the respondent authority, which would indicate that the respondent did not want to go deep into the matter."

Reference to CBI is not a condition precedent for raising a bill, merely because the subscriber demands it.

13. There was thus no ground for the High Court to interfere with the findings arrived at by the Arbitrator in exercising the power of judicial review. By assuming a non-existing appellate jurisdiction and by making wrong assumptions and drawing wrong inferences, the learned Single Judge has interfered with a reasoned arbitral award.

14. We may next deal with the conclusion of the learned Single Judge that the award was invalid because it was made by an Arbitrator who was junior in rank, when compared to the officer who passed the appellate order dated 12.2.1998. It is a usual practice for the government departments to have the employees of the department (high level officers unconnected with the contract) as Arbitrators. The mere fact that the Arbitrator is of a rank lower than the officer who rejected the claim of the subscriber would not invalidate the arbitration or can be a reason for imputing bias to the Arbitrator (see *Secretary to Govt., Transport Department v. Munuswamy Mudaliar* – 1988 (Supp) SCC 651 and *Indian Oil Corporation Ltd. v. Raja Transport (P) Ltd.* – 2009 (8) SCC 520). In *Indian Oil Corpn. Ltd*. (supra) this court held thus :

"The fact that the named Arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality of lack of independence on his part.

There can however be a justifiable apprehension about the independence or impartiality of an Employee-Arbitrator, *if*

such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute. Where however the named Arbitrator though a senior officer of the government/statutory body/government company, had nothing to do with execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer/s (usually heads of department or equivalent) of a government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as Arbitrators merely because their employer is a party to the contract."

(emphasis supplied)

In this case, the Arbitrator had neither dealt with the matter at any point of time nor was he a subordinate of the appellate authority in the concerned telecom district who decided the matter. The bills related to a telephone installed at the premises in Anand/Nadiad falling within the jurisdiction of the General Manager Telecom Kheda Telecom District, Nadiad and the appellate order dated 12.2.1998 was passed by the General Manager of Kheda Telecom District, Nadiad. The Arbitrator was working as a Deputy General Manager (T) East & Arbitrator Ahmedabad Telecom District, not under the General Manager who passed the appellate order but in a different telecom district. Therefore, there was no justification for the learned Single Judge to hold that the award was invalid merely because the Arbitrator was of a rank lower than that of the officer who passed the appellate order. It should also be noted that the appeal was decided by the General Manager, Kheda Telecom district in pursuance of a direction of the High Court. Again in a subsequent proceeding the High court directed that the

matter should be referred to arbitration under section 7B of the Act and accordingly the dispute was referred to arbitration and the departmental officer functioning as Arbitrator decided the matter. There is nothing irregular or erroneous in the said procedure.

15. The last para discloses the learned Single Judge had virtually prejudged the matter and was prejudiced against the appellant. The learned Single Judge allowed himself to be swayed by the following irrelevant factors in deciding against the appellant: (i) the respondent had come up before the High Court thrice; and (ii) the department counsel did not agree with the suggestion of the learned Single Judge to reconsider the bill amounts by issuing a revised bill on the basis of the average of the bills for last six months. The learned Single Judge proceeded on the basis that the attitude of the department was adamant and it was indulging in unnecessary litigation. The department was simply pursuing a legitimate claim. The matter had been decided by a statutory Arbitrator. Therefore if the department decided not to give up or reduce its claim that cannot be held against the department. The order shows that the learned Single Judge had tried virtually to force the department to agree for suggestions which obviously the officers and the counsel for the department could not agree. Such attitude on the part of the High Court requires to be discouraged. Unfortunately the division bench did not examine any of these aspects and merely affirmed the decision of the learned Single Judge.

16. We therefore allow this appeal, set aside the order of the learned Single Judge and the Division Bench and dismiss the writ petition filed by the respondent challenging the bills.

K.K.T. Appeal allowed.

GANPAT

v.

STATE OF HARYANA & ORS.

(Criminal Appeal Nos. 279-281 of 2002)

SEPTEMBER 27, 2010

[P. SATHASIVAM AND R.M. LODHA, JJ.]

Penal Code, 1860 – ss. 148, 302, 325, 324, 323 r/w s. 149 – Prosecution for murder and for causing injuries – In the incident, injuries sustained by the prosecution-witnesses as well as accused persons – Contradiction in the police-statement of complainant and FIR version, regarding number of accused participating in the incident – One of the accused, in his statement u/s. 313 stated that complainant party was the aggressor – I.O. not recording the statement of the injured accused – Conviction by trial court – Acquittal by High Court – On appeal, held: In view of the testimony of PWs, the presence of the complainant at the scene of occurrence was doubtful – In the facts of the case, the complainant party was the aggressor – High Court rightly acquitted the accused.

Appeal – Appeal against acquital – Principles to be followed – Discussed.

Respondent-accused were prosecuted for having caused death of one person and for causing injuries to others. The prosecution case was that eleven accused persons attacked the victim party armed with weapons. PW12 (the appellant-complainant) in his police-statement named only four of the accused. The complainant lodged FIR wherein he named eleven accused. Challan was filed by the police naming only four of the accused out of the eleven accused. On the application of the complainant u/s. 319 Cr.P.C., the rest of the seven accused were also charged. All the eleven accused were charged u/ss. 148,

302, 325, 324, 323 r/w. s. 149 IPC. The trial court convicted the accused. High Court acquitted all the accused. Therefore, the instant appeals were filed by the appellant-complainant.

Dismissing the appeals, the Court

HELD: 1. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc., the appellate court is competent to reverse the decision of the trial court depending on the materials placed. [Para 5]

Madan Lal vs. State of J & K **(1997) 7 SCC 677;** *Ghurey*

Lal vs. State ofU.P. **(2008) 10 SCC 450;** *Chandra Mohan Tiwari vs. State of M.P*. **(1992) 2 SCC 105;** ***Jaswant Singh vs. State of Haryana*** **(2000) 4 SCC 484, relied on.**

2.1. From the analysis of the statement of prosecution-witnesses (PWs 12 and 13), various details about the injuries sustained by the prosecution witnesses as well as the accused spoken to by the doctor (PW-3), categorical assertion of A-2 in his statement u/s. 313 Cr.P.C., conduct of I.O. (PW-14) in not recording statement of the injured accused who were also present in the same hospital when he visited to record the statement of injured complainant party, it is clear that two groups of people clashed *inter se* with weapons causing injuries to each other, and thus, it is held that the complainant party was the aggressor and in the absence of definite material and explanation from the prosecution side, the High Court is right in acquitting all the eleven accused. [Para 12]

2.2. It is clear from the evidence of prosecution-witnesses as well as the defence that A2, A-3 and A-11 also sustained injuries. Among these persons, A-2 sustained grievous injuries by the use of *ghandasa.* There is no proper explanation by the prosecution about the injuries sustained by the accused. Further, there is no definite evidence as to the place of occurrence. A-2 in his statement recorded u/s. 313 Cr.P.C. stated to the effect that the complainant party was the aggressor. [Para 9]

2.3. According to Pws 12 and 13, the accused had inflicted injuries on them and blamed them for being the aggressor and having caused the death of the deceased and for inflicting injuries to others. PW-12 was confronted with his statement made before the police wherein he had not mentioned the names of seven

persons said to have participated in the commission of the crime. The only explanation for omission of those names was that of nervousness. The very same person who made a complaint to the police, mentioned all the names of the accused persons and assigned specific role for each one of them. [Para 7]

2.4. The statement of PW-13 also makes the presence of PW-12 at the spot to be doubtful. Though PW-13 has denied the suggestion that he was under the influence of alcohol at the time of occurrence, the same was falsified by the version of the doctor (PW-3). PW-3, in his statement, has noted that the injured (PW13) was under the influence of alcohol at the time of first arrival. [Para 8]

Case Law Reference:

(1997) 7 SCC 677	**Relied on.**	**Para 5**
(2008) 10 SCC 450	**Relied on.**	**Para 5**
(1992) 2 SCC 105	**Relied on.**	**Para 5**
(2000) 4 SCC 484	**Relied on.**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 279-281 of 2002.

From the Judgment & Order dated 1.5.2001 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 647-DB of 2000 in Criminal Appeal No. 657-DB of 2000 and in Criminal Revision Petition No. 475 of 2000.

Rohit Sharma, Akshat Goel, Abhijat P. Medh, S. Gowthanan, Ashubhtiy for the Appellant.

K.B. Sinha, Roopansh Purohit, Kamal Mohan Gupta, Kawaljit Kochar, Ashok K. Sharma, Kusum Chaudhary for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the common judgment and final order dated 01.05.2001 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 647 and 657 of 2000 and Criminal Revision Petition No. 475 of 2000 whereby the High Court allowed the appeals and acquitted all the eleven accused persons of the charges framed against them and dismissed the Criminal Revision filed by the appellant herein.

2. The case of the prosecution is as under:

(a) Four-five days prior to the date of occurrence i.e. 25.10.1992, there was a dispute between Mohinder Singh PW-13, who is the son of Shambhu (the deceased) and Madan Lal and Sat Pal, the accused, who used to run Kiryana shop in the village, over payment of price of crackers. But, later on, the dispute was settled between them with the intervention of villagers and Mohinder Singh paid an amount to the accused as the price of the crackers.

(b) On 25.10.1992, at about 9.00 p.m., when Mohinder Singh, after having meals, was going to his Garhi (outer house), he found eight persons, namely, Sat Pal, Pala Ram, Madan Lal, Jai Kumar, Ram Prakash, Rajesh, Ram Bhaj and Jai Singh standing there and they were armed with gandasis and lathis. Sat Pal raised a lalkara that Mohinder Singh should be taught a lesson for making less payment for crackers and he gave a gandasi blow on his right leg. Mohinder Singh shouted for help and on hearing the same, Ishwar – his brother came there. Pala Ram gave gandasi blows repeatedly from its reverse side on Ishwar's chin and jaw and Madan Lal gave two lathi blows on his face and Jai Kumar gave lathi blows on his hands and chest. On hearing the calls for help, Shambhu-the

deceased came to the spot. Rajesh and Ram Bhaj, who were standing in front of the house of Chandan came there with lathis and Ram Bhaj gave a lathi blow on the head of Shambhu and Rajesh gave a lathi blow on his legs. In the meantime, Ishwar's wife – Murti Devi also came there and Naresh and Jai Singh gave lathi blow on Murti Devi.

(c) Ganpat (PW-12)-the complainant (appellant herein), who was standing at a distance of 10 yards from the place of occurrence, shouted "Naa Maro Naa Maro". Thereafter, Ganpat brought a tractor from his house with the help of his son Shri Pal for taking the injured to the hospital. When they were lifting the injured persons, Mohan Lal gave one gandasi blow on his right arm and Rajesh gave a lathi blow on the back of his right hand palm and Ram Prakash gave a lathi blow on his left shoulder. Thereafter, Shri Pal, Chappa and Satta and other persons came there and rescued them and all the injured persons were taken to Primary Health Centre, Nissing. Dr. Sanjiv Grover, PW-3 examined the injured persons. Ishwar and Shambhu were referred to General Hospital, Karnal. Thereafter, Mohinder Singh and Murti Devi were also referred to the same hospital. Dr. Sanjiv Grover sent the ruqa to the in-charge, Police Station, Nissing on 26.10.1992 at 00:10 a.m. but due to inadvertence he mentioned the time as 12:10 a.m. On receipt of ruqa, ASI Ram Karan – PW-14 went to Primary Health Centre to inquire about the condition of the injured and came to know that the injured persons have been referred to General Hospital, Karnal. Then, on 26.10.1992, at 01:15 p.m., the ASI recorded the statement of Ganpat-the appellant herein in General Hospital, Karnal and a case was registered and a formal FIR was recorded at 2:30 p.m. under Sections 148, 149, 323, 324, 325 Indian Penal Code (hereinafter referred to as 'IPC'). He could not record the statement of Shambhu as he was not fit for making statement. After taking the clothes of the

injured persons into possession, he went to the scene of occurrence and prepared rough site plan and lifted blood stained earth. Thereafter, the accused were arrested and the weapons were also recovered.

(d) On 09.11.1992, Shambhu died and the case was converted to that under Sections 148, 302, 323, 324, 325 read with Section 34 Indian Penal Code (hereinafter referred to as "IPC"). On 12.03.1993, challan was filed by the police in the Court, mentioning only the names of four accused out of the 11 accused, whose names were mentioned in the FIR. On 09.04.1993, Ganpat (PW-12), the appellant herein filed an application under Section 319 of the Criminal Procedure Code (hereinafter referred to as "Cr.P.C.") for summoning the other seven accused. The trial Court, vide order dated 12.05.1993, allowed the application and summoned the other seven accused persons to face trial along with the four accused. Vide order dated 22.03.1994, the trial Court ordered for framing of charges against all the 11 accused persons for offences under Sections 148, 302, 325, 324, 323 read with Section 149 IPC.

(e) The prosecution examined 15 witnesses. After recording the evidence, the trial Judge convicted Pala Ram, Sat Pal Madan Lal, Ram Prakash, Rajesh, Ram Bhaj and Jai Kumar for the offence under Section 148 IPC and sentenced them to undergo rigorous imprisonment for two years and to pay a fine of Rs.1000/- each, in default of payment of fine, each of them was ordered to undergo further rigorous imprisonment for three months. They were further convicted under Section 302 read with Section 149 IPC and sentenced to undergo rigorous imprisonment for life. They were also convicted under Section 325 read with Section 149 IPC and were sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1000/- each. In default of payment of fine, each of them was

ordered to undergo further rigorous imprisonment for three months. All of them were further convicted under Section 324 read with Section 149 IPC and sentenced to undergo rigorous imprisonment for six months and further they were convicted under Section 323 read with Section 149 IPC and each of them was sentenced to undergo rigorous imprisonment for four months. Mohan Lal was convicted under Section 324 IPC and sentenced to undergo rigorous imprisonment for six months, Naresh, Ramesh Chand and Jai Singh were convicted under Section 323 IPC and were sentenced to undergo rigorous imprisonment for four months. The substantive sentences of imprisonment were ordered to run concurrently.

(f) Against the abovesaid order, Jai Singh, Ramesh, Naresh and Mohan Lal filed Criminal Appeal No. 647 of 2000 and Pala Ram, Sat Pal, Madan Lal, Ram Prakash, Rajesh, Ram Bhaj and Jai Kumar filed Criminal Appeal No. 657 of 2000 and Ganpat- the complainant and the appellant herein filed Criminal Revision Petition No. 475 of 2001 before the High Court of Punjab & Haryana for not holding guilty four of the eleven accused, namely, Jai Singh, Ramesh, Naresh and Mohan Lal under Sections 302/149 IPC. Vide judgment dated 01.05.2001, the High Court allowed the appeals and acquitted all the eleven accused persons and dismissed the criminal revision petition filed by the appellant herein. Challenging the judgment of the High Court, the appellant/complainant has preferred these appeals by way of special leave petitions.

3. Heard learned counsel for the appellant as well as the respondents.

4. The only point for consideration in these appeals is whether there is any ground for interference against the order of acquittal by the High Court. This Court has repeatedly laid down that the first appellate court and the High Court while dealing with an appeal is entitled and obliged as well to scan

through and if need be re-appreciate the entire evidence and arrive a conclusion one way or the other.

5. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. [Vide *Madan Lal vs. State of J & K,* (1997) 7 SCC 677, *Ghurey Lal vs. State of U.P.,* (2008) 10 SCC 450, *Chandra Mohan Tiwari vs. State of M.P.,* (1992) 2 SCC 105, *Jaswant Singh vs. State of Haryana,* (2000) 4 SCC 484].

6. With these principles, let us examine whether interference is required in the impugned order of the High Court acquitting all the eleven accused. It is not in dispute that the

incident occurred on the night of 25.10.1992. Among several witnesses examined on the side of the prosecution, material witnesses relied on by the trial court and the High Court are:

Ganpat PW-12/complainant/appellant herein, Mohinder Singh PW-13, Investigation Officer PW-14 and Dr. Sanjiv Grover PW-3, who treated injured witnesses/accused.

7. Before the trial court as well as the High Court, the accused took up the plea that they were innocent and there was danger to their life and the complainant party was the aggressor. We have already adverted to the relevant fact that there was dispute between the accused and the complainant party regarding the payment of price of crackers. A Panchayat was convened and the amount of the price of crackers was fixed by the Panchayat and still Mohinder Singh was demanding the price and he himself used force and caused harm to the accused party. We perused the evidence of PWs 12 and 13. It is true that both of them sustained injuries in the clash. According to them, the accused had inflicted injuries on them and blamed them for being the aggressor and having caused the death of Shambhu and for inflicting injuries to others. A perusal of the oral testimony of Ganpat PW-12 who was confronted with his statement made before the police wherein he had not mentioned the names of seven persons who is said to have participated in the commission of the crime. The only explanation for omission of those names was that of nervousness. It is useful to refer that the very same person who made a complaint to the police mentioned all the names of the accused persons assigned specific role for each one of them.

8. We also verified the statement of Mohinder Singh PW-13 wherein he claimed that Ganpat PW-12 reached the spot when he and Ishwar had already received the injuries. This also makes the presence of PW-12 at the spot to be doubtful. Though PW-13 has denied the suggestion that he was under the influence of alcohol at the time of occurrence the same was

falsified by the version of Dr. Sanjiv Grover PW-3. In his statement, he has noted that the injured Mohinder Singh was under the influence of alcohol at the time of first arrival.

9. It is also clear from the evidence of prosecution witnesses as well as the defence that Satpal A2, Madan Lal A-3, Jai Kumar A-11 also sustained injuries. Among these persons, A-2 sustained grievous injuries by the use of ghandasa. There is no proper explanation by the prosecution about the injuries sustained by the accused. Further, there is no definite evidence as to the place of occurrence. It is also relevant to note the statement of accused Satpal A-2 recorded under Section 313 of the Cr.P.C. After denying several questions, as regard to the last question about the alleged incident as set out by the prosecution, he explained before the Addl. Sessions Judge on 15.07.2000. The relevant question and answer is as follows:-

"Q.20. Have you to say anything else?

Ans. The facts of this case are that on the day of occurrence Mohinder PW came at the house of Jai Kumar in drunken condition and started abusing him. I and Madan were also present there being his nephew and also on account of Diwali festival. Jai Kumar and his wife stopped them from abusing and thereafter Mohinder PW went back and after sometime he came along with Shambu deceased, Ganpat and Ishwar Singh. Mohinder PW gave a gandasi blow on my head and I fell down on the ground. Thereafter Jai Kumar and his wife Kitabo Devi came forward to save me and then all of them started causing injuries to them as well as to Madan Lal and me. Jai Kumar etc. also caused injuries to the complainant in their self defence. Initially I, Pala Ram, Madan Lal and Jai Kumar were challaned and remaining accused were found to be innocent because all the eye witnesses including the complainant Ganpat and injured witnesses related to

deceased, had stated in their statement under section 161 Cr.P.C. that only four persons i.e. myself, Pala Ram, Madan and Jai Kumar were responsible for the death of Shambu and remaining accused were not named by them at all. The matter was placed before Panchayat also in which the complainant party had admitted that seven persons have been wrongly named. In fact the complainant party was aggressor and they entered the house of Jai Kumar and caused injuries to me, Madan, Jai Kumar and Kitabo Devi."

10. If we consider the above assertion by A-2 and the evidence of PWs 12, 13 as well as Dr. Sanjiv Grover PW-3 about the injuries sustained by the persons belonging to the complainant's and accused party, the conclusion of the High Court that the complainant party was the aggressor cannot be ignored.

11. It is also relevant to note the evidence of I.O. PW-14. His evidence shows that after the occurrence when he visited the hospital, he noticed not only the injured witnesses but also the injured accused. He admitted that Madan Lal A-3 and Satpal A-2 have sustained injuries and he also admitted that he had not recorded their statement as to in what manner they sustained injuries. Though he answered that they refused to make statement, admittedly he had not taken any action against them for refusing to make statements.

12. From the analysis of the statement of prosecution witnesses PWs 12, 13, various details about the injuries sustained by the prosecution witnesses as well as the accused spoken to by Dr. PW-3, categorical assertion of Satpal A-2 in respect of question No. 20 under Section 313 of the Cr.P.C., conduct of I.O. PW-14 in not recording statement of the injured accused who were also present in the same hospital when he visited to record the statement of injured complainant party, it is clear that two groups of people clashed *inter se* with

weapons causing injuries to each other, we hold that the complainant party was the aggressor and in the absence of definite material and explanation from the prosecution side, the High Court is right in acquitting all of them.

13. In the light of the above discussion, we find no merit in the appeals. On the other hand, we are in entire agreement with the conclusion arrived at by the High Court. Consequently, all the appeals are dismissed.

K.K.T. Appeals dismissed.

STATE OF ASSAM
v.
UNION OF INDIA AND ORS. ETC.
(Civil Appeal Nos. 8378-8392 of 2010)

SEPTEMBER 30, 2010

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

Party:

Impleadment of party – Held: In proceedings for a writ of certiorari, not only the Tribunal or Authority whose order is sought to be quashed but also the parties in whose favour the said order is issued are necessary parties – Writ petition by Voluntary Female Attendants seeking parity of pay scale as 'ward girls', which was '900-1435 p.m. – Single judge of High Court directing respondents including Union of India and State Government to pay Rs.900 p.m. – Writ appeal by Union of India – State Government not impleaded as a party – Division Bench of High Court shifting the liability of payment of salary/wages on the State Government – Held: Division Bench of High Court should have taken care and caution to find out whether the State Government was arrayed as a party to the proceedings and whether they were served with the notice of the appeals – In such matters, even if by mistake of the party, the proper parties were not arrayed in the proceedings, it is the duty of the Court to see that the parties are properly impleaded – It is well settled principle consistent with natural justice that if some persons are likely to be affected on account of setting aside a decision enuring to their benefit, the court should not embark upon the consideration and the correctness of such decision, in the absence of such persons – State Government was a necessary party – Non-impledment of State Government resulted in imposition of huge recurring financial liability on it without a fair hearing – Matter remitted to High Court for consideration afresh –

However, State Government directed to pay minimum wages during the pendency of appeals before High Court subject to final orders – Natural justice – Writ of certiorari – Service law – Parity in pay scale.

Necessary party and proper party – Distinction between – Held: A necessary party is one without whom, no order can be made effectively and 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 of the question involved in the proceeding.

***Evidence**: Admission – Held: The allegation of fact, if not denied/controverted in the counter affidavit, normally, it shall be taken to be admitted by the respondents.*

***Judgment/order**: Appeal against a judgment – Duty of appellate court – Held: Appellate court has to look into the impugned judgment for the facts stated therein and not infer facts based on what is urged before it.*

The Union of India had introduced "Family Welfare Scheme" under its Family Planning Programme with effect from 1st September, 1966. Under the scheme, there was a provision for the appointment of 'Voluntary Female Attendants' on a monthly honorarium of Rs.50/- from the inception of the scheme, which was subsequently increased to Rs.100/- p.m. In 1973, one such Voluntary Female Attendant, Nandeshwari Devi filed a writ petition before the High Court against the State of Assam on the ground that the work of the Voluntary Female Attendant under the said scheme and that of the regularly appointed 'Ward Girls' by the Union of India was similar and, therefore, they were entitled to parity in the pay scale as 'Ward Girls'' which at that time was Rs.900-1435 per month. The single judge of the High Court partly allowed the writ petition and directed the State Government to pay

the minimum pay-scale in the time-scale of pay i.e. Rs.900/- p.m. After the said decision, nearly 54 Voluntary Female Attendants filed the writ petition in the High Court seeking the same relief that was granted in *Nandeshiwari Bora's* case. The relief that was sought in the writ petition was for regularisation of their services and for payment of salary as per the existing pay scale. In the light of decision in *Nandeshwari Bora's* case, the single judge of the High Court partly allowed the writ petition and directed all the respondents including the Union of India and the State Government to pay Rs.900/- p.m., the minimum of the pay scale to the Voluntary Female Attendants. However, with regard to the question of regularization of service, the High Court observed that it was for the State of Assam to consider the same in accordance with law.

Aggrieved, the Union of India filed appeals before the Division Bench of the High Court. In the appeals so filed, the Union of India did not implead the State of Assam as a party. The contention of the Union of India was that these Voluntary Female Attendants were not their employees and the appointment letters to these Female Attendants were issued by the State of Assam and there was no mention in those appointment letters that they were appointed under the Centrally Sponsored Scheme. The Division Bench of the High Court absolved the Union of India of the responsibility of making payment to these Voluntary Female Attendants, but fixed this liability on the State of Assam. The instant appeals were filed by the State of Assam challenging the decision of the High Court.

Allowing the appeals and remitting the matter to the High Court, the Court

HELD: 1.1. In proceedings for a writ of certiorari, not

only the Tribunal or Authority whose order is sought to be quashed but also the parties in whose favour the said order is issued are necessary parties and that it is in the discretion of the Court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either suo-moto or on the application of a party to the writ or on application filed at the instance of such proper party. A necessary party is one without whom, no order can be made effectively and 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 of the question involved in the proceeding. [Paras 13, 14]

Udit Narain Singh Malpharia v. Additional Member, Board of Revenue, Bihar **AIR 1963 SC 786, relied on.**

1.2. The State of Assam specifically asserted the issue that it was neither impleaded as a party to the proceedings nor it was heard in the matter before passing an adverse order against it. In the counter affidavits filed by the Union of India, it had denied various assertions made by the State of Assam, but it was not stated by them that they had arrayed the State of Assam as a party to the proceedings nor did they assert that the counsel for the State was heard in the matter. The respondents ought to have dealt specifically with each allegation of fact of which, it did not admit to be true. The allegation of fact, if not denied/controverted in the counter affidavit, normally it shall be taken to be admitted by the respondents. The State of Assam, while filing the appeals, had enclosed the copies of the memoranda of writ appeals filed by the Union of India before the Division Bench of the High Court. On a perusal of the same, in light of the grounds raised and the relief sought, the State of Assam should have been joined as a necessary party. The reason being, firstly, the State of Assam was the first

respondent in the writ petition that was filed by the private respondents. Secondly, the main grievance of the Union of India was against the direction issued by the single judge to pay minimum pay scale to the volunteers, since it is their stand in the writ appeal that under the scheme, their liability is only to the extent of Rs.100/- per month as honorarium payable to Voluntary Female Attendants and anything over and above, was required to be paid by the State Government. Thirdly, the Division Bench of the High Court had imposed the burden of payment of the salary/wages as directed by the single judge on the State of Assam in view of the fact that the appointments were made by the State Government. This omission or default cannot be characterized as technical breach nor just an irregularity, since this omission had resulted in a party suffering an adverse order without getting a fair hearing. [Paras 15, 16, 19]

2.1. The appellate court has to look into the impugned judgment for the facts stated therein and not infer facts based on what is urged before it. The appellate court always proceeds on the assumption that whatever is on record in clear terms is the correct factual position, and not what can be inferred by interpreting stray observations. [Para 20]

State of Maharashtra v. R.S. Nayak **(1982) 2 SCC 463;** *Apar Pvt. Ltd. v. Union of India* **(1992) Supp (1) SCC 1;** *Registrar, Osmania University v. K. Jyoti Lakshmi* **(2000) 9 SCC 177, relied on.**

2.2. The High Court while allowing the appeals filed by the Union of India and shifting the liability of payment of salary/wages to Voluntary Female Attendants on the State of Assam should have taken a little more care and caution to find out whether the State of Assam was arrayed as a party to the proceedings and whether they

were served with the notice of the appeals and whether in spite of service, they had remained absent. This is the least that is expected from the Court. Without making this small verification, the Division Bench of the High Court fixed huge recurring financial liability on the State Government. In matters of this nature, even if by mistake of the party, the proper parties were not arrayed in the proceedings, it is the duty of the Court to see that the parties are properly impleaded. It is well settled principle consistent with natural justice that if some persons are likely to be affected on account of setting aside a decision enuring to their benefit, the Court should not embark upon the consideration and the correctness of such decision in the absence of such persons. [Para 21]

3. Keeping in view the interim orders passed by this Court dated 20.04.2009, pursuant to which it is the State of Assam which is paying minimum of pay scale to the private respondents, the private respondents in these appeals are required to be paid at least minimum wages payable under the Minimum Wages Act during the pendency of the appeals before the High Court, by the State of Assam, subject to the final orders that may be passed by the High Court. [Para 26]

Case Law Reference:

AIR 1963 SC 786	**relied on**	**Para 13**
(1982) 2 SCC 463	**relied on**	**Para 20**
(1992) Supp (1) SCC 1	**relied on**	**Para 20**
(2000) 9 SCC 177	**relied on**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8378-8392 of 2010.

From the Judgment & Order dated 16.11.2001 in Review

Petition No. 124 of 2006 of the High Court of Gauhati and Order dated 2.9.2003 in WA No. 535 of 2001 & 536, 349, 383, 331-339 & 534 of 2002.

H.P. Rawal, ASG, Krishnan Venugopal, Vijay Hansaria, Avijit Roy, Krishna, Corporate Law Group, Sanjeev Sen, Jai Prakash Pandey, Amit Pandey, Biswanath Agrawala, Rajiv Mehta, Shailender, Saini, D.S. Mahra, Sneha Kalita, Shankar Divate, Goodwill Indeevar, Rituraj Biswas, Manish Kumar, Gopal Singh for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. The appellant, being aggrieved by the judgment and order in WA No. 535/2001 and other connected appeals and also the dismissal of the Review Petition No. 124/2006 by the Division Bench of High Court of Gauhati, is before us in these appeals.

3. The factual matrix in brief is as under :

The Union of India (Respondents herein) had introduced "Family Welfare Scheme" under its Family Planning Programme with effect from 1st day of September, 1966. Under the said scheme, there was a provision for the appointment of 'Voluntary Female Attendants' on a monthly honorarium of `50/- per month from the inception of the scheme, which was subsequently increased to `100/- per month with effect from February, 2001. According to the Union of India, the work of these attendants is to motivate people in their locality to have a small family. This assertion of the Union of India is disputed by the private respondents. They assert that though they were appointed as `Volunteers', they were made to assist the Auxiliary nurses-cum-midwives in the Health sub-centers at the time of field visit and for miscellaneous works like cleaning, etc. in the sub-centers.

4. Sometime in the year 1993, one such Voluntary Female Attendant - Nandeshwari Bora filed a writ petition CR No. 3847/1993 before the High Court of Gauhati against the State of Assam, on the ground that the work of the Voluntary Female Attendant under the aforesaid scheme and that of the regularly appointed 'Ward Girls' by the respondents therein was similar and, therefore, demanded parity in the pay scale as 'Ward Girls', which at that time was `900-1435 per month. The single Judge of the High Court allowed the writ petition and directed the State Government to pay the minimum pay-scale in the time-scale of pay i.e. `900/- per month. Unfortunately, the text of this judgment of the learned Single Judge is not before us for our perusal, as the counsel appearing on both sides have stated that though they have made all efforts to secure a certified copy of the judgment, they have been unsuccessful, as the same is not available in the Registry of the High Court of Gauhati. Therefore, we will have to proceed without having the advantage of seeing the reasoning of the learned Judge in his conclusion. However, in the subsequent judgment passed by the High Court, there is some reference to the findings and conclusion reached by the learned Single Judge in Nandeshwari Bora's case. This may help us in understanding the reasoning and conclusion reached in Nandeshwari Bora's case.

5. After the decision of the High Court in Nandeshwari Bora's case in C.R. No. 3847 of 1993, nearly 54 (fifty four) Voluntary Female Attendants filed writ petition in the High Court, inter alia seeking the same relief that was granted in Nandeshwari Bora's case. The lead case was by Jalini Brahma being C.R. No. 3073 of 1995. The relief that was sought in the writ petition was for regularization of their services and for payment of salary as per the existing pay scale. In the light of the decision of the Court in Nandeshwari Bora's case, the learned Single Judge of the High Court by judgment and order dated 22.02.2000, partly allowed the writ petition and directed all the respondents (which included the Union of India and the

State Government) to pay '900/- per month, the minimum of the pay scale to the Voluntary Female Attendants. The operative portion of the Judgment and order is extracted. It reads :-

> "…Learned Counsel for the respondents have not been able to show anything whereby the petitioners can be deprived of their minimum wages. It is submitted that the ROP Rules of 1990 provide a pay scale of Rs.900-1435/- for the post of Female Attendant. Accordingly, I direct all the 7 respondents to pay the petitioner the minimum wages of Rs. 900/- per month from the month of July 1990 or from the date of their employment, whichever is later…"

6. However, with regard to the question of regularization of service, the learned Single Judge has observed that it was for the State of Assam to consider the same in accordance with law.

7. Subsequently, another Writ Petition No. 5496 of 2001 came to be filed by Hazera Khatoon for the same relief as in Jalini Brahma's case. There were 5 (five) respondents in the petition, amongst them were the Union of India and the State of Assam. The learned Single Judge of the High Court disposed of the same in light of the decision of the Court in Jalini Brahma's case.

8. After disposal of the writ petition filed by Hazera Khatoon, the Union of India, being aggrieved by the said order and the orders passed in Jalini Brahma's case, filed appeals before the Division Bench of the High Court. In the appeals so filed, the Union of India, strangely, did not implead the State of Assam as a party to those proceedings.

9. In their appeals, the Union of India contended that these Voluntary Female Attendants were not their employees and, therefore, the learned Single Judge ought not to have issued any direction to the Union of India, much less for payment of minimum of pay scale. It was further brought on record that the

State of Assam had issued appointment letters to these Female Attendants and there was no mention in those appointment letters that they were appointed under the Centrally Sponsored Scheme. Hence, the Union of India requested the Court to discharge them of the liability of any payment of wages to the private respondents appointed by the State Government by issuing orders/letters of appointment. The Division Bench, while accepting the stand of the Union of India, has observed :-

> "…However, it will be seen as discussed in this judgment that the appointment letters in question have nothing to link them with the centrally sponsored scheme of Voluntary Workers at fixed honorarium espoused by the present appellant. Neither in the assertion in the writ petitions nor in the appointment letters there are any contention to invite and fix any liability on the Union of India for minimum wages. Any such dispute is a matter to be settled by the Union of India and the State of Assam without effecting the rights of the Writ petitions.
>
> Appeals filed by the Union of India are allowed. The Union of India has no liability in these connected Writ Appeals, vis-à-vis the writ petitions…"

10. By this order, the Division Bench of the High Court absolved the Union of India of the responsibility of making payment of minimum of the pay scale to these Voluntary Female Attendants, but fixed this liability on the State of Assam.

11. Aggrieved by the judgment and order of the Division Bench, a Review Petition was filed by the State of Assam, inter alia, on the ground, that they were not heard before an adverse order was passed against them. By an innocuous order, the Division Bench has dismissed the same. Hence the State of Assam is before us, being aggrieved by the judgment and order of the Gauhati High Court in the said Writ Appeals and also against the dismissal of the Review Petition.

12. Shri. Krishnan Venugopal, learned senior counsel, appeared on behalf of the appellants. Shri. H.P. Rawal, the learned Additional Solicitor General, appeared for the Union of India. The private respondents were represented by Sh. Vijay Hansaria, learned senior counsel and Sh. Sanjiv Sen, learned counsel.

13. The State of Assam has raised several grounds in their petitions for Special Leave. However, at the time of hearing of these appeals, the learned senior counsel for the State of Assam contended that the State of Assam was not arrayed as a party to the proceedings and without impleading the State and without affording an opportunity of hearing, the Division Bench ought not to have passed an adverse order against the State. He further contended that the State of Assam was a necessary party to the lis before the High Court and the non-impleadment was contrary to the well settled principle of Natural Justice, namely audi alterem partem. In aid of this submission, the learned senior counsel has placed reliance on the law laid down by this Court in the case of Udit Narain Singh Malpharia Vs. Additional Member, Board of Revenue, Bihar (AIR 1963 SC 786), wherein it was held that in proceedings for a writ of certiorari, it is not only the Tribunal or Authority whose order is sought to be quashed but also the parties in whose favour the said order is issued, are necessary parties and that it is in the discretion of the Court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either suo-moto or on the application of a party to the writ or on application filed at the instance of such proper party.

14. We respectfully agree with the observations made by this Court in *Udit Narain's* case (supra) and adopt the same. We may add that the law is now well settled that a necessary party is one without whom, no order can be made effectively and 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 of the question involved in the proceeding.

15. In the appeals filed, the State of Assam has specifically joined the issue with the respondents that the appellant was neither impleaded as a party to the proceedings nor it was heard in the matter before passing an adverse order against it. The specific issue raised reads as under:

> "c) For that, the Division Bench of the Hon'ble Court while exercising its review as well as writ appellate jurisdiction failed to appreciate the facts of the case and overlooked the fact that the State of Assam, present leave petitioner, was not made party to the said 14 numbers of Writ Appeals preferred by the Respondent No.1 while allowing the said Writ Appeals absolving the responsibility of Union of India/Respondent No.1 from making payment of the honorarium at the enhanced rate of Rs. 900/- per month to the writ petitioners and imposing the entire burden of such payment on the State of Assam and more particularly when the State of Assam was not made a party in the aforesaid Writ Appeals. In view of commission of such gross error of law as well facts, the said impugned order dated November 16, 2007 and judgment and order dated September 02, 2003 is liable to be interfered with for meeting the ends of justice."

16. The Union of India has filed its counter affidavit. It has denied various assertions made by the appellants, but in so far as the aforesaid assertion of the appellants, it is not stated by them that they had arrayed the State of Assam as a party to the proceedings nor do they assert that the learned counsel for the State was heard in the matter. In our view, the respondents must deal specifically with each allegation of fact of which, it does not admit to be true. The allegation of fact, if not denied/controverted in the counter affidavit, normally it shall be taken to be admitted by the respondents.

17. The learned A.S.G. Shri H.P. Rawal drew our attention

to the observation in the impugned judgment of the Writ Appeal to contend that though State of Assam was not arrayed as a party in the Memorandum of Appeal filed, the learned Government Advocate was heard in the matter. In support of his submission, the learned ASG invites our attention to the following observations made by the Court in the course of the order :-

> "5. We have heard the learned Sr CGSC and the Government Advocates in length, considered all relevant materials in these appeals and perused the judgment and order passed by the Single Benches."

18. Keeping the aforesaid observation in view, Sh. Rawal urged before us that an inference can be drawn from the reference made in the judgment, that the State of Assam was heard through their Government Advocate. Therefore, he submits that it cannot be contended by the State of Assam that they were not heard before passing of the impugned judgment. We are not inclined to accept this argument.

19. State of Assam, while filing these appeals, has enclosed the copies of the memorandum of writ appeals filed by the Union of India before the Division Bench of the High Court. On a perusal of the same, we are of the view that in light of the grounds raised and relief sought, the State of Assam should have been joined as a necessary party. The reason being, firstly, the State of Assam was the first respondent in the writ petition that was filed by the private respondents. Secondly, the main grievance of the Union of India was against the direction issued by the learned Single Judge to pay minimum pay scale to the volunteers, since it is their stand in the writ appeal that under the scheme, their liability is only to the extent of '100/- per month as honorarium payable to Voluntary Female Attendants and anything over and above, requires to be paid by the State Government. Thirdly, the Division Bench of the High Court has imposed the burden of payment of the salary/ wages as directed by the Single Judge on the State of Assam

in view of the fact that the appointments were made by the State Government. In our view, this omission or default cannot be characterized as technical breach nor just an irregularity, since this omission has resulted in a party suffering an adverse order without getting a fair hearing.

20. We cannot also agree with the contention of Shri Rawal, learned Additional Solicitor General, that the learned Government counsel for the State of Assam was heard by the Division Bench before passing the impugned order for the reason that it is consistently held by this Court that we need to look into the impugned judgment for the facts stated therein and not infer facts based on what is urged before us. In other words, the appellate court always proceeds on the assumption that whatever is on record in clear terms is the correct factual position, and not what can be inferred by interpreting stray observations. This principle is now well settled by several decisions of this Court. [See: *State of Maharashtra v. R.S. Nayak,* (1982) 2 SCC 463; *Apar Pvt. Ltd. v. Union of India,* (1992) Supp (1) SCC 1; *Registrar, Osmania University v. K. Jyoti Lakshmi,* (2000) 9 SCC 177].

21. We are also unable to comprehend any possible reasons for the Union of India to omit the State of Assam from the array of parties in the writ appeals filed before the Division Bench of the High Court. The fact remains that they were not made parties to the proceedings. The High Court, in our view, while allowing the appeals filed by the Union of India and shifting the liability of payment of salary/wages to Voluntary Female Attendants on the State of Assam, should have taken a little more care and caution to find out whether the State of Assam is arrayed as a party to the proceedings and whether they are served with the notice of the appeals and in spite of service, whether they have remained absent. This is the least that is expected from the Court. Without making this small verification, the Division Bench of the High Court has fixed huge recurring financial liability on the State Government. In our opinion, in

matters of this nature, even by mistake of the party, the proper parties were not arrayed in the proceedings, it is the duty of the Court to see that the parties are properly impleaded. It is well settled principle consistent with natural justice that if some persons are likely to be affected on account of setting aside a decision enuring to their benefit, the Court should not embark upon the consideration and the correctness of such decision in the absence of such persons.

22. In light of the above findings, we have no other alternative except to set aside the impugned judgment and remand the matter to the Division Bench of the High Court for de-novo hearing.

23. The next issue that needs our attention is: what is to be done to protect the interests of the private respondents who are working as volunteers for the last two decades. Whether they should wait till the writ appeals are decided by the High Court or whether they should be paid some remuneration during the interregnum. If they have to be paid immediately, what is the amount and who should pay?

24. Sh. Vijay Hansaria and Sh. Sanjiv Sen, appearing on behalf of the private respondents, have vehemently argued before us that the matter may be remanded only to decide who should shoulder the burden of payment of salary to the private respondents.

25. In support of their submission, they have urged before us that the issue whether the liability of payment of salary exists or not, has attained finality. The only issue that requires to be gone into by the High Court is who should shoulder the responsibility. It is pointed out that in Jalini Brahma's case, the learned Single Judge of the Gauhati High Court has placed the responsibility of payment of salary to the private respondents and similarly placed persons, on all the respondents, viz. the Union of India and the State Government (or their functionaries). They further stated that the question of liability, as decided by

the learned Single Judge, was never appealed against and in so far as the payment of minimum wages to the Voluntary Female Attendants at par with the regularly appointed Ward Girls has also attained finality. They fairly conceded that with respect to their request for regularization of their service, the learned Single Judge had decided against the private respondents, and since they never appealed against the same, it had also attained finality. Therefore, the learned counsel would contend that till the appeals are decided by the Division Bench of the High Court, the State of Assam should be directed to pay the minimum of the pay scale to the private respondents.

26. Having considered the rival opinions suggested by the learned counsel for the parties to the lis and also keeping in view the interim orders passed by this Court dated 20.04.2009, pursuant to which it is the State of Assam which is paying minimum of pay scale to the private respondents, we are of the view that the private respondents in these appeals require to be paid at least minimum wages payable under The Minimum Wages Act during the pendency of the appeals before the High Court, by the State of Assam, subject to the final orders that may be passed by the High Court.

27. In view of the above, we allow these appeals and set aside the impugned judgment and orders passed by the Division Bench of Gauhati High Court and remand the matter to the High Court with a request to dispose of the appeals as early as possible, at any rate, within six months from today after ensuring that proper parties are impleaded. During the interregnum, we direct the State Government to pay the minimum wages under the provisions of Minimum Wages Act, as notified in their official Gazette to the private respondents. Liberty is reserved to all the parties to raise all such contentions which are available to them including the contentions raised before this Court. In the facts and circumstances of the case, we direct the parties to bear their own costs.

D.G. Appeals allowed.

SMT. PEBAM NINGOL MIKOI DEVI
v.
STATE OF MANIPUR AND ORS.
(Criminal Appeal No. 1849 of 2010)

SEPTEMBER 27, 2010

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

National Security Act, 1980 – s.3(2) – Preventive detention – Legality – Editor of a Daily evening paper detained under the National Security Act – Detention order – Challenge to – Held: There was no reasonable basis for the detention order, and there was no material to support the same – None of the documents relied on by the detaining Authority in passing the detention order could be deemed to be pertinent – Delay in forwarding the representation of the detenu to Central Government also remained unexplained – Sufficient ground made out for quashing the order of preventive detention – Constitution of India, 1950 – Article 22(5) – Judicial review – Purpose of – Delay

Code of Criminal Procedure, 1973 – s.161 – Statements under – Held: Cannot be taken as sufficient grounds in the absence of any supportive or corroborating grounds – S.161 statements are not considered substantive evidence, but can only be used to contradict the witness in the course of a trial – Evidence.

The husband of the appellant was the Editor of a Manipuri Daily evening paper. He was detained under Section 3(2) of the National Security Act, 1980 on the allegation that he was involved in extorting money from contractors and engineers of Public Health Engineering Department and Forest Department of Manipur Government by delivering demand letters which he printed in his own press; and that this extortion resulted

in a terror wave in the general public which was prejudicial to the maintenance of public order.

The appellant filed a habeas corpus petition before the High Court questioning the detention on various grounds viz.: (1) that the allegations made in the detention order were vague and irrelevant and not sufficient to deprive the detenu of his fundamental rights guaranteed under Art. 22(5) of the Constitution; (2) that there were no cogent materials upon which the subjective satisfaction of the detaining Authority that the detenu was likely to be released on bail was arrived at; (3) that there was a delay in forwarding the representation to the Central government; (4) that all the procedural requirements of Article 22 are mandatory in character and even if one of the procedural requirements is not complied with, the order of detention would be rendered illegal. The High Court dismissed the petition.

In the instant appeal, the question arising for consideration was whether, in the fact and circumstances of the case, a *prima facie* case for release of the detenu was made out.

Allowing the appeal, the Court

HELD:1. Individual liberty is a cherished right, one of the most valuable Fundamental Rights guaranteed by the Constitution to the citizens of this Country. The Constitution of India protects the liberty of an individual. Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. In matters of preventive detention such as this, as there is deprivation of liberty without trial, subsequent safeguards are provided in Article 22 of the Constitution. They are, when any person is detained pursuant to an order made under

any law providing for preventive detention, the authority making the order is required to communicate the grounds on the basis of which, the order has been made and give him an opportunity to make a representation against the order as soon as possible. [Para 4]

2. In matters of this nature, this Court normally will not go into the correctness of the decision as such but will only look into decision making process. Judicial review is not an appeal from a decision but review of the manner in which the decision was made. The purpose of review is to ensure that the individual receives a fair treatment. The fact that the grounds stated in the order of detention are sufficient or not, is not within the ambit of the discretion of the court and it is the subjective satisfaction of the detaining authority which is implied. However, if one of the grounds or reasons which lead to the subjective satisfaction of the detaining authority under the National Security Act, is non-existent or misconceived or irrelevant, the order of detention would be invalid. [Paras 15 and 22]

3. There must be a reasonable basis for the detention order, and there must be material to support the same. The Court is entitled to scrutinize the material relied upon by the Authority in coming to its conclusion, and accordingly determine if there is an objective basis for the subjective satisfaction. The subjective satisfaction must be two fold. The detaining authority must be satisfied that the person to be detained is likely to act in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order and the authority must be further satisfied that it is necessary to detain the said person in order to prevent from so acting. [Para 20]

Fazal Ghosi v. *State of Uttar Pradesh*, **(1987) 3 SCC 502;**

Shafiq Ahmed v. *District Magistrate, Meerut*, **(1989) 4 SCC 556;** *State of Punjab* v. *Sukhpal Singh*, **(1990) 1 SCC 35 and** *State of Rajasthan* v. *Talib Khan*, **(1996) 11 SCC 393, relied on.**

4. Under Article 22(5) of the Constitution, a detenu has two rights (1) to be informed, as soon as may be, of the grounds on which his detention is based and (2) to be afforded the earliest opportunity of making a representation against his detention. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the first right and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second right. No distinction can be made between introductory facts, background facts and 'grounds' as such; if the actual allegations were vague and irrelevant, detention would be rendered invalid. [Para 23]

5. In the instant case, it is clear that the grounds on which detention order was passed has no probative value and were extraneous to the scope, purpose and the object of the National Security Act. Insofar as the documents on which reliance is placed is concerned, none of these documents provide any reasonable basis for passing the detention order. The primary reliance has been on the accused's own statement made to an Investigating Officer. This cannot be said to be sufficient to form the subjective satisfaction of the detaining Authority. Statements under Section 161, CrPC cannot be taken as sufficient grounds in the absence of any supportive or corroborating grounds. Section 161 statements are not considered substantive evidence, but can only be used to contradict the witness in the course of a trial. The same is clear from the wording of Section 162(1) of CrPC and has been so held time and again by this Court. Furthermore, none of the other documents

substantiate the involvement of the detenu in unlawful activities as alleged in the detention order. Thus, it is clear that there was no pertinent or relevant material on the basis of which, the detention order could be passed. [Para 23]

Mohd. Yousuf Rather Vs. State of Jammu & Kashmir and Ors. **(AIR 1979 SC 1925) and** *Rajendra Singh* v. *State of Uttar Pradesh*, **(2007) 7 SCC 378, relied on.**

6. The other issue in the instant case is that of delay. There has been a delay of 7 days, i.e. from 09/10/2009 to 16/10/2009, in forwarding the representation of the detenu to the Central Government. There has been no explanation of the reasons for this delay given by the respondents. Article 22(5) of the Constitution of India mandates in preventive detention matters that the detenu should be afforded the earliest possible opportunity to make a representation against the order. The delay of 7 days may not be inordinate; however, at no stage has there been an explanation given for this delay. The State Government or Central Government has not clarified the same and thus the delay remains unexplained. [Paras 24, 25 and 27]

Union of India v. *Laishram Lincola Singh @ Nicolai*, **(2008) 5 SCC 490 and** *Haji Mohd. Akhlaq* v. *District Magistrate*, **1988 Supp (1) SCC 538, relied on.**

7. In light of the fact that none of the documents relied on by the detaining Authority in passing the detention order can be deemed to be pertinent, and the fact that the delay has remained unexplained, there is sufficient ground made out in order to quash the order of preventive detention made against the detenu. In the facts and circumstances of the case, the appellant *prima-facie* had made out a case for release of the detenu. The husband of the appellant ought not to have been

detained under preventive detention and have his liberty curtailed by virtue of his incarceration under Section 3(2) of the National Security Act, 1980. [Paras 2, 3 and 28]

Case Law Reference:

(1987) 3 SCC 502	**relied on**	**Para 16**
(1989) 4 SCC 556	**relied on**	**Para 17**
(1990) 1 SCC 35	**relied on**	**Para 18**
(1996) 11 SCC 393	**relied on**	**Para 19**
AIR (1979) SC 1925	**relied on**	**Para 23**
(2007) 7 SCC 378	**relied on**	**Para 23**
(2008) 5 SCC 490	**relied on**	**Para 25**
1988 Supp (1) SCC 538	**relied on**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1849 of 2010.

From the Judgment & Order dated 18.2.2010 of the High Court of Gauhati, Imphal Bench in Writ Petition (Crl.) No. 111 of 2009.

Dolen Phurailatpam, L. Roshmani Kh., Thajamanbi Luwang, Ananga Bhattacharyya, Khwairakpam Nobin Singh, Dr. Charu Wali Khanna, Shailendra Saini, Shreekant N. Terdal for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. By our order dated 14.09.2010, after hearing the learned counsel for the parties to the lis, we had directed the release of the detenu, since we were satisfied that the appellant prima-facie had made out a case for release of the detenu. Now

we give our reasons for allowing this appeal in support of our pre-emptory order.

3. Here is an unfortunate case involving a person who ought not to have been detained under preventive detention and have his liberty curtailed by virtue of his incarceration under Section 3(2) of the National Security Act, 1980 (hereinafter "NS Act").

4. Individual liberty is a cherished right, one of the most valuable Fundamental Rights guaranteed by the Constitution to the citizens of this Country. On "liberty", William Shakespeare, the great play writer, has observed that "a man is master of his liberty". Benjamin Franklin goes even further and says that "any society that would give up a little liberty to gain a little security will deserve neither and lose both". The importance of protecting liberty and freedom is explained by the famous lawyer Clarence Darrow as "you can protect your liberties in this world only by protecting the other man's freedom; you can be free only if I am free." In India, the utmost importance is given to life and personal liberty of an individual, since we believe personal liberty is the paramount essential to human dignity and human happiness. The Constitution of India protects the liberty of an individual. Article 21 provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. In matters of preventive detention such as this, as there is deprivation of liberty without trial, and subsequent safeguards are provided in Article 22 of the Constitution. They are, when any person is detained pursuant to an order made under any law providing for preventive detention, the authority making the order is required to communicate the grounds on the basis of which, the order has been made and give him an opportunity to make a representation against the order as soon as possible. It thus, cannot be doubted that the Constitutional framework envisages protection of liberty as essential, and makes the circumstances under which it can be deprived.

5. The appellant is the wife of Mr. Ranjit Oinamcha @ Oinam Ranjit Singh, who is the detenu under the National Security Act. She is questioning the detention order dated 24/09/2009 passed by the District Magistrate, Imphal West District, Manipur, against which, a challenge was made in the form of a habeas corpus petition in the Gauhati High Court (Imphal Bench) in Writ Petition (Crl.) No. 111/2009. By an order dated 18/02/2010, the High Court dismissed the writ petition. Aggrieved by the same, the appellant has filed this appeal.

6. The facts of this case, in a nutshell, are that the detenu was the Editor of a Manipuri Daily evening paper named 'Paojel', having its printing press at Keisamthing Top Leirak, Manipur. The assertions and allegations leading to his detention, as stated in the Grounds of Detention order passed by the District Magistrate dated 28/09/2009, are that the detenu could not get enough money from his press to maintain it or support his family, particularly due to the high rates of essential commodities in Manipur. Therefore, in 2003, he contacted Mr. Irom Priyobarta Singh @ Naocha with the intention of earning money without labour. From July 2003, he was in touch with Mr. Ratan @ Inao @ N. Ibochouba Singh, who was the Finance in-Charge of the United National Liberation Front (UNLF), Imphal West, after discussion with whom he decided to get involved in extorting money from contractors and engineers of Public Health Engineering Department ("PHED" for short) and Forest Department of Manipur Government by delivering demand letters which he printed in his own press. He and Mr. Irom Priyobarta Singh were to receive a 10% share of the extortion money. They accordingly started carrying out such extortion by printing these demand letters in his press and delivering them to the aforementioned contractors and engineers, and even issued threats to them not to report the matter to the Security Forces. This extortion resulted in a terror wave in the general public which is prejudicial to the maintenance of public order. The Grounds also pointed out that the UNLF is an unlawful association (declared so vide Gazette of India Notification,

under No. S.O. 1992(E), dated 13/11/2007) which looks to create an independent, sovereign State of Manipur by seceding from the Union of India, and that the said organization has involved itself in procuring arms and ammunitions from foreign countries, recruiting youngsters, and committing heinous crimes such as murder, dacoity, extortion, kidnapping for ransom etc.

7. Further, it is pointed out that on 17/09/2009 at 8 PM, a team of CDO/IW led by S.I. T. Khogen Singh came to the detenu's house as disclosed by Mr. Irom Priyobarta Singh, arrested him, and seized after observing due formality '10,04,000/- from him, as well as one Nokia handset from Mr. Irom Priyobarta Singh. An F.I.R. No. 183(9)09 SJM-P.S. was registered under Section 17/20 of the Unlawful Activities (Prevention) Act, 1967, and the detenu was arrested on 18/09/2009 and remanded into police custody till 24/09/2009. On 24/09/2009, he was presented before the Magistrate for judicial remand, and the detention order passed by the District Magistrate, Imphal West, was served on him. The Grounds of Detention were served on him on 28/09/2009, as required under Section 8 of the National Security Act.

8. The version of the detenu, on the contrary, as emerges from his Representation made to the Secretary, Ministry of Home Affairs, Government of India, as well as to the Chief Secretary, Manipur State, and the District Magistrate, Imphal West on 09/10/2009, is that he was indeed the editor of 'Paojel', an evening daily, which was established on 08/04/2006. On 17/09/2009 at about 4:30 PM, Mr. Irom Priyobarta Singh @ Naocha, who was a 'locality brother', brought to his residence a sum of `10,04,000/- for safe keeping, which he claimed was received for contract work, and which the detenu bona fide believed, and kept the money with him. The detenu then claims that at around 8:30 PM on the same day, police personnel of CDO, Imphal West, along with Mr. Irom Priyobarta Singh, came to his residence and asked him to hand over the money, which he did. On 18/09/2009, i.e. the next day, he was

told to report to the Officer in-Charge of the CDO, Imphal West, where he asserts he was interrogated regarding the money and forced to sign on a back dated Seizure Memo for 17/09/2009, as well as a back dated Arrest Memo. He was then detained and handed over to the Singjamei Police Station, where he was told that he was made a co-accused with Mr. Irom Priyobarta Singh, and a police case F.I.R. No. 183(9)09 SJM-P.S. was registered under Section 17/20 of the Unlawful Activities (Prevention) Act, 1967. Then, on 19/09/2009, he was remanded to police custody till 24/09/2009, when he was produced before the Magistrate for judicial remand, and the detention order passed by the District Magistrate, Imphal West, was served on him, which was followed by the Grounds of Detention given to him on 28/09/2009 at his cell at Manipur Central Jail, Sajiwa. He denies all the allegations made against him in the Grounds for Detention, claiming that he was not in any way involved with the UNLF or any of its associated cadres, that he started the press only in 2006 and could not have been involved in printing demand letters since 2003, that he did not even know Mr. Ratan @ Inao @ N. Ibochouba Singh, that the arrest and seizure was not done on 17/09/2008, but actually on 18/09/2009, and that he has not committed any acts so as to disturb the maintenance of public order and cause prejudice to the security of the State in any manner so as to have the NS Act invoked against him.

9. The Representation made by the detenu was rejected by State of Manipur on 03.10.2009. The Advisory Board constituted under Section 9 of the Act opined that there was sufficient cause for detention of the husband of the appellant under the National Security Act. The Governor of Manipur, in exercise of the power conferred under Section 12(1) of the Act, has approved the opinion expressed by the Advisory Board and has ordered that the detention of the husband of the appellant made by the District Magistrate, Imphal West District, dated 24.09.2009,and fixed the period of the detention for 12(twelve) months from the date of detention by his order dated

07.11.2009. There was delay in forwarding the Representation of the detenu to the Government of India. It was filed on 09/10/2009 and it was forwarded to the Central Government on 16/10/2009 by the State Government and received only on 28/10/2009, before being finally rejected by the Central Government on 03/11/2009.

10. The detention order was questioned before the Gauhati High Court in W.P. (Crl.) No.111/2009. The Court in the course of its order has noticed the main contention of the petitioner (who is the appellant in this appeal). They are: (1) the allegations made in the detention order are vague and irrelevant and not sufficient to deprive the detenu of his fundamental rights guaranteed under Art. 22(5); (2) there are no cogent materials upon which the subjective satisfaction of the detaining Authority that the detenu was likely to be released on bail was arrived at; (3) there was a delay of 6 days in forwarding representation to the Central government. (4) All the procedural requirements of Article 22 are mandatory in character and even if one of the procedural requirements is not complied with, the order of detention would be rendered illegal.

11. The High Court has responded to each of these, by holding that the allegations projected in the grounds of detention have been corroborated in material particulars. Further, the allegations were not vague or ambiguous, and the material was sufficient for the detaining Authority to arrive at the subjective satisfaction that the detenu was acting in a manner prejudicial to the maintenance of the public order. The High Court has also pointed out that the statement incriminating himself under Section 161 was prepared by a public servant, and there is a presumption of regularity, which the appellant has a burden to disprove in order to prove them false and fabricated, which was not done in this case. It highlighted that the exercise of discretionary power involved objective and subjective elements, and the subjective elements if derived from objective elements cannot be questioned on grounds of adequacy of subjective

satisfaction by a judicial review.

12. On the second ground, the Court held that the likelihood of detenu being released on bail can be determined by objective criteria, such as the conditions prevailing in Manipur, the fact that he was charged with heinous offences, and that he was remanded to judicial custody; it refused to interfere with the determination as it said it was not irrational, and the Court in such circumstances could not substitute its view for that of the detaining Authority. On the issue of delay, it pointed out that even though no explanation has been given by the State on delay, it is not inordinate enough to quash the order, and that delay per se cannot be a ground to quash the order.

13. At the time of hearing, learned Counsel for the appellant Mr.Dolen Phurailatpam argued, that though a few days have remained for the detention period to expire, the appeal need not be disposed of as having become infructuous, since the reputation of the detenu is sacrosanct and the right of reputation is a facet of right to life under Article 21. He took considerable time explaining the factual background of the case. He pointed out that the printing press of the detenu was established only in 2006, and therefore, there could be no question of him having been involved in printing demand letters from 2003 or 2004. He further explained that there was no supportive material to sustain the detention order, and that the same had also been mentioned in the writ petition filed before the High Court. He also stressed the point of delay of forwarding the representation of the detenu, and that no adequate reasons for the same had been given by the respondents in either the affidavit or in the pleadings before the Court.

14. Per contra, the learned counsel for the State of Manipur Mr.Khwairakpam Nobin Singh urged the factual background on the basis of which the decision to detain had been taken, and the difficulty faced due to the special conditions prevailing in Manipur in getting the evidence to prove the illegal activities of people such as the detenu and further the prosecution would

not be in a position to procure any evidence to sustain conviction. It is also urged that with the documents available, the detaining authority could form an opinion that the person to be detained is likely to act in a manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order etc. He did not, however, provide any explanation regarding the reason for delay in forwarding the representation. The learned counsel appearing for the Union of India Ms. Charu Wali Khanna, when questioned by this Court, also did not shed any further light on this issue.

15. To decide the correctness or otherwise of the detention order, two issues of importance arise before this Court. The first is, regarding the documents and material on which reliance was placed by the detaining Authority in passing the detention order. Secondly, with those materials, the detaining authority was justified in arriving at a finding that the detenu should be detained under the National Security Act without any trial. In matters of this nature, this Court normally will not go into the correctness of the decision as such but will only look into decision making process. Judicial review, it may be noted, is not an appeal from a decision but review of the manner in which the decision was made. The purpose of review is to ensure that the individual receives a fair treatment.

16. Some of the decisions of this Court may be of relevance in determining in what manner such subjective satisfaction of the Authority must be arrived at, in particular on Section 3(2) of the National Security Act. In *Fazal Ghosi* v. *State of Uttar Pradesh*, (1987) 3 SCC 502, this Court observed that:

> "The District Magistrate, it is true, has stated that the detention of the detenus was effected because he was satisfied that it was necessary to prevent them from acting prejudicially to the maintenance of public order, but *there is no reference to any material in support of that satisfaction*. We are aware that *the satisfaction of the District Magistrate is subjective in nature, but even subjective satisfaction must be based upon some pertinent material*. *We are concerned here not with the sufficiency of that material but with the existence of any relevant material at all.*" (emphasis supplied) (Para 3).

17. In *Shafiq Ahmed* v. *District Magistrate, Meerut*, (1989) 4 SCC 556, this Court opined :-

> "Preventive detention is a serious inroad into the freedom of individuals. Reasons, purposes and the manner of such detention must, therefore, be *subject to closest scrutiny and examination* by the courts." (emphasis supplied) (Para 5).

This Court further added:

> "…there must be *conduct relevant to the formation of the satisfaction having reasonable nexus with the action of the petitioner* which are prejudicial to the maintenance of public order. *Existence of materials relevant to the formation of the satisfaction and having rational nexus to the formation of the satisfaction* that because of certain conduct "it is necessary" to make an order "detaining" such person, are *subject to judicial review*." (emphasis supplied) (Para 5).

18. In *State of Punjab* v. *Sukhpal Singh*, (1990) 1 SCC 35, this Court held:

> "…*the grounds supplied operate as an objective test for determining the question whether a nexus reasonably exists between grounds of detention and the detention order* or whether some infirmities had crept in." (emphasis supplied) (Para 9).

19. In *State of Rajasthan* v. *Talib Khan*, (1996) 11 SCC 393, this Court observed that:

> "…what is material and mandatory is the communication

of the grounds of detention to the detenu *together with documents in support of subjective satisfaction* reached by the detaining authority." (emphasis supplied) (Para 8).

20. What emerges from these rulings is that, there must be a reasonable basis for the detention order, and there must be material to support the same. The Court is entitled to scrutinize the material relied upon by the Authority in coming to its conclusion, and accordingly determine if there is an objective basis for the subjective satisfaction. The subjective satisfaction must be two fold. The detaining authority must be satisfied that the person to be detained is likely to act in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of the public order and the authority must be further satisfied that it is necessary to detain the said person in order to prevent from so acting.

21. In light of these decisions, to determine the validity of the detention order, it is necessary to go into the materials relied on by the detaining Authority in passing the detention order. The documents relied upon by the District Magistrate, West Imphal, as mentioned in the Grounds for Detention dated 28/09/2009 are:

(a) The statement of the detenu given before the I.O. on 18/09/2009.

(b) Statement of S.I. T. Khogen Singh of CDO/I.W. recorded under S. 161 Cr.P.C. in connection with F.I.R. No. 183 (9) 09 SJM-P.S. under S. 17/20 of the Unlawful Activities (Prevention) Act, 1967.

(c) Statement of Rfm. No. 15007038 L. Rajen Singh of CDO/I.W. recorded under S. 161 Cr.P.C. in connection with F.I.R. No. 183 (9) 09 SJM-P.S. under S. 17/20 of the Unlawful Activities (Prevention) Act, 1967.

(d) Statement of C/No. 0601193 S. Khomei Singh recorded under S. 161 Cr.P.C. in connection with F.I.R. No. 183 (9) 09 SJM-P.S. under S. 17/20 of the Unlawful Activities (Prevention) Act, 1967.

(e) Copy of arrest memo dated 17/09/2009.

(f) Copy of seizure memo dated 17/09/2009.

(g) Copy of Manipur Local daily "the Poknapham" dated 08/03/1999.

(h) Copy of Notification under No. S.O. 1922 (E) dated 13/11/2007.

22. We are conscious of the fact that the grounds stated in the order of detention are sufficient or not, is not within the ambit of the discretion of the court and it is the subjective satisfaction of the detaining authority which is implied. However, if one of the grounds or reasons which lead to the subjective satisfaction of the detaining authority under NS Act, is non-existent or misconceived or irrelevant, the order of detention would be invalid.

23. Keeping in view these well settled legal principles, we have perused the grounds of detention and the documents relied on by the detaining authority while passing the order of detention. In our considered view, the grounds on which detention order is passed has no probative value and were extraneous to the scope, purpose and the object of the National Security Act. This Court in the case of *Mohd. Yousuf Rather Vs. State of Jammu & Kashmir and Ors.* (AIR 1979 SC 1925) has observed that under Article 22(5), a detenu has two rights (1) to be informed, as soon as may be, of the grounds on which his detention is based and (2) to be afforded the earliest opportunity of making a representation against his detention. The inclusion of an irrelevant or non-existent ground among other relevant grounds is an infringement of the first right and the inclusion of an obscure or vague ground among other clear and definite grounds is an infringement of the second right. No distinction can be made between introductory facts, background

facts and 'grounds' as such; if the actual allegations were vague and irrelevant, detention would be rendered invalid. In so far as the documents on which reliance is placed, in our opinion, none of these documents provide any reasonable basis for passing the detention order. The primary reliance has been on the accused's own statement made to an Investigating Officer. This cannot be said to be sufficient to form the subjective satisfaction of the detaining Authority. Statements under Section 161, Code of Criminal Procedure, 1973, (hereinafter Cr.P.C.) cannot be taken as sufficient grounds in the absence of any supportive or corroborating grounds. Section 161 statements are not considered substantive evidence, but can only be used to contradict the witness in the course of a trial. The same is clear from the wording of Section 162(1) of the Cr.P.C and has been so held time and again by this Court. In *Rajendra Singh* v. *State of Uttar Pradesh*, (2007) 7 SCC 378, this Court laid down that:

> "*A statement under Section 161 Cr.P.C. is not a substantive piece of evidence*. In view of the proviso to Sub-section (1) of Section 162 Cr.P.C., the statement *can be used only for the limited purpose of contradicting the maker thereof in the manner laid down* in the said proviso. Therefore, the High Court committed *a manifest error of law in relying upon wholly inadmissible evidence*..." (emphasis supplied) (Para 6).

23. Furthermore, none of the other documents substantiate the involvement of the detenu in unlawful activities as alleged in the detention order. Thus, it is clear that there was no pertinent or relevant material on the basis of which, the detention order could be passed.

24. The second issue is that of delay. There has been a delay of 7 days, i.e. from 09/10/2009 to 16/10/2009, in forwarding the representation of the detenu to the Central Government. There has been no explanation of the reasons for this delay given by the respondents.

25. Article 22(5) of the Constitution of India mandates in preventive detention matters. The detenu should be afforded the earliest possible opportunity to make a representation against the order. With regard to the importance of delay in preventive detention matters under the National Security Act, it has been held by this Court in *Union of India* v. *Laishram Lincola Singh @ Nicolai*, (2008) 5 SCC 490, that:

> "There can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red-tapism on the facts of a case, the Court would not interfere. It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the law of preventive detention is not lost in mechanical routine, dull casualness and chill indifference, on the part of the authorities entrusted with their application. *When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable.*" (emphasis supplied) (Para 6).

26. On the specific ground of delay in forwarding the representation under the National Security Act, it has been observed by this Court in *Haji Mohd. Akhlaq* v. *District Magistrate*, 1988 Supp (1) SCC 538, that:

> "*There can be no doubt whatever that there was unexplained delay on the part of the State Government in forwarding the representation to the Central Government* with the result that the said representation was not considered by the Central Government till October 16, 1987 i.e. for a period of more than two months. Section 14(1) of the Act confers upon the Central Government the power to revoke an order of detention even if it is made by the State Government or its officer. That power, in order to be real and effective, must imply a right in a detenu to make representation to the Central Government against

the order of detention. Thus, *the failure of the State Government to comply with the request of the detenu for the onward transmission of the representation to the Central Government has deprived the detenu of his valuable right to have his detention revoked by that Government*." (emphasis supplied) (Para 3).

27. In the matter before us, a delay of 7 days has occurred in the forwarding of the representation. This may not be inordinate; however, at no stage has there been an explanation given for this delay. The State Government or Central Government has not clarified the same and thus the delay remains unexplained.

28. In light of the fact that none of the documents relied on by the detaining Authority in passing the detention order can be deemed to be pertinent, and the fact that the delay has remained unexplained, there is sufficient ground made out in order to quash the order of preventive detention made against the detenu.

29. Before parting with the case, we wish to add that in a criminal case, if it is initiated against the detenu, the prosecution would not be in a position to procure evidence to sustain conviction cannot be a ground to pass an order of preventive detention under National Security Act. Therefore, we cannot agree with the submission made by the learned counsel for the State of Manipur.

30. As a result of our above discussion, we cannot sustain the impugned judgment and order of the High Court and the order of detention passed by the detaining authority. Accordingly, the appeal is allowed. The impugned order of the High Court and the order of detention passed by the detaining authority are set aside. Ordered accordingly.

B.B.B. Appeal allowed.

MOHD. YUNUS KHAN
v.
STATE OF U.P. AND ORS.
(Civil Appeal No. 8349 of 2010)

SEPTEMBER 28, 2010

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

Service Law – Termination – On ground of misconduct – Uttar Pradesh Police – Appellant, Guard Commander, found absent from duty for 25 minutes – Punishment drill for 10 days imposed – Protest by appellant – Punishment enhanced to confinement in cell for ten days – Appellant refused to serve the enhanced punishment – Disciplinary proceedings initiated by Commandant concerned – He appointed his own subordinate as the inquiry officer and himself appeared as a witness in the enquiry – Inquiry officer recommended removal of appellant and accordingly the Commandant terminated the service of appellant – Appellate Authority upheld the order of termination – Tribunal upheld the order of termination – Writ petition dismissed by High Court – On appeal, held – Held: The order of punishment stood vitiated – Absence of appellant from duty as Guard Commander for 25 minutes was bona fide and permissible under the statutory rules – Imposition of punishment for the said absence was unwarranted – Protest against the imposition of the said punishment could not warrant enhancement of punishment by the Commandant concerned – Consequently, disobedience of the enhanced punishment could not warrant initiation of disciplinary proceedings by the Commandant – The Commandant could not himself become the Judge of his own cause and could not appoint his own subordinate as the inquiry officer – The punishment order was passed in violation of the statutory rules and the principles of natural justice as well, and hence rendered null and void –

Directions issued to meet the ends of justice – Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Rules 13 and 14(1).

Service Law – Disciplinary proceedings – Bias – Authority who initiated the disciplinary proceedings against the employee became a witness before the inquiry officer appointed by him, who is subordinate to him in his office and also accepted the enquiry report and passed the order of punishment – Justification of – Held: Not justified – Such a course is not permissible in law – Natural justice – Violation of.

Service Law – Punishment – Past conduct – Relevance of – Held: Past conduct of an employee should not generally be taken into account to substantiate the quantum of punishment without bringing it to the notice of the delinquent employee.

Maxims – *Maxim* "nemo debet esse judex in propria causa" *(no man shall be a judge in his own cause).*

The appellant was posted with 30th Battalion PAC in G-Company. While on duty as Guard Commander, the appellant left his post and came back after 25 minutes after having tea and medicine in the canteen. The Dal Nayak endorsed his comments in respect of the appellant's absence for the period of 25 minutes and placed it before the Commandant concerned. The Commandant imposed the punishment of 10 days punishment drill. Upon protest by the appellant, the Commandant enhanced the punishment to 10 days confinement in a cell. The appellant refused to serve the punishment, which was considered to be a serious act of indiscipline and he was placed under suspension. The appellant was served with a chargesheet indicating that an enquiry was to be held against him under Rule 14(1) of the Uttar Pradesh Police Officers of the Subordinate

Ranks (Punishment and Appeal) Rules, 1991. The inquiry officer concluded the enquiry and submitted report that the appellant was guilty of negligence and disobedience and recommended his removal from service. Consequently, the Commandant passed order imposing the punishment of termination from service. Aggrieved, the appellant preferred appeal which was dismissed by the Appellate Authority. The appellate authority while justifying the order of termination took into consideration the past conduct of the appellant. The appellant filed claim petition before the Tribunal. The Tribunal dismissed the said Claim Petition recording the finding that the absence from duty for 25 minutes was bona fide and permissible under Rule 21 of the Guard and Escort Rules, however, not obeying the order of punishment was a case of gross indiscipline and thus, the order of termination of his services was justified. Thereafter, the appellant filed Writ Petition before the High Court which was dismissed.

Disposing of the appeal, the Court

HELD:1. Holding disciplinary proceedings against a government employee and imposing a punishment on his being found guilty of misconduct under the statutory rules is in the nature of quasi-judicial proceedings. Though, the technical rules of procedure contained in the Code of Civil Procedure, 1908 and the provisions of the Indian Evidence Act, 1872 do not apply in a domestic enquiry, however, the principles of natural justice require to be observed strictly. Therefore, the enquiry is to be conducted fairly and reasonably and the enquiry report must contain reasons for reaching the conclusion that the charge framed against the delinquent stood proved against him. It cannot be an ipse dixit of the inquiry officer. Punishment for misconduct can be imposed in consonance with the statutory rules and principles of natural justice. [Para15]

Bachhittar Singh v. State of Punjab & Anr., **AIR 1963 SC 395;** *Union of India v. H.C. Goel,* **AIR 1964 SC 364;** *Anil Kumar v. Presiding Officer & Ors.,* **AIR 1985 SC 1121;** *Moni Shankar v. Union of India & Anr.* **(2008) 3 SCC 484 and** *Union of India & Ors. v. Prakash Kumar Tandon* **(2009) 2 SCC 541, relied on.**

2. The requirements of morale, discipline and justice have to be reconciled. Even in disciplined forces, forced morale and discipline without assured justice breeds defiance and belligerency. Our Constitution protects not only the life and liberty but also the dignity of every person. Life convicts and hardcore criminals deprived of personal liberty are also not wholly denuded of their Constitutional rights. Arbitrariness is an anathema to the principles of reasonableness and fairness enshrined in our constitutional provisions. The rule of law prohibits the exercise of power in an arbitrary manner and/or in a manner that travels beyond the boundaries of reasonableness. Thus, a statutory authority is not permitted to act whimsically/arbitrarily. Its actions should be guided by the principles of reasonableness and fairness. The authority cannot be permitted to abuse the law or to use it unfairly. It is evident from the aforesaid rule that a person who is a witness in a case can neither initiate the disciplinary proceedings nor pass an order of punishment.[Paras 20, 21]

State of U.P. v. Mohd. Noor **AIR 1958 SC 86, followed.**

Union of India & Ors. v. L.D. Balam Singh, **(2002) 9 SCC 73;** *Lt. Col. Prithpal Singh Bedi v. Union of India & Ors*. **AIR 1982 SC 1413;** *R. Viswan & Ors. v. Union of India & Ors.* **AIR 1983 SC 658 and** *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School & Ors.* **AIR 1993 SC 2155, relied on.**

3. The legal maxim "*nemo debet esse judex in propria causa*" (no man shall be a judge in his own cause) is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof is treated as a violation of the principles of natural justice. Law requires that a person should not decide a case wherein he is interested. The failure to observe this principle creates an apprehension of bias on the part of the said person. The question is not whether the person is actually biased but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision. The existence of an element of bias renders the entire disciplinary proceedings void. Such a defect cannot be cured at the appellate stage even if the fairness of the appellate authority is beyond dispute. [Paras 24, 25 and 26]

Secretary to Government, Transport Department v. Munuswamy Mudaliar & Anr., **AIR 1988 SC 2232;** *Meenglas Tea Estate v. The Workmen* AIR 1963 SC 1719; *Mineral Development Ltd. v. The State of Bihar & Anr.* **AIR 1960 SC 468;** *A.U. Kureshi v. High Court of Gujarat & Anr.* **(2009) 11 SCC 84;** *S. Parthasarthy v. State of Andhra Pradesh* **AIR 1973 SC 2701 and** *Tilak Chand Magatram Obhan v. Kamla Prasad Shukla & Ors.* **1995 Supp. (1) SCC 21, relied on.**

Ashok Kumar Yadav & Ors. v. State of Haryana & Ors. **(1985) 4 SCC 417, referred to.**

4.1. If a person appears as a witness in disciplinary proceedings, he cannot be an inquiry officer nor can he pass the order of punishment as a disciplinary authority. This rule has been held to be sacred. An apprehension of bias operates as a disqualification for a person to act as adjudicator. No person can be a Judge in his own cause and no witness can certify that his own testimony

is true. Any one who has personal interest in the disciplinary proceedings must keep himself away from such proceedings. The violation of the principles of natural justice renders the order null and void. [Para 28]

4.2. In the instant case, the Commandant appeared as a witness and proved the disobedience of his orders of imposition of punishment, first as of punishment drill and subsequently of confinement to a cell. However, after appearing as a witness in the enquiry, he also passed the order of punishment, i.e., dismissal of the appellant from service. This issue has been agitated by the appellant throughout but none of the authorities or the courts below had taken it into consideration. Appellant has made crystal clear pleadings before this Court also in this regard and the same have not been denied in the counter affidavit by the respondents, rather a very vague and evasive reply has been filed stating that the disciplinary proceedings had been concluded strictly in accordance with law. [Para 29]

Arjun Chaubey v. Union of India & Ors. **AIR 1984 SC 1356, followed.**

5. An order in violation of the principles of natural justice may be void depending on the facts and circumstances of the case. In the instant case, in case the very first order of imposition of punishment for remaining absent from duty for 25 minutes was bad in law, the appellant's protest against the said punishment could not be said to be unjustified. The initiation of disciplinary proceedings against the appellant and the conclusion thereof by the imposition of the punishment by the Commandant, who had himself been a witness, was in flagrant violation of the principles of natural justice and thus, stood vitiated. "Principles of natural justice are to some minds burdensome but this price-a small price

indeed-has to be paid if we desire a society governed by the rule of law." All other consequential orders passed in appeal etc. remained inconsequential. More so, a protest/disobedience against an illegal order may not be termed as misconduct in every case. In an appropriate case, it may be termed as revolting to one's sense of justice. In view of the above, the protest raised by the appellant against the punishment imposed for his absence could not give rise to a cause of action for initiating the disciplinary proceedings. [Paras 31, 32]

Raja Jagdambika Pratap Narain Singh v. Central Board of Direct Taxes & Ors. **AIR 1975 SC 1816;** *Smt. Maneka Gandhi v. Union of India & Anr.* AIR 1978 SC 597; *Krishan Lal v. State of J & K,* **(1994) 4 SCC 422;** *State Bank of Patiala & Ors. v. S.K. Sharma* **AIR 1996 SC 1669;** *Union of India & Anr. v. M/s. Mustafa & Najibai Trading Co. & Ors.* **AIR 1998 SC 2526;** *Vishnu Dutt & Ors. v. State of Rajasthan & Ors.* **(2005) 13 SCC 592 and** *Nawabkhan v. State of Gujarat* **AIR 1974 SC 1471, relied on.**

6. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment. [Para 33]

Union of India & Ors. v. Bishamber Das Dogra **(2009) 13 SCC 102;** *State of Assam v. Bimal Kumar Pandit* **AIR 1963 SC 1612;** *India Marine Service (P) Ltd. v. Their Workmen* **AIR 1963 SC 528;** *State of Mysore v. K. Manche Gowda* **AIR 1964 SC 506;** *Colour-Chem Ltd. v. A.L. Alaspurkar & Ors.* **AIR 1998 SC 948;** *Director General, RPF v. Ch. Sai Babu* **(2003) 4 SCC 331;** *Bharat Forge Co. Ltd. v. Uttam Manohar Nakate*

(2005) 2 SCC 489; *Govt. of A.P. & Ors. v. Mohd. Taher Ali* (2007) 8 SCC 656, referred to.

7. The appellant joined the service on 10.2.1969 and his services stood terminated vide order dated 8.4.2003. Therefore, the benefit of service rendered by the appellant for more than 34 years stood forfeited. At the time of his removal from service, the appellant was 54 years of age. Thus, he had been visited with serious punishment on the verge of retirement. [Para 35]

8. In the facts and circumstances of the case, the following conclusions are inescapable viz. that (i) absence of appellant from duty as Guard Commander for 25 minutes was bona fide and permissible under the statutory rules; (ii) imposition of punishment of punishment drill for 10 days for the said absence was unwarranted; (iii) protest by the appellant against the imposition of the said punishment could not warrant enhancement of punishment of the appellant for confinement in cell for ten days; (iv) disobedience of the enhanced punishment could not, in this case, warrant initiation of disciplinary proceedings by the Commandant concerned against the appellant; (v) the Commandant could not himself become the Judge of his own cause; (vi) the Commandant could not appoint his own subordinate as the inquiry officer; (vii) the Commandant could have referred the matter to his superior officer for appropriate action in terms of Rules 1991; (viii) once the Commandant concerned appeared as a witness himself in the enquiry, he could not pass the order of punishment; (ix) the Authority who initiated the disciplinary proceedings against the appellant became a witness before the inquiry officer appointed by him, who is subordinate to him in his office and also accepted the enquiry report and passed the order of punishment.

Thus, the order of punishment stood vitiated; (x) the Appellate Authority could not consider the past conduct of the appellant to justify the order of punishment passed by the disciplinary authority without bringing it to the notice of the appellant; (xi) as the punishment order had been passed in violation of the statutory rules and the principles of natural justice as well, it is rendered null and void; thus, it remained inexecutable; (xii) past conduct of an employee should not generally be taken into account to substantiate the quantum of punishment without bringing it to the notice of the delinquent employee; and (xiii) the error of violating the principles of natural justice by the Disciplinary Authority has been of such a grave nature that under no circumstance can the past conduct of the appellant, even if not satisfactory, be taken into consideration. [Para 36]

9. The order of punishment is null and void and, therefore, cannot be given effect to. The appellant had already reached the age of superannuation and no fresh enquiry can be initiated in the matter if the earlier proceedings are rendered null and void for the violation of the statutory provisions and principles of natural justice. In the facts and circumstances of the case and in order to meet the ends of justice, it is desirable that the appellant be paid 50% of the wages from the date of removal from service till the date of reaching the age of superannuation and he be granted retiral benefits in accordance with law from the date of his retirement. [Para 37]

Case Law Reference:

AIR 1963 SC 395	**relied on**	**Para16**
AIR 1964 SC 364	**relied on**	**Para16**

AIR 1985 SC 1121	**relied on**	**Para16**
(2008) 3 SCC 484	**relied on**	**Para16**
(2009) 2 SCC 541	**relied on**	**Para 16**
(2002) 9 SCC 73	**relied on**	**Para 17**
AIR 1982 SC 1413	**relied on**	**Para 18**
AIR 1983 SC 658	**relied on**	**Para 19**
AIR 1958 SC 86	**followed**	**Para 22**
AIR 1993 SC 2155	**relied on**	**Para 23**
AIR 1988 SC 2232	**relied on**	**Para 24**
AIR 1963 SC 1719	**relied on**	**Para 24**
AIR 1960 SC 468	**relied on**	**Para 24**
(2009) 11 SCC 84	**relied on**	**Para 25**
(1985) 4 SCC 417	**referred to**	**Para 25**
AIR 1973 SC 2701	**relied on**	**Para 26**
1995 Supp. (1) SCC 21	**relied on**	**Para 26**
AIR 1984 SC 1356	**followed**	**Para 27**
AIR 1975 SC 1816	**relied on**	**Para 30**
AIR 1978 SC 597	**relied on**	**Para 30**
(1994) 4 SCC 422	**relied on**	**Para 30**
AIR 1996 SC 1669	**relied on**	**Para 30**
AIR 1998 SC 2526	**relied on**	**Para 30**
(2005) 13 SCC 592	**relied on**	**Para 30**
AIR 1974 SC 1471	**relied on**	**Para 31**

(2009) 13 SCC 102	**referred to**	**Para 34**
AIR 1963 SC 1612	**referred to**	**Para 34**
AIR 1963 SC 528	**referred to**	**Para 34**
AIR 1964 SC 506	**referred to**	**Para 34**
AIR 1998 SC 948	**referred to**	**Para 34**
(2003) 4 SCC 331	**referred to**	**Para 34**
(2005) 2 SCC 489	**referred to**	**Para 34**
(2007) 8 SCC 656	**referred to**	**Para 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8349 of 2010.

From the Judgment & Order dated 12.7.2007 of the High Court of Allahabad, Lucknow Bench in Writ Petition No. 782 (S/B) of 2007.

Tripurari Ray, Vishnu Sharma for the Appellant.

S.R. Singh, S.K. Dwivedi, Ameet Singh, Gunnam Venkateswara Rao for the Respondent.

The Judgment of the Court was delivered by

Dr. B.S. CHAUHAN, J. 1. Leave granted.

The facts of the present case reveal that a person who initiated the disciplinary proceedings against the appellant for disobeying his own orders; appointed his subordinate as an inquiry officer; appeared as a witness in the proceedings to prove the charges of disobedience of his orders; accepted the enquiry report; and further passed the order of punishment - i.e. dismissal of the appellant from service. The question does arise as to whether such a course is permissible in law.

2. This appeal has been preferred against the judgment and order dated 12th July, 2007 passed by the High Court of Allahabad (Lucknow Bench), dismissing the Writ Petition No. 782 of 2007 filed by the appellant against the judgment and order of the U.P. State Public Services Tribunal, (hereinafter referred to as the 'Tribunal') Lucknow dated 25th May, 2007, by which the Tribunal dismissed the Claim Petition No. 837 of 2003 filed by the appellant and upheld the order of dismissal of the appellant from service by the Statutory Authorities.

3. Facts and circumstances giving rise to this case are that the appellant was appointed as a Constable in the Provincial Armed Constabulary (hereinafter referred to as 'PAC') on 10th February, 1969 and promoted to the post of Head Constable vide order dated 5th May, 1983. The appellant was posted with 30th Battalion PAC in G-Company in the year 2002. On 29th September, 2002, the appellant was on duty as Guard Commander along with another Head Constable named Rama Nand. At around 6.20 A.M., the appellant left his post and came back after 25 minutes after having tea and medicine in the canteen. His departure from his post was duly recorded in the register maintained for the purpose by the other guard, Head Constable Rama Nand. The Dal Nayak endorsed his comments in respect of the appellant's absence for the period of 25 minutes and placed it before the Commandant on 3rd October, 2002. The Commandant vide order dated 4th October, 2002 imposed the punishment of 10 days punishment drill. Upon protest by the appellant, the Commandant enhanced the punishment to 10 days confinement in a cell. The appellant refused to serve the punishment being not acceptable to him.

4. Refusal to serve the punishment so imposed by the appellant was considered to be a serious act of indiscipline and he was placed under suspension. The appellant was served with a chargesheet dated 2nd December, 2002 indicating that an enquiry was to be held against him under Rule 14(1) of the Uttar Pradesh Police Officers of the Subordinate Ranks

(Punishment and Appeal) Rules, 1991 (hereinafter referred to as 'the Rules 1991). The appellant submitted his reply to the said chargesheet on 11th December, 2002. The inquiry officer concluded the enquiry and submitted the report on 28th March, 2003 with the finding that the appellant was guilty of negligence and disobedience and recommended his removal from service.

5. The Disciplinary Authority issued a notice dated 31st March, 2003 to the appellant to show cause as to why his services should not be terminated in view of the enquiry report. The appellant submitted his reply to the said show cause on 7th April, 2003. After considering the same, the Commandant passed the order dated 8th April, 2003 imposing the punishment of termination from service.

6. Being aggrieved, the appellant preferred an appeal against the order of termination. However, the said appeal was dismissed by the Appellate Authority vide order dated 25th August, 2003. The appellant challenged the said order of termination before the Tribunal by filing Claim Petition No. 837 of 2003. The Tribunal dismissed the said Claim Petition vide judgment and order dated 25th May, 2007 recording the finding that the absence from duty for 25 minutes on 29th September, 2002 was bona fide and permissible under Rule 21 of the Guard and Escort Rules, however, not obeying the order of punishment was a case of gross indiscipline and thus, order of termination of his services was justified.

7. Being aggrieved of the said judgment and order of the Tribunal, the appellant preferred a Writ Petition before the High Court which was dismissed vide impugned judgment and order dated 12th July, 2007 in a cursory manner without considering the issues raised by the appellant, merely on the ground that charge of disobedience of the orders of the higher authority stood proved and the enquiry had been conducted in accordance with law. Hence, this appeal.

8. Shri Tripurari Ray, learned counsel appearing for the

appellant has raised large number of submissions, *inter-alia,* the absence from duty for a short - specified period, when other guard is present on duty, is permissible under the Guard and Escort Rules. The appellant had left his duty for only 25 minutes and it was so recorded in the register at the spot. If such an absence is permissible in law, imposing the punishment of 10 days' punishment drill was unwarranted. More so, it had been awarded without giving a proper opportunity of hearing to the appellant. The appellant's protest against such an arbitrary imposition of punishment could not be the ground for enhancing the punishment to 10 days confinement in a cell; depriving him of his personal liberty was totally unwarranted and uncalled for, particularly, in view of the fact that the imposition of the very first punishment was in contravention of the statutory rules. The disciplinary authority did not consider the reply submitted by the appellant against the show cause notice wherein it had specifically been submitted that in case the Commandant was of the view that his orders had been violated, he should have referred the matter to his superior officer to transfer the disciplinary proceedings to another coordinate officer and that officer should have conducted the enquiry. The Disciplinary Authority himself appeared as a witness in the enquiry. Thus, the enquiry itself stood vitiated. The punishment of dismissal remained disproportionate to the proved delinquency; the Appellate Authority considered while passing the order, the past conduct of the appellant for the purpose of confirming the order of punishment passed by the Disciplinary Authority. The appellant's past conduct had never been the part of the chargesheet or the show cause notice; nor had the appellant ever been informed that his past conduct was likely to be considered at the time of passing the order of punishment. The High Court failed to consider that, in a case where there had been a violation of the statutory provisions, or principles of natural justice, power of judicial review required to be exercised. The appeal deserves to be allowed.

9. Per contra, Shri Ameet Singh, learned counsel

appearing for the State of U.P., has opposed the appeal contending that the appellant had been the member of a disciplined force. Indiscipline therein, amounts to a very serious misconduct. Therefore, it is intolerable. Once the charge of absence and further charge of disobedience stood proved, the matter does not deserve to be considered by this Court. The appeal lacks merit and is liable to be dismissed.

10. We have considered the rival submissions made by learned counsel for the parties and perused the record.

11. An enquiry was initiated against the appellant by the Commandant, for disobedience of the order of punishment by the Commandant himself. The charge-sheet contained two basic charges which read as under:-

"1. Your duty was as a Guard Commander in the Vahini Quarter Guard from 22.9.2002 to 29.9.2002. On 29.9.2002 in the morning at 06.30 a.m., inspection of the Vahini Quarter Guard was made by the Platoon Officer of "G" Platoon, when you were found absent. With regard to this absence the Second Guard Commander H.C.39074 Rama Nand told that you have gone to take tea and medicine. This was mentioned by the Platoon Officer "G" Platoon in the Inspection Book. With regard to this absence your explanation was sought by the Platoon Officer "G" Platoon, when you did not give satisfactory explanation and you sought that your explanation be placed before the Senanayak, in your explanation you alleged violation of rules and standing orders by the Platoon Officer "G" Platoon, which was submitted by the Platoon Officer "G" Platoon on 3.10.2002 with his comments before the Senanayak to produce you in his chamber.

2. On 4.10.2002 when you appeared before the Senanayak in the Orderly Chamber, after the hearing 10 days' P.D. was awarded to you which you declined. On this you were punished by the Senanayak for violation of

his order passed in the Orderly Chamber with 10 days cell punishment, which you the H.C. did not accept and after saluting the Commandant you voluntarily went out of the chamber."

12. The inquiry officer conducted the enquiry and on its conclusion held that the appellant was guilty on both counts. The Disciplinary Authority accepted the report and held that:

"Mohd. Yunus Khan has been found to be violating orders and bleak chances of improvement, not fit to be retained in a disciplined force like PAC as his continuance in the force will have adverse effect on other personnel. He is guilty of negligence in duty, indiscipline and disobedience of orders."

The Commandant awarded the punishment - dismissal from service.

13. The Appellate Authority, while affirming the said order of punishment, considered the past conduct of the appellant wherein it had been mentioned that the appellant had been given 8 petty punishments; 3 censure entries; and a penalty of reversion for six months from the post of Head Constable to the post of Constable. He was also reduced to the lowest pay scale of Rs.975/- for one year after he had been found guilty in a departmental enquiry.

14. The Tribunal dismissed the Claim Petition filed by the appellant, however, it recorded the finding that the absence of the appellant for 25 minutes was bona fide and legally permissible in view of the provisions of Rule 21 of the Guard and Escort Rules. However, his subsequent misconduct, i.e., disobedience in carrying out the punishment was a serious matter. The Tribunal also took note of the order of the Appellate Authority wherein the past conduct of the appellant had been taken into consideration. The High Court dismissed the Writ

Petition without realising the gravity of the legal issues involved in the case.

15. We have to proceed, keeping in mind the trite law that holding disciplinary proceedings against a government employee and imposing a punishment on his being found guilty of misconduct under the statutory rules is in the nature of quasi-judicial proceedings. Though, the technical rules of procedure contained in the Code of Civil Procedure, 1908 and the provisions of the Indian Evidence Act, 1872 do not apply in a domestic enquiry, however, the principles of natural justice require to be observed strictly. Therefore, the enquiry is to be conducted fairly and reasonably and the enquiry report must contain reasons for reaching the conclusion that the charge framed against the delinquent stood proved against him. It cannot be an ipse dixit of the inquiry officer. Punishment for misconduct can be imposed in consonance with the statutory rules and principles of natural justice. (See *Bachhittar Singh v. State of Punjab & Anr.,* AIR 1963 SC 395; *Union of India v. H.C. Goel,* AIR 1964 SC 364; *Anil Kumar v. Presiding Officer & Ors.,* AIR 1985 SC 1121; *Moni Shankar v. Union of India & Anr.* (2008) 3 SCC 484; and *Union of India & Ors. v. Prakash Kumar Tandon,* (2009) 2 SCC 541).

16. The Tribunal has categorically held that absence of the appellant from duty for such a short span of time was permissible in view of the statutory rules and was bona fide. That finding was not challenged by the respondents any further and attained finality. This finding of the Tribunal leads us to the questions that in case the first punishment of 10 days punishment drill was unwarranted and illegal; whether any protest against such punishment, authorised the Commandant to enhance the punishment to 10 days confinement in a cell; and whether further disobedience thereof, ought to have enabled the Commandant to initiate the disciplinary proceedings against the appellant. These questions have to be considered keeping in mind that the appellant was a member

of disciplined force and the Appellate Authority as well as the Tribunal had very heavily relied on the past conduct of the appellant for considering the proportionality of the punishment, though it had not been a part of the charge-sheet nor was the appellant informed of the same while issuing the second show cause notice, giving him the opportunity to make his representation against the enquiry report.

17. In *Union of India & Ors. v. L.D. Balam Singh,* (2002) 9 SCC 73, this Court observed as under:

> "….the extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula. The Constitution-makers were obviously anxious that *no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties* and the maintenance of discipline amongst the armed force personnel". (Emphasis added)

18. In *Lt. Col. Prithpal Singh Bedi v. Union of India & Ors.,* AIR 1982 SC 1413, this Court observed:

> "It is one of the cardinal features of our Constitution that a person by enlisting in or entering armed forces does not cease to be a citizen so as to wholly deprive him of his rights under the Constitution….
>
> Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by the liberty-oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must

> be preceded by an enquiry ensuring fair, just and reasonable procedure and trial".

19. In *R. Viswan & Ors. v. Union of India & Ors.,* AIR 1983 SC 658, Constitution Bench of this Court observed:

> "Morale and discipline are indeed the very soul of an army and no other consideration, howsoever important, can outweigh the need to strengthen the morale of the Armed Forces and to maintain discipline amongst them. Any relaxation in the matter of morale and discipline may prove disastrous and ultimately lead to chaos and ruination affecting the well being and imperilling the human rights of the entire people of the country".

20. Thus, the requirements of morale, discipline and justice have to be reconciled. There is no scarcity of examples in history, and we see it in day-to-day life also, that even in disciplined forces, forced morale and discipline without assured justice breeds defiance and belligerency. Our Constitution protects not only the life and liberty but also the dignity of every person. Life convicts and hardcore criminals deprived of personal liberty are also not wholly denuded of their Constitutional rights. Arbitrariness is an anathema to the principles of reasonableness and fairness enshrined in our constitutional provisions. The rule of law prohibits the exercise of power in an arbitrary manner and/or in a manner that travels beyond the boundaries of reasonableness. Thus, a statutory authority is not permitted to act whimsically/arbitrarily. Its actions should be guided by the principles of reasonableness and fairness. The authority cannot be permitted to abuse the law or to use it unfairly.

21. Rule 13 of the Rules 1991 reads as under:

> *"Officer not competent to conduct disciplinary proceedings- A gazetted officer of the Police Force who is either a prosecution witness in the case or has either*

conducted a preliminary enquiry in that case shall not conduct inquiry in that case under these rules. In case the said gazetted officer is the Superintendent of Police himself, the Deputy Inspector-General concerned shall be moved to transfer the case to some other district or unit as the case may be." (Emphasis added)

It is evident from the aforesaid rule that a person who is a witness in a case can neither initiate the disciplinary proceedings nor pass an order of punishment.

22. A Constitution Bench of this Court in *State of U.P. v. Mohd. Noor,* AIR 1958 SC 86, rejected a submission made on behalf of the State that there was nothing wrong with the Presiding Officer of a Tribunal appearing as a witness and deciding the same case, observing as under:

"The two roles could not obviously be played by one and the same person…….the act of Shri B. N. Bhalla in having his own testimony recorded in the case indubitably evidences a state of mind which clearly discloses considerable bias against the respondent. If it shocks our notions of judicial propriety and fair play, as indeed it does, it was bound to make a deeper impression on the mind of the respondent as to the unreality and futility of the proceedings conducted in this fashion. We find ourselves in agreement with the High Court that the rules of natural justice were completely discarded and all canons of fair play were grievously violated by Shri. B.N. Bhalla continuing to preside over the trial. Decision arrived at by such process and order founded on such decision cannot possibly be regarded as valid or binding."

23. A similar view was taken by this Court in *Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School & Ors.,* AIR 1993 SC 2155, observing that a person cannot be a witness in the enquiry as well as the inquiry officer.

24. The legal maxim "*nemo debet esse judex in propria causa"* (no man shall be a judge in his own cause) is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof is treated as a violation of the principles of natural justice. (Vide *Secretary to Government, Transport Department v. Munuswamy Mudaliar & Anr.,* AIR 1988 SC 2232; *Meenglas Tea Estate v. The Workmen,* AIR 1963 SC 1719; and *Mineral Development Ltd. v. The State of Bihar & Anr.,* AIR 1960 SC 468).

25. This Court in *A.U. Kureshi v. High Court of Gujarat & Anr.,* (2009) 11 SCC 84, placed reliance upon the judgment in *Ashok Kumar Yadav & Ors. v. State of Haryana & Ors.,* (1985) 4 SCC 417, and held that no person should adjudicate a dispute which he or she has dealt with in any capacity. The failure to observe this principle creates an apprehension of bias on the part of the said person. Therefore, law requires that a person should not decide a case wherein he is interested. The question is not whether the person is actually biased but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision.

26. The existence of an element of bias renders the entire disciplinary proceedings void. Such a defect cannot be cured at the appellate stage even if the fairness of the appellate authority is beyond dispute. (Vide: *S. Parthasarthy v. State of Andhra Pradesh,* AIR 1973 SC 2701; and *Tilak Chand Magatram Obhan v. Kamla Prasad Shukla & Ors.,* 1995 Supp. (1) SCC 21).

27. In *Arjun Chaubey v. Union of India & Ors.,* AIR 1984 SC 1356, a Constitution Bench of this Court dealt with an identical case wherein an employee serving in the Northern Railway had been dismissed by the Deputy Chief Commercial Superintendent on a charge of misconduct which concerned himself, after considering by himself, the explanation given by

the employee against the charge and after thinking that the employee was not fit to be retained in service. It was also considered whether in such a case, the court should deny the relief to the employee, even if the court comes to the conclusion that order of punishment stood vitiated on the ground that the employee had been guilty of habitual acts of indiscipline/ misconduct. This Court held that the order of dismissal passed against the employee stood vitiated as it was in utter disregard of the principles of natural justice. The main thrust of the charges against the employee related to his conduct qua the disciplinary authority itself, therefore, it was not open to the disciplinary authority to sit in judgment over the explanation furnished by the employee and decide against the delinquent. No person could be a judge in his own cause and no witness could certify that his own testimony was true. Any one who had a personal stake in an enquiry must have kept himself aloof from the enquiry. The court further held that in such a case it could not be considered that the employee did not deserve any relief from the court since he was habitually guilty of acts subversive of discipline. The illegality from which the order of dismissal passed by the Authority concerned suffered was of a character so grave and fundamental that the alleged habitual misbehaviour of the delinquent employee could not cure or condone it.

28. Thus, the legal position emerges that if a person appears as a witness in disciplinary proceedings, he cannot be an inquiry officer nor can he pass the order of punishment as a disciplinary authority. This rule has been held to be sacred. An apprehension of bias operates as a disqualification for a person to act as adjudicator. No person can be a Judge in his own cause and no witness can certify that his own testimony is true. Any one who has personal interest in the disciplinary proceedings must keep himself away from such proceedings. The violation of the principles of natural justice renders the order null and void.

29. In the instant case, Shri Arvind Kumar Upadhyaya, IPS, Commandant, 30th PAC Battalion, Gonda, appeared as a witness and proved the disobedience of his orders of imposition of punishment, first as of punishment drill and subsequently of confinement to a cell. However, after appearing as a witness in the enquiry, he also passed the order of punishment, i.e., dismissal of the appellant from service on 8.4.2003. This issue has been agitated by the appellant throughout but none of the authorities or the courts below had taken it into consideration. Appellant has made crystal clear pleadings before this Court also in this regard and the same have not been denied in the counter affidavit by the respondents, rather a very vague and evasive reply has been filed stating that the disciplinary proceedings had been concluded strictly in accordance with law.

30. An order in violation of the principles of natural justice may be void depending on the facts and circumstances of the case. (Vide *Raja Jagdambika Pratap Narain Singh v. Central Board of Direct Taxes & Ors.,* AIR 1975 SC 1816; *Smt. Maneka Gandhi v. Union of India & Anr., AIR 1978 SC 597; Krishan Lal v. State of J & K,* (1994) 4 SCC 422; *State Bank of Patiala & Ors. v. S.K. Sharma,* AIR 1996 SC 1669; *Union of India & Anr. v. M/s. Mustafa & Najibai Trading Co. & Ors.,* AIR 1998 SC 2526; and *Vishnu Dutt & Ors. v. State of Rajasthan & Ors.,* (2005) 13 SCC 592).

31. In case the very first order of imposition of punishment for remaining absent from duty for 25 minutes was bad in law, the appellant's protest against the said punishment could not be said to be unjustified. In *Nawabkhan v. State of Gujarat,* AIR 1974 SC 1471, this Court dealt with the issue and held as under:

"In the present case, a fundamental right of the petitioner has been encroached upon by the police commissioner without due hearing so the Court quashed it – not killed it then but performed the formal obsequies of the order

which had died at birth. The legal result is that the accused was never guilty of flouting an order which never legally existed." (Emphasis added)

32. We are of the considered opinion that the initiation of disciplinary proceedings against the appellant and the conclusion thereof by the imposition of the punishment by the Commandant, who had himself been a witness, was in flagrant violation of the principles of natural justice and thus, stood vitiated. "Principles of natural justice are to some minds burdensome but this price-a small price indeed-has to be paid if we desire a society governed by the rule of law." All other consequential orders passed in appeal etc. remained inconsequential. More so, a protest/disobedience against an illegal order may not be termed as misconduct in every case. In an appropriate case, it may be termed as revolting to one's sense of justice. In view of the above, we are of the considered opinion that the protest raised by the appellant against the punishment imposed for his absence could not give rise to a cause of action for initiating the disciplinary proceedings.

33. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment.

34. This Court in *Union of India & Ors. v. Bishamber Das Dogra,* (2009) 13 SCC 102, considered the earlier judgments of this Court in *State of Assam v. Bimal Kumar Pandit,* AIR 1963 SC 1612; *India Marine Service (P) Ltd. v. Their Workmen,* AIR 1963 SC 528; *State of Mysore v. K. Manche Gowda,* AIR 1964 SC 506; *Colour-Chem Ltd. v. A.L. Alaspurkar & Ors.,* AIR 1998 SC 948; *Director General, RPF v. Ch. Sai Babu,* (2003) 4 SCC 331, *Bharat Forge Co. Ltd. v. Uttam Manohar Nakate,* (2005) 2 SCC 489; and *Govt. of A.P.*

& Ors. v. Mohd. Taher Ali, (2007) 8 SCC 656 and came to the conclusion that it is desirable that the delinquent employee be informed by the disciplinary authority that his past conduct could be taken into consideration while imposing the punishment. However, in case of misconduct of a grave nature, even in the absence of statutory rules, the Authority may take into consideration the indisputable past conduct/service record of the delinquent for "adding the weight to the decision of imposing the punishment if the fact of the case so required."

35. The appellant joined the service on 10.2.1969 and his services stood terminated vide order dated 8.4.2003. Therefore, the benefit of service rendered by the appellant for more than 34 years stood forfeited. At the time of his removal from service, the appellant was 54 years of age. Thus, he had been visited with serious punishment on the verge of retirement.

36. In view of the above, we reach the following inescapable conclusions:-

I. Absence of appellant from duty as Guard Commander for 25 minutes was bona fide and permissible under the statutory rules.

II. Imposition of punishment of punishment drill for 10 days for the said absence was unwarranted.

III. Protest by the appellant against the imposition of the said punishment could not warrant enhancement of punishment of the appellant for confinement in cell for ten days.

IV. Disobedience of the enhanced punishment could not, in this case, warrant initiation of disciplinary proceedings by the Commandant concerned against the appellant.

V. The Commandant could not himself become the Judge of his own cause.

VI. The Commandant could not appoint his own subordinate as the inquiry officer.

VII. The Commandant could have referred the matter to his superior officer for appropriate action in terms of Rules 1991.

VIII. Once the Commandant concerned appeared as a witness himself in the enquiry, he could not pass the order of punishment.

IX. The Authority who initiated the disciplinary proceedings against the appellant became a witness before the inquiry officer appointed by him, who is subordinate to him in his office and also accepted the enquiry report and passed the order of punishment. Thus, the order of punishment stood vitiated.

X. The Appellate Authority could not consider the past conduct of the appellant to justify the order of punishment passed by the disciplinary authority without bringing it to the notice of the appellant.

XI. As the punishment order had been passed in violation of the statutory rules and the principles of natural justice as well, it is rendered null and void. Thus, it remained inexecutable.

XII. Past conduct of an employee should not generally be taken into account to substantiate the quantum of punishment without bringing it to the notice of the delinquent employee.

XIII. The error of violating the principles of natural justice by the Disciplinary Authority has been of such a grave nature that under no circumstance can the past conduct of the appellant, even if not satisfactory, be taken into consideration.

37. In view of the above, we are of the considered opinion that the present case is squarely covered by the decision of the Constitution Bench in **A***rjun Chaubey* (supra). The order of punishment is null and void and therefore, cannot be given effect to. The appeal deserves to be allowed. The appellant had already reached the age of superannuation and no fresh enquiry can be initiated in the matter if the earlier proceedings are rendered null and void for the violation of the statutory provisions and principles of natural justice. In the facts and circumstances of the case and in order to meet the ends of justice, it is desirable that the appellant be paid 50% of the wages from the date of removal from service till the date of reaching the age of superannuation and he be granted retiral benefits in accordance with law from the date of his retirement.

In view of the above, appeal stands disposed of. No order as to costs.

B.B.B. Appeal disposed of.

UNION OF INDIA AND OTHERS
v.
NARINDERJIT SINGH SINDHU
(Civil Appeal No. 80 of 2003)

SEPTEMBER 29, 2010

[J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.]

Service Law – Promotion – Officer initially commissioned in the Regiment of Artillery – After establishment of Army Aviation Corps, the officer transferred to the Aviation Corps permanently – Complaint by the officer for non-consideration of his name for promotion to the next higher post of Major General – Rejection of – Writ petition – High Court directing the authorities concerned to consider the name of the officer for promotion – On appeal, held: The direction given by High Court is just – Rejection of the complaint by the Authorities was erroneous.

The respondent was commissioned in the Indian Army in the Regiment of Artillery. In the year 1997, he was promoted to the post of Brigadier, in the said Regiment. After the establishment of Army Aviation Corps, the appellants invited applications for conversion to Army Aviation Corps. In response thereto, the respondent submitted his application for permanent transfer from his parent Regiment to the Army Aviation Corps. The transfer was approved.

The respondent filed a non-statutory complaint against non-consideration of his name for promotion to the next rank of Major General in the Army Aviation Corps, because he was the senior-most Brigadier in the Army Aviation Corps (Permanent Cadre). The complaint was rejected by the authorities concerned. By further communication, the respondent was informed that if he

so wished, he could seek reversion to his parent Regiment.

The respondent filed a writ petition, wherein the High Court directed the appellants to consider his case for promotion to the rank of Major General in Army Aviation Corps. Therefore, the instant appeal was filed.

Dismissing the appeal, the Court

HELD: 1. The High Court has given a just direction to the appellants to consider the case of the respondent for promotion to the post of Major General in Army Aviation Corps and no case is made out for interfering with the same. [Para 8]

2. A conjoint and purposeful reading of the documents produced on record, makes it evident that the post of Major General had already been earmarked and specified for Army Aviation Corps to which sanction of the President of India was granted and conveyed. The language of the documents on record do not in any manner suggest that Army Aviation Corps had no specified vacancy in the rank of Major General. After creating a permanent cadre and specifying the post of Major General in the Army Aviation Corps, the appellants were treating the same as an unspecified vacancy to be manned by an officer to be brought from the other Corps, which was erroneous and not justified at all. The High Court has rightly observed that the inevitable effect of filling up the post of Major General sanctioned in Army Aviation Corps by bringing Major General from other Corps had the adverse effect of marring the chances of promotion of the officers belonging to Army Aviation Corps. [Para 7]

3. The respondent was permanently converted to the

Army Aviation Corps. The respondent, having opted for conversion from Regiment of Artillery to Army Aviation Corps, was precluded from again opting for Regiment of Artillery. This is so, in view of the letter/order dated April 17, 1997. As per the guidelines mentioned in the said communication, Aviation Officers were to be groomed in stipulated criteria appointments and due career protection was to be given to those posted in "hi-tech" appointments like test Pilots. On the basis of these clear terms, the respondent had applied for conversion to the Aviation Corps on permanent basis. The respondent left his permanent Corps after considering various aspects including the chances of future promotion in the Aviation Corps. Initially, the allocation of vacancy in the rank of Major General in the Aviation Corps was not decided. However, the process of exercising an option was irreversible one and the officer was left with no option to revert back to his parent Corps. [Para 5]

4. The reason mentioned for rejecting the claim of the respondent in his non-statutory complaint, was that the appointment of Major General was not authorized for Army Aviation Corps, Permanent Cadre and holding of selection for the said rank was not possible. The reason given by the Chief of Army Staff for turning down the request made by the respondent to consider his case for promotion to the post of Major General, was totally erroneous and contrary to the record. One post of Major General was allocated to the Army Aviation Corps, which is evident from the communication dated November 27, 1997. While providing a post for Major General in Army Aviation Corps, one post of Major General provided in Pay Commission Cell was Offset. The claim made by the appellants that the provision of post of Major General, made in Army Aviation Corps was mere allocation of vacancy by the Chief of Army Staff and not for release of vacancy for Army Aviation Corps, cannot be accepted in

view of the contents of the communication dated November 27,1997 nor the idea that the issue of allotment of specified and unspecified vacancies was required to be determined by Chief of Army Staff can be appreciated. Though the order rejecting the complaint of the respondent does not mention so, a stand was taken by the appellants before this Court that at the time when the complaint was made by the respondent, the post of Major General in Army Aviation Corps was being manned by a Major General, who was brought from Artillery Corps. Bringing a Major General from different cadre to man the post of Major General in Army Aviation Corps was illegal and contrary to the guidelines laid down by the appellants themselves. The record would show that after sanction to the formation of the nucleus Additional Directorate General Army Aviation at Army Head Quarters vide order dated October 29, 1986, a permanent and regular cadre was established for the Army Aviation Corps vide order dated April 17, 1997 passed by the Chief of Army Staff. Having sanctioned the cadre structure, Selection Grade ranks were provided by communication dated November 27, 1997, under which the post of Major General was sanctioned after offsetting the post of Major General provided in Ex Pay Commission Cell. Under the circumstances, no other Major General could have been brought to Army Aviation Corps for manning the post of Major General sanctioned for the said establishment. [Paras 5 and 6]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 80 of 2003.

From the Judgment & Order dated 10.10.2002 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 10037 of 2002.

R. Balasubramanian, B.V. Balaram Das for the Appellants.

P.S. Patwalia, Aman Preet Singh Rahi, Tushar, Bakshi, Saswat Acharya, Sureshta Bagga for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. This appeal is directed against judgment dated October 10, 2002, rendered by the Division Bench of High Court of Punjab and Haryana at Chandigarh in CWP No. 10037 of 2002, by which the appellants are directed to consider the case of the respondent for promotion to the rank of Major General in accordance with the Rules and his service profile in the Army Aviation Corps.

2. The relevant facts emerging from the record of the case are as under:

The respondent was commissioned in the Indian Army in the Regiment of Artillery on June 23, 1968 in the rank of Second Lieutenant. After grant of Commission, the seniority of the respondent was re-fixed with effect from August 21, 1969. Thus, for the purpose of promotion and career advancement, he became an officer of 1969 Batch. The Government of India, Ministry of Defence, sanctioned formation of a nucleus Additional Directorate General Army Aviation at Army Head Quarters by order dated October 29, 1986. The selection grade vacancies including the post of Major General were to be from within the sanctioned cadre of the Army and were to remain unfilled for a period of one year till the post of Additional Director General Army Aviation was sanctioned by the Government of India. The Chief of Army Staff approved the establishment of a permanent cadre of officers for the Army Aviation Corps by an order dated April 17, 1997. In the said order/letter, it was mentioned that the cadre initially would have 15% permanent officers and 85% would be borrowed from the other cadres and would be built up in a graduated manner to 100% permanent cadre. By the said letter, cadre structure was formulated. Regarding allocation of vacancy in the rank of Major General

to permanent cadre, it was mentioned that it would be decided later. The initial induction was to be on voluntary basis with an irrevocable one time option. It was also provided by the said order that Aviation Corps Officers would be eligible for induction into general cadre on the lines as officers of supporting Arms, i.e., after selection based on positive recommendation in designated Command and staff assignment.

In May, 1997 the respondent was promoted to the rank of Brigadier in the Regiment of Artillery. On September 1, 1997 a letter was issued by Army Head Quarters seeking application from volunteers for transfer to Army Aviation as per the terms and conditions set out in the letter/order dated April 17, 1997 passed by the Chief of Army Staff. The record shows that the President of India approved following Peace Establishments of Army Aviation: -

(a) Additional Directorate General Army Aviation, at Army Head Quarters.

(b) Command (Aviation) Branch at Eastern, Western and Northern Commands.

(c) Command (Aviation) Branch Southern and Central Commands.

The President also sanctioned selection grade ranks as under: -

(a) Major General - 1 (Offset provided Ex Pay Commission Cell).

(b) Brigadiers - 7 .....

It was also mentioned in the said order that three selection grade ranks of Brigadiers for which offsets have not been identified would remain suppressed till suitable offsets were identified by the SD Directorate and removal of this suppression would be carried out in consultation with MOD

(Fin.). The decision of the President was communicated by the Government of India, Ministry of Defence, New Delhi vide communication dated November 27, 1997 to the Chief of the Army Staff. Along with the communication dated November 27, 1997, appendix A was also sent which was in the following terms: -

"Appendix A to Government of India,

Ministry of Defence letter
No. 00659/PE/Misc./AA-5/
1875/DO-1/D(GS-I)
Dated 27 Nov., 1997.

(The information given in this document is not to be communicated decision directly or indirectly to the press or to any person not authorized to receive it)

PE No. 00659/PE/Misc.AA-5/
1975/DO-1/D(GS-1)
Dt. 27th Nov., 1997

(Three pages)

ADDITIONAL DIRECTORATE GENERAL
ARMY AVIATION
ARMY HEAD QUARTERS
PEACE ESTABLISHMENT

SUMMARY

Personnel

Officers

Army	-	25
JCO	-	2
Other Ranks	-	44
Total	-	71

Transport

Car Ambassador	-	1
Gypsy	-	2
Motor Cycle	-	2
Total	-	5

Details	Number	Notes
1. Personnel		
Officers		
Additional Director General (Maj. Gen.) (a)	1	
Deputy Director General (Brig) (a) and (i)	2	
Directorate (Col) (a)	6	
AMS (Lt. Col) (a) (b)	1	
General Staff Officers (Lt. Col.) (a) (h)	8	
General Staff Officers (Maj) (a) (h)	7	
Total	25	
Junior Commissioned Officer (b)		
JCO (Clerk) (c) (d) (e)	2	
Other Ranks		
Personal Assistant	9	
Clerk (GD) (c) (d) (f)	15	
Drivers (c) (f)		3
Driver Motor Cycle (c) (f)	2	
Draughtsman (c) (d) (g)	2	

Jetliner Operator (c) (g)	1
Runner	11
Despatcher	1
Total other tanks	44
2. Transport	
Motor Cycle	2
Car Ambassador	1
Gypsy	2
Total transport	5

GENERAL NOTES

(a) Officer to be trained aviator

(b) To function under MS-6

(c) Rank as per Corps roster

(d) To be computer qualified

(e) One JCO to function under MS-6

(f) To be provided by Regiment of Artillery

(g) To be provided by Corps of Engineers

(h) Two officers to be qualified on computer

(i) Appointment of One Deputy Director General will be kept suppressed till offset is identified by SD Directorate. The removal of suppression would be carried out in consultation with MOD (Fin.)."

On December 14, 1997, the respondent voluntarily applied for permanent transfer from the Regiment of Artillery to Army Aviation Corps. By a communication dated November 6, 1998, the transfer of the respondent to Army Aviation Corps was approved with immediate effect by the Army Head Quarters. Between the year 1997 and 1999, the respondent commanded 373(I) Artillery Brigade in the Regiment of Artillery. The respondent assumed the appointment of Brigadier (Aviation) Head Quarters Western Command at Chandimandir on June 24, 1999. On December 22, 2001, the respondent submitted a non-statutory complaint to the Chief of Army Staff against non-consideration of his name for promotion to the next rank of Major General in the Army Aviation Corps, since he was the senior most Brigadier in the Army Aviation Corps (Permanent Cadre). The complaint of the respondent was considered by the Chief of Army Staff but was rejected on June 10, 2002 on the ground that no appointment of Major General was authorized to Army Aviation Corps (Permanent Cadre). By the said communication the respondent was informed that if he so wished, he should seek reversion to the Regiment of Artillery.

3. Feeling aggrieved, the respondent filed CWP No. 10037 of 2002 before the High Court of Punjab and Haryana at Chandigarh praying, inter alia, to direct the appellants to consider his case for promotion to the rank of Major General in Army Aviation Corps. He also prayed that the appellants be restrained from posting an ex-cadre officer to the Post of Additional Director General Army Aviation, Army Head Quarters. The petition filed by the respondent was contested by the appellants. The High Court, by the impugned judgment, has directed the appellants to consider the case of the respondent for promotion to the rank of Major General in Army Aviation Corps, giving rise to the instant appeal.

4. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered

the documents forming part of the appeal.

5. The fact, the respondent had a reasonably good service profile and was awarded various distinctions, as mentioned in the impugned judgment, is not in dispute. The respondent was promoted on selection to the post of Brigadier in the Regiment of Artillery in the year 1997. The appellants had invited applications for conversion to Army Aviation Corps and in response thereto the respondent had submitted application on December 14, 1997. The respondent was permanently converted to the Army Aviation Corps on November 6, 1998. It is relevant to notice that the respondent, having opted for conversion from Regiment of Artillery to Army Aviation Corps, he was precluded from again opting for Regiment of Artillery. This is so in view of the letter/order dated April 17, 1997, referred to earlier. As per the guidelines mentioned in the said communication, Aviation Officers were to be groomed in stipulated criteria appointments and due career protection was to be given to those posted in "hi-tech" appointments like test Pilots. On the basis of these clear terms, the respondent had applied for conversion to the Aviation Corps on permanent basis. The respondent left his permanent Corps after considering various aspects including the chances of future promotion in the Aviation Corps. Initially, the allocation of vacancy in the rank of Major General in the Aviation Corps was not decided. However, the process of exercising an option was irreversible one and the officer was left with no option to revert back to his parent Corps. The respondent had made a non-statutory complaint as his name for promotion to the next rank of Major General was not considered. It was rejected vide letter dated June 10, 2002. The only reason mentioned for rejecting the claim of the respondent was that the appointment of Major General was not authorized for Army Aviation Corps, Permanent Cadre and holding of selection for the said rank was not possible. This Court finds that the reason given by the Chief of Army Staff for turning down the request made by the

respondent to consider his case for promotion to the post of Major General, was totally erroneous and contrary to the record.

6. As observed earlier, one post of Major General was allocated to the Army Aviation Corps, which is evident from the communication dated November 27, 1997. While providing a post for Major General in Army Aviation Corps, one post of Major General provided in Pay Commission Cell was Offset. The claim made by the appellants that the provision of post of Major General, made in Army Aviation Corps was mere allocation of vacancy by the Chief of Army Staff and not for release of vacancy for Army Aviation Corps, cannot be accepted in view of the contents of the communication dated November 27, 1997 nor the contention that the issue of allotment of specified and unspecified vacancies was required to be determined by Chief of Army Staff can be appreciated. Though the order rejecting the complaint of the respondent does not mention so, a stand was taken by the learned counsel for the appellants before this Court that at the time when the complaint was made by the respondent, the post of Major General in Army Aviation Corps was being manned by a Major General, who was brought from Artillery Corps. On question being asked as to whether the Major General, who was brought from Artillery Corps and was manning the post of Major General in Army Aviation Corps, had voluntarily applied as contemplated by the Scheme for being absorbed in Army Aviation Corps, the learned counsel could not give any reply. Nor the learned counsel could give reply to the question whether condition that once an officer opts for Army Aviation Corps would not be entitled to revert back to his parent Corps, was made applicable to the Major General, who was brought from Artillery Corps and was manning the post of Major General in Army Aviation Corps. There is no manner of doubt that bringing a Major General from different cadre to man the post of Major General in Army Aviation Corps was illegal and contrary to the guidelines laid down by the appellants themselves. The record

would show that after sanction to the formation of the nucleus Additional Directorate General Army Aviation at Army Head Quarters vide order dated October 29, 1986, a permanent and regular cadre was established for the Army Aviation Corps vide order dated April 17, 1997 passed by the Chief of Army Staff. Having sanctioned the cadre structure by the order dated April 17, 1997, Selection Grade ranks were provided by communication dated November 27, 1997 under which the post of Major General was sanctioned after offsetting the post of Major General provided in Ex Pay Commission Cell. Under the circumstances, this Court is of the firm opinion that no other Major General could have been brought to Army Aviation Corps for manning the post of Major General sanctioned for the said establishment.

7. A conjoint and purposeful reading of the documents produced on record of the case by the parties makes it evident that the post of Major General had already been earmarked and specified for Army Aviation Corps to which sanction of the President of India was granted and conveyed. The language of the documents on record do not in any manner suggest that Army Aviation Corps had no specified vacancy in the rank of Major General. After creating a permanent cadre and specifying the post of Major General in the Army Aviation Corps, the appellants were treating the same as an unspecified vacancy to be manned by an officer to be brought from the other Corps, which was erroneous and not justified at all. The High Court has rightly observed that the inevitable effect of filling up the post of Major General sanctioned in Army Aviation Corps by bringing Major General from other Corps had the adverse effect of marring the chances of promotion of the officers belonging to Army Aviation Corps.

8. On the facts and in the circumstances of the case, this Court is of the opinion that a just direction is given to the appellants to consider the case of the respondent for promotion to the post of Major General in Army Aviation Corps and no

case is made out for interfering with the same in the instant appeal. The appeal, which lacks merit, therefore, deserves to be dismissed.

9. For the foregoing reasons, the appeal fails and is dismissed. There shall be no order as to costs.

K.K.T. Appeal dismissed.

IYASAMY & ANR.
v.
SPECIAL TAHSILDAR, LAND ACQUISITION
(Civil Appeal Nos. 1760-1761 of 2004 etc.)

SEPTEMBER 30, 2010

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

LAND ACQUISITION ACT, 1894 *– ss. 4, 23(2) and 23(1A) – Land acquired – Compensation awarded – Quantum of compensation determined by High Court – In some cases interest on solatium u/s 23(2) and additional compensation u/s 23(1A) were denied – On appeal, held: The quantum of compensation determined by High Court is correct – However, claimants are entitled to interest on solatium and additional interest.*

Land of the appellants was acquired under Land Acquisition Act, 1894. Compensation was awarded by Land Acquisition Officer. The Reference Court enhanced the compensation and fixed it @ Rs.6/- per sq. ft. Appeals were preferred before High Court. The High Court remanded all the appeals to the Reference Court, except one, wherein it fixed the compensation at Rs.6/- per sq. ft. However, it rejected the claim of interest on solatium u/s 23(2) and additional compensation u/s 23(1A) of the Act. The Reference Court, after the remand, fixed the compensation at Rs.6/- per sq. ft.. In other remanded matters in respect of the neighbouring lands, the Reference Court fixed the compensation at Rs.13-14/- per sq. ft.. In appeal, the High Court reduced the compensation of Rs.13-14 to Rs.6.25 per sq. ft., and in respect of other appeals, the compensation fixed at Rs.6/- per sq. ft. by the Reference Court, was upheld. Therefore, the instant appeals were filed, questioning the

quantum of compensation and also questioning denial of interest on solatium and additional compensation.

Dismissing the appeals questioning the quantum of compensation and partly allowing the appeals with respect to interest on solatium and additional compensation, the Court

HELD: 1.1 There is no merit in the instant appeals to interfere with the quantum of compensation awarded by the High Court. The compensation at the rate of Rs. 6/- per sq. ft. are upheld, in respect of the instant lands as awarded by the High Court. The High Court by its impugned judgment considered Exhibit C3 which is a sale deed in which the sale of the adjoining land was made at the rate of Rs. 10/- per sq ft. If the market value of the land is assessed on the basis of Ex. C3 and 1/3rd is deducted towards development charges, it comes approximately to Rs. 6.25 per sq ft. As far as Exs. 15, 16 and 17 are concerned, in those documents, transaction were made at the rate 20/- per sq. ft. But the lands pertaining to those sale deeds are land of better quality, and better location with better connectivity. Besides, these are small pieces of land compared to a large tract of land acquired in the instant case. Therefore, a deduction of 65% of land value appears to be just and appropriate. For quality and location of land, if deduction is permissible at 1/3rd valuation and for smaller piece of land pitted against large tract of land also another 1/3rd deduction is permissible, the same would again amount to valuation being fixed at Rs. 6/- or Rs. 6.25/-. This amount of compensation was awarded by the High Court in respect of acquired neighbouring lands. The neighbouring lands have good connectivity, however, such advantages are not available to the land in the instant case, as the same are landlocked plots. [Paras 6, 8 and 12]

Smt.Kausalya Devi Bogra and Ors. vs. Land Acquisition Officer, Aurangabad and Anr. **(1984) 2 SCC 324;** *Kasturi and Ors. v. State of Haryana* **(2003) 1 SCC 354 – relied on.**

1.2 There is also other guidance available on record to determine the valuation in the form of various awards with respect to acquisition of adjoining lands. These awards are important piece of evidence for arriving at the market value of the acquired land. [Para 9]

Mohammad Raofuddin vs. Land Acquisition Officer **(2009) 14 SCC 367 – relied on.**

2. As regards the interest on solatium and additional compensation, since the impugned order which was challenged in the instant appeal, was pronounced prior to judgment in *Sunder vs. Union of India, and the instant appeal was pending before the Supreme Court, therefore, the ratio of *Sunder's* case would entitle the appellants to receive interest on solatium u/s. 23(2) and additional compensation u/s. 23(1A) in terms of the said decision. According to *Gurpreet Singh's* case such interest can be claimed only from the date of the judgment in *Sunder's* case i.e. 19.9.2001. Therefore, the appellants claiming interest on solatium shall be entitled to such interest for the period after 19.9.2001, not the period prior to the same. [Para 11]**

Sunder v. Union of India* **(2001) 7 SCC 211; *Gurpreet Singh v. Union of India* **(2006) 8 SCC 457 – relied on.**

Case Law Reference:

(1984) 2 SCC 324	**Relied on.**	**Para 7**
(2003) 1 SCC 354	**Relied on.**	**Para 7**
(2009) 14 SCC 367	**Relied on.**	**Para 9**

(2001) 7 SCC 211	**Relied on.**	**Para 11**
(2006) 8 SCC 457	**Relied on.**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1760-1761 of 2004.

From the Judgment & Order dated 18.1.2001 of the High Court of Judicature at Madras in Appeal No. 298 of 1992 and C.M.P. No. 15057 of 1997.

WITH

C.A. Nos. 6875-6877 of 2004, 7434 of 2004.

R. Chandrachud, Promila, V. Prabhakar and R. Nedumaran for the Appellant.

V. Krishna Murthy, T. Harish Kumar, V. Vasudevan, S. Thananjayan and R. Ayyam (for Parekh & Co.) for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. All these appeals are arising out of the land acquisition proceeding in which various notifications under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") were issued in proximity of time, i.e. in 1981, with respect to adjoining lands in the Erode and Periasemur Villages for the construction of houses for the scheme called "Erode West Neighbourhood Scheme" and therefore we propose to decide them by a common judgment and order. The Civil Appeal Nos. 1760-1761 are directed against final judgment and order dated 18-01-2001 passed by the Madras High Court in Appeal No.298/92 and CMP No. 15057/97 wherein the High Court by its impugned judgment partly allowed the appeal filed by the Respondent and declined to condone the delay of 7 days in filing the Cross appeal by the appellants and consequently, dismissed the CMP No. 15057/97. Consequent thereto, the

cross-appeal of the Appellants was also dismissed without going into merit. The Civil Appeal No. 6875-6877/04 and 7434/04 are directed against the final judgment and order dated 17/10/03 passed in A.S. Nos. 754/02, 759/02. 760/02 and 128/92 by the Madras High Court whereby the High Court by its impugned judgment and order dismissed the appeals filed by the appellants.

2. The appellants were not satisfied with the compensation awarded by the Land Acquisition Officer, so there were 12 LAOPs filed before the Reference Court. The Reference Court enhanced the compensation and fixed it at the rate of Rs. 6/- per sq. ft. Both the appellants and respondent filed appeals before the High Court. The High Court was pleased to remand back the appeals to the Reference Court except A.S. No. 298/92.

3. In A.S. No. 298/92, the appellants moved CMP No. 15057/97 to condone the delay of 7 days in filing the cross objection. The High Court dismissed the said application. Consequently, the cross appeal of appellants was dismissed. As far as the appeal filed by the respondent in A.S. no. 298/92 was concerned, the High Court referred its judgment in A.S. No. 71/92 which was in reference to the same scheme for the adjoining survey no. and in which the High Court enhanced the market value to Rs. 9/- per sq. ft. and thereby the High Court in its impugned judgment and order dated 18/1/2001 also enhanced the market value of the land involved in A.S. No. 298/92 to Rs. 9/- per sq. ft., and deducted 33-1/3% towards development charges and ultimately the compensation was fixed at Rs. 6/- per sq. ft. The High Court also rejected the claim of interest on solatium u/s 23 (2) and additional compensation u/s 23(1A) of the Act.

4. As far as the matters remanded back are concerned, the Reference Court fixed compensation at the rate of Rs. 6/- per sq. ft. after remand for the lands involved in LAOP Nos. 4/87, 9/87, 19/87 and 25/87, against which A.S. No. 754/02, 759/

02, 760/02 and 128/92 were made. Simultaneously, by separate orders, the Reference Court in LAOP Nos. 22/87, 24/87, 26/87 and 410/00, which were matters involving neighbouring lands for the same housing scheme and which were also remanded back by the High Court, fixed compensation at the rate of Rs. 13-14/- per sq. ft., against which appeals were also filed. All these appeals were decided by the High Court by judgment and order dated 17/10/03 whereby the High Court reduced the compensation of 13-14/- per sq. ft. awarded in LAOP Nos. 22/87, 24/87, 26/87 and 410/00 by the Reference Court to 6.25/- per sq. ft., while A.S. Nos. 754/02, 759/02, 760/02 and 128/92 were dismissed upholding the compensation @ 6/- per sq. ft.

5. We have heard the learned counsel appearing on behalf of the parties at length. The principal issue that arises for our consideration is what would be the reasonable compensation for the acquired lands in the present case. The learned counsel for Appellants contended before us that the Reference Court in LAOP Nos. 22/87, 24/87, 26/87 and 410/00 fixed compensation at the rate of Rs. 13-14/- per sq. ft., therefore, the appellants are also entitled to the same amount of compensation and that the High Court by its impugned judgment and order dated 17/10/03 erroneously fixed the market value @ Rs.6.25/- and 6/- by overlooking the evidence of sale instances (i.e. Ex. C15, C16 and C17) which shows the market value of the adjoining lands at Rs. 19-20/- per sq. ft. Further, the learned counsel for appellants contended that the deduction of 1/3rd towards development charges is illegal and not sustainable.

6. We have considered the evidence on record and appreciated the documents to determine the just and fair market value of the acquired lands. The High Court by its impugned judgment and order dated 17.10.2003 considered Exhibit C3 which is a sale deed in which the sale of the adjoining land was made at the rate of Rs. 10/- per sq ft. The

evidence produced further proves that this land is on the Nasiyanur Road and very near and almost adjacent to the land acquired. Therefore, this piece of evidence is very valuable and dependable for determining the market value in the present case. However, this sale deed pertains to a small portion of land i.e. one acre and four cents, while the acquired land is a large tract of land.

7. The legal position in this regard has been reiterated by this court time and again. It was held in *Smt.Kausalya Devi Bogra and Ors. Vs. Land Acquisition Officer, Aurangabad & Anr.* reported at (1984) 2 SCC 324, **(**in paragraph 13) that: -

> "Where large tracts of land are acquired, valuation in transaction in regard to smaller properties does not offer a proper guideline and therefore, cannot be taken a real basis for determining compensation. For determining the market value of a large property on the basis of a sale transaction for smaller property a deduction should be given."

Besides, in *Kasturi & Ors. v. State of Haryana* reported at (2003) 1 SCC 354 it was held that (in paragraph 7):-

> "It is well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation has to be deducted out of the amount of compensation payable on the acquired land subject to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for roads and other civic amenities to develop the land so as to make the plots for residential or commercial purposes."

8. If we assess the market value of the land acquired at Rs. 10/- per sq ft. on the basis of Ex. C3 and deduct 1/3rd towards development charges, it comes approximately to Rs.

6.25 per sq ft. As far as Exs. 15, 16 and 17 are concerned, in those documents, transaction were made at the rate 20/- per sq. ft. But the lands pertaining to those sale deeds are highly developed and better located being situated right on the Manickampalayam road not very far from the Mettur road, and the Municipal Colony. Therefore, if a deduction of 65% should be made as is done in some cases decided by this Court, the valuation would come to Rs. 6.25/-. The aforesaid lands covered by the three exhibits are land of better quality, and better location with better connectivity. Besides, these are small pieces of land compared to a large tract of land acquired in the present case. Therefore, a deduction of 65% of land value appears to be just and appropriate. For quality and location of land, if deduction is permissible at 1/3rd valuation and for smaller piece of land pitted against large tract of land also another 1/3rd deduction is permissible, the same would again amount to valuation being fixed at Rs. 6/- or Rs. 6.25/-. This amount of compensation was awarded by the High Court in respect of acquired lands in LAOP Nos. 22/87, 24/87, 26/87 and 410/00. The lands in LAOP Nos. 22/87, 24/87, 26/87 and 410/00 have an access to road which connects Nasiyanur Road and Manickampalayam Road, however, such advantages are not available to the land in the present case as the same are landlocked plots. Therefore, we uphold the compensation at the rate of Rs. 6/- per sq. ft. in respect of present lands as awarded by the High Court.

9. There is also other guidance available on record to determine the valuation in the form of various awards with respect to acquisition of adjoining lands. These awards are important piece of evidence for arriving at the market value acquired land in view of the decision of this court in *Mohammad Raofuddin vs. Land Acquisition Officer* reported at (2009) 14 SCC 367, wherein it was held that (paragraph 21): -

> "….*reliance on earlier judgment in respect of a land situated in the same village, acquired only six months*

ago, could not be said to be an irrelevant factor affecting the determination of market value/ compensation in respect of the land of the appellant."

10. The High Court in A.S. No. 875 of 1991 and cross-objection No. 253 of 1992 fixed the market value at Rs. 6, 99, 934/- for one acre and ten cents, which works out to Rs. 6/- per sq. ft. The lands are situated in S.No. 147/1, Periasemur village acquired for the same public purpose pursuant to notification under Section 4 of the Act dated 15.07.1981. Though the revenue village is different, the lands are located very adjacent and in the same locality having similar facilities. Similarly in A.S. No. 137 of 1993 and the cross-objection No. 72 of 1994, the Division Bench of the High Court fixed the market value of the land Rs. 5.53 per sq. ft. In this matter the land was covered by S.No. 145/1,2,3 and 4, Erode village acquired for the same Erode neighbourhood scheme by the notification dated 5/1/1981, which is next to the present acquired land. In A.S. No. 584 of 1986 in which adjoining land was acquired via notification dated 14-3-1973, the division bench of the High Court fixed the market value Rs. 5/- per sq. ft. Since all these awards have become final and binding, therefore reliance could be placed on the same. Consequently, the reasonable compensation and fair market value of the present acquired land should be Rs. 6/- per sq.ft.

11. The learned counsel for Appellants in Civil Appeal Nos. 1760-1761/04 are also claiming interest on solatium and additional compensation as the impugned order of the High Court was pronounced prior to judgment in *Sunder v. Union of India* reported at (2001) 7 SCC 211. Since the present appeal was pending before this court, therefore, the ratio of *Sunder v. Union of India* would entitle the appellants to receive interest on solatium under section 23 (2) and additional compensation under Section 23 (1A) in terms of the said decision. It was decided in *Gurpreet Singh v. Union of India* reported at (2006) 8 SCC 457 that such interest can be claimed

only from the date of the judgment in *Sunder* (supra) i.e. 19.9.2001. Therefore, the appellants in the Civil Appeal Nos. 1760-1761/04 shall be entitled to such interest for the period after 19.9.2001, not the period prior to the same.

12. In view of the aforesaid, we do not find any merit in these appeals to interfere with the quantum of compensation awarded by the High Court and accordingly, dismiss the Civil Appeal Nos. 6875-6877/04 and 7434/04. However, we partly allow the Civil Appeal Nos. 1760-1761/04 with respect to interest on solatium u/s 23(2) and additional compensation u/s 23(1A) of the Act, which shall be guided by observations and directions made in paragraph 11 above. The parties are left to bear their own cost.

K.K.T.

MOHANLAL NANABHAI CHOKSI (DEAD) BY LRS.

v.

STATE OF GUJARAT AND ORS.

(Civil Appeal No. 7268 of 2004)

OCTOBER 04, 2010

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

Gujarat Agricultural Produce Market Act, 1963: Acquisition proceedings initiated by State Government to establish a vegetable market under Bombay Provincial Municipal Corporations Act, 1949 – Held: The land owner is entitled to raise the question of non-applicability of the 1949 Act, in view of a specific later legislative enactment i.e. 1963 Act – Matter remitted to High court for consideration afresh in the light of questions formulated – Land Acquisition Act, 1894 – Bombay Provincial Municipal Corporations Act, 1949 – s.78.

Constitution of India, 1950: Article 300A – Right to property – Deprivation of property by acquisition – Held: Right to property may no longer be a fundamental right, but it enjoys the protection of Article 300A to the extent that there can be no deprivation of property save by valid authority of law – Land Acquisition Act, 1894 – Bombay Provincial Municipal Corporations Act, 1949 – s.78 – Gujarat Agricultural Produce Market Act, 1963.

The question which arose for consideration in the instant appeal was whether the State Government could initiate the acquisition proceedings to establish a vegetable market on the basis of resolution of Surat Municipal Corporation (SMC) under Section 78 of Bombay Provincial Municipal Corporations Act, 1949 in view of a specific later legislative enactment i.e. the Gujarat Agricultural Produce Market Act, 1963.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: 1. Under Chapter IX and Section 49 of the Gujarat Agricultural Produce Market Act, 1963, the State Government is authorized to acquire any land within a market area, if it is needed for the purposes of the Act, i.e. the 1963 Act. Such acquisition can be made under the provisions of the Land Acquisition Act, 1894 or any other corresponding law for the time being in force. Surat Municipal Corporation (SMC) passed the resolution relying on Section 78 of the Bombay Provincial Municipal Corporations Act, 1949 (BPMC Act) for initiating its proposal of acquisition of land for the establishment of a vegetable market. Since the property of the appellants was taken away as a result of the acquisition proceedings, the appellants were entitled to raise the question of non-applicability of the BPMC Act to initiate the acquisition proceedings for establishing a vegetable market, in view of the clear provisions of the 1963 Act, which is a special and a later Act. [Paras 14, 21, 30]

2. The right of property, may no longer be a fundamental right, but it enjoys the protection of Article 300A of the Constitution to the extent that there can be no deprivation of property save by authority of law. Authority of law would obviously mean valid authority of law. In a case of deprivation of property by acquisition, ultimately by Land Acquisition Act, 1894, which is a drastic and expropriatory piece of legislation, the owners of property, the appellants were, admittedly, entitled to raise all legally permissible objections to the legality of an acquisition proceeding. The High Court proceeded on an erroneous approach as it refused to examine the validity of the main challenge raised by the appellants on a ground of their lack of locus. The approach of the High Court goes to the root of the issue and makes its

judgment very vulnerable. Thus, the impugned judgment of the High Court is set aside and the matter is remitted to it for decision afresh on all issues but specifically on two questions formulated as under:

(i) Whether the 1963 Act, a later and a special Act as compared to the 1949 Act would prevail over the 1949 Act or whether a harmonious construction is possible between the 1963 Act and the 1949 Act on the footing that they seem to govern two distinct and separate spheres of markets.

(ii) Section 78 peculiarly uses the term "property vested in the corporation". A plain reading of the term seem to *prima facie* imply that the SMC can only acquire property vested in it and not private property. Thus, High Court may decide the scope and extent of the said expression in Section 78 of the BPMC Act and determine the issue of validity of the impugned acquisition. [Paras 31-34]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7268 of 2004.

From the Judgment & Order dated 1.2.2002 of the Division Bench of High Court of Gujarat at Ahmedabad in special Civil Application No. 3435 of 1991.

R.F. Nariman, Shirish H. Sanjanwala, S.P. Singh, Shamik Sanjanwala, (for Lawyer's Knit & Co.) for the Appellant.

Prashant Desai, Hemantika Wahi, Murgendra Purohit, Rahul Satija and Sumita Hazarika for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. The appellants are the owners of the lands bearing Survey Nos. 1587 to 1596, 1597-A-Part, 1599

to 1601 of Ward No. 4 of Taluka Choryasi of the city of Surat in Gujarat.

2. On 22.08.1980, the Standing Committee of the Surat Municipal Corporation (hereinafter 'SMC'), passed a resolution with a proposal to the State Government, under Section 78 of the Bombay Provincial Municipal Corporations Act, 1949 (hereinafter 'BPMC Act'), for initiating land acquisition proceedings under the Land Acquisition Act, 1894, for acquiring the abovementioned land of the appellants. The said land, admeasuring 7168.09 sq. mts., was to be acquired for the setting up of a vegetable market. The said resolution was approved and the proposal was sanctioned by the State Government on 30.07.1981.

3. On 3.03.1986, the first Development Plan under the Gujarat Town Planning & Urban Development Act, 1976 (hereinafter the 'Development Act') was under preparation for the Surat Urban Development Authority (hereinafter 'SUDA'). During the pendency of the said plan, the State Government sanctioned the abovementioned proposal, and therefore the land in question was kept reserved for a vegetable market for SMC.

4. On 9.2.1990, a notification was issued under Section 4 of the Land Acquisition Act, 1894 for acquiring the lands of the appellants. The appellants, on 14.3.1990, filed their objections under Section 5A of the Land Acquisition Act. However the objections were overruled and then followed a notification under Section 6 of the said Act on 8.02.1991.

5. The appellants, on 16.3.1991, filed a special civil application (No. 3435/1991) before the Gujarat High Court, challenging the notifications under Sections 4 and 6 of the Land Acquisition Act.

6. In 1996-97, SUDA started revising the Development

Plan, and in its revision the land was shown as reserved for the vegetable market of SMC.

7. On 17.05.2001, a notification was issued by the State Government under Section 17 of the Development Act, whereunder it was proposed to de-reserve the lands that had been reserved for the establishment of a vegetable market by SMC and place them in the residential zone. SMC objected to the said proposal of de-reservation on 13.07.2001.

8. The Gujarat High Court by the impugned judgment dismissed the special civil application (No.3435/1991) on 1.02.2002 and allowed the acquisition of the lands of the appellants for setting up a vegetable market.

9. In the impugned judgment the Hon'ble High Court, inter alia, held as follows:

a. A major part of the land in question was open land, the construction upon it was very old and hardly 1/10th of the land was occupied by structures.

b. The land was required for a public purpose in terms of Sections 78 of the BPMC Act, and 12 (2) (b) read with Section 20 of the Development Act.

c. The other markets, which the appellants claim as very closeby, were actually quite far away. SMC needs to provide a market close to the people so that they do not have to move far to purchase their daily necessities. A vegetable market is required to be near the people, especially in India, as in India people buy their fresh vegetables daily.

d. The notification dated 17.05.2001 made it clear that it was a draft development plan, and suggestions and objections were invited from persons for modification of the said Plan. Therefore, the notification dated 17.05.2001 was merely a

proposal to modify the draft Development Plan and did not reflect a decision to de-reserve the lands of the appellants.

e. A reading of Section 63(12) read with Section 66(42) of the BPMC Act made it clear that there was an obligatory duty on SMC to construct and maintain a public market, for which it can take appropriate action as required under the Act. Further the scheme of the Act clearly indicated that SMC was competent to establish a market.

f. The appellants had raised a contention that SMC had no right to acquire the land and at most the State Government could acquire land. The High Court dismissed the said contention holding once a notification was published under Section 6 after complying with the provisions of the Land Acquisition Act, it was conclusive evidence that the land was required for a public purpose and the Court could not go behind the said notification.

g. The appellants were neither agriculturalists nor producers of agricultural produce, nor dealers or office bearers of the Surat Agricultural Produce Market Committee, and as such they had no right to question the authority of SMC to initiate acquisition proceedings for a vegetable market.

h. The 1963 Act applied only to bulk sales and not retail sales. The SMC was providing a market so that the retailers and consumers have no difficulty in the sale/purchase of commodities. Retailers were excluded from the purview of the 1963 Act and Rules framed thereunder. Thus, the SMC could set up the vegetable market as it was doing the same for retailers. The 1963 Act had been enforced to

regulate transactions between traders and agriculturalists, in order to prevent exploitation of the latter by the former. Thus, a market for agriculturalists and traders could only be set up under the provisions of the 1963 Act, but the same did not and would not apply to retailers dealing in small quantities. There was nothing in the 1963 act to indicate that transactions between the ultimate consumers and the vendors was controlled or that the local authority was prohibited from setting up a vegetable market for the same.

10. The appellants on 19.3.1992 filed an SLP (No.7559/2002), before this Court raising, inter alia, the following main contentions:

a. SMC, acting under the provisions of the BPMC Act, had no authority to establish the vegetable market as there was a later and special Act passed by the Gujarat government, namely the Gujarat Agricultural Produce Market Act, 1963 (hereinafter the '1963 Act') and under 1963 Act a vegetable market could only be established by a Market Committee constituted under the 1963 Act.

b. There were markets already established within a radius of 1 and 1/2 kms, and thus there was no need to establish a vegetable market. It was also contended that there was no mandatory duty on the SMC to establish the said market, and that establishing such a market would only lead to traffic problems as the area was a congested area in the middle of the city. The appellants also stated that the area sought to be acquired was occupied by many tenants with many superstructures on it.

c. The lands in question had been reserved in the Final Development Plan of SUDA, but there was a

proposal to de-reserve the said lands (by notification dated 17.05.2001), and thus the notifications under Sections 4 and 6 of the Land Acquisition Act would not survive.

11. On 2.09.2004, the State Government issued a notification under Section 17(1)(c) of the Development Act sanctioning the revised Development Plan (called the revised Final Development Plan). In the said plan, the State Government, due to the objections raised by SMC, did not accept the proposal for de-reservation of the appellants' lands. Thus, the reservation of the lands for a vegetable market for SMC was continued.

12. On 22.04.2002, this Court in the pending SLP stayed further steps regarding the proposed acquisition of land and the interim order of stay was continued on 5.11.2004.

13. This Court is of the view that among the contentions which have been raised by the appellants herein, the one relating to non-applicability of BPMC Act, to initiate an acquisition by the State for establishment of a vegetable market in the context of enactment of a later and a special Act, namely, the 1963 Act, is of some substance.

14. Admittedly, from the resolution of SMC, it is clear that it was relying on Section 78 of the BPMC Act for initiating its proposal of acquisition of land for the establishment of a vegetable market. Section 78 of the BPMC Act runs as under:

"78. Procedure when immovable property cannot be acquired by agreement.-

(1) Whenever the Commissioner is unable under section 77 to acquire by agreement any immovable property or any easement affecting any immovable property vested in the Corporation or whenever any immovable property or any easement affecting any immovable property vested in

the Corporation is required for the purposes of this Act, the State Government may, in its discretion, upon the application of the Commissioner made with the approval of the Standing Committee and subject to the other provisions of this Act, order proceedings to be taken for acquiring the same on behalf of the Corporation, as if such property or easement were land needed for a public purpose within the meaning of the Land Acquisition Act, 1894 (1 of 1894).

(2) Whenever an application is made under sub-section (1) for the acquisition of land for the purpose of providing a new street or for widening or improving an existing street it shall be lawful for the Commissioner to apply for the acquisition of such additional land immediately adjoining the land to be occupied by such new street or existing street as is required for the sites of buildings to be erected on either side of the street, and such additional land shall be deemed to be required for the purposes of this Act.

(3) The amount of compensation awarded and all other charges incurred in the acquisition of any such property shall, subject to all other provisions of this Act, be forthwith paid by the Commissioner and thereupon the said property shall vest in the Corporation."

15. A perusal of Sub-section(1) of Section 78 shows that the State Government may, in its discretion, upon application of the Commissioner, order proceedings to be taken for acquiring the land in question if the SMC needs it for the *purposes of this Act.* Section 63 of the BPMC Act provides for certain categories of matters in respect of which SMC is competent to take steps and one such step is provided under Section 63(12). Under Sub-section 12 of Section 63, SMC can take steps for:

"63. (12) the construction or acquisition and maintenance of public markets and slaughter-houses and tunneries and

the regulation of all markets and slaughter-houses and tunneries;"

16. Section 2(33) of BPMC Act defines a 'market'. The said definition is very broad and is set out herein below:

"2. (33) "market" includes any place where persons assembly for the sale of, or for the purpose of exposing for sale, live-stock or food for live-stock or meat, fish, fruit, vegetables, animals intended for human food or any other articles of human food whatsoever with or without the consent of the owner of such place, notwithstanding that there may be no common regulation of the concourse of buyers and sellers and whether or not any control is exercised over the business of or the persons frequenting the market by the owner of the place or any other person;"

17. Relying on these provisions of BPMC Act, it has been argued by the learned counsel for the appellants that a Municipal Commissioner is authorized to set up a market within the meaning of Section 2(33) of BPMC Act. Such a market is much wider than a vegetable market.

18. The learned counsel for the appellants buttressed the argument by further reference to the 1963 Act. Referring to the Statement of Objects and Reasons of the 1963 Act, learned counsel urged that the said 1963 Act has been enacted to consolidate and amend the law relating to buying and selling of agricultural produce and the establishment of markets for agricultural produce in the State of Gujarat. The Statement of Objects and Reasons of the 1963 Act, in the Gujarat Government Gazette Extraordinary dated March 22, 1963 is as follows:

"**STATEMENT OF OBJECTS AND REASONS**.

As regards the regulation of sales and purchases of agricultural produce, there is in force, in the Bombay area

of the State, the Bombay Agricultural Produce Markets Act, 1939, and in the Saurashtra area of the State, the Saurashtra Agricultural Produce Markets Act, 1955. There is no corresponding law in force in the Kutch area of the State.

2. The aforesaid Bombay Act is on the statute book for the last 23 years and during that period it has undergone various changes from time to time to suit the development and growth of regulated agricultural produce markets.

3. Government had appointed a Committee under the Chairmanship of Shri Jashvantlal Shah, the then Deputy Minister for Co-operation, to review the entire position of agricultural produce markets in the light of the experience gained in the day-to-day working thereof and to suggest amendments, if any, to the existing Law. Accordingly the Committee has suggested various amendments. In pursuance of the policy of the State to bring about uniformity in the laws in force in the State, it is proposed to consolidate and amend the law relating to the regulation of buying and selling of agricultural produce in the whole of the State Of Gujarat. The present Bill seeks to achieve that object. The Bill mainly follows the Bombay Agricultural Produce Markets Act, 1939 (hereinafter referred to as "the existing Act'). Various amendments suggested by the Committee have also been incorporated in the Bill."

19. The learned counsel for the appellants further urged that the Act of 1963 is a later and a special law for establishment of a market for agricultural produce in the State. The learned counsel also referred to the definition of 'agricultural produce' under Section 2(i) of the 1963 Act and argued that vegetables definitely come within the definition of 'agricultural produce'. He also referred to the definition of 'market' under Section 2(xii) of the 1963 Act to mean 'a market declared or deemed to be declared under the Act'; as also to the definition of a 'market area' under Section 2(xiii), which means 'any area

declared or deemed to be declared to be a market area under this Act.'

20. Reference was also made to 'retail sale' under Section 2(xviii) of the 1963 Act, whereunder 'retail sale' means:

"2. (xviii) "retail sale" means a sale of any agricultural produce not exceeding such quantity as a market committee may by bye-laws determine to be a retail sale in respect of such agricultural produce;"

21. This Court notes that sale and purchase in the market area is controlled under Section 6(1) and (2). Section 6(3) carves out an exception in the following terms:

"6. (3) Nothing in sub-section (2) shall apply to the purchase or sale of any such agricultural produce, if its producer is himself its seller and the purchaser purchases it for his own private consumption."

22. The learned counsel for the appellants, relying on these provisions urged that the establishment of a vegetable market falls solely and squarely within the provisions of the 1963 Act.

23. Under Chapter IX and section 49 of the 1963 Act, the State Government is authorized to acquire any land within a market area if it is needed for the purposes of this Act, i.e. the 1963 Act. Such acquisition can be made under the provisions of the Land Acquisition Act, 1894 or any other corresponding law for the time being in force. Section 49 (1) and (2) are set out below:

"49. (1) The State Government may acquire any land within a market area, which in its opinion is needed for the purposes of this Act, under the provisions of the Land Acquisition Act, 1894 or any other corresponding law, for the time being in force.

(2) Such land shall be transferred by the State Government

to the market committee on payment by the market committee of the compensation awarded under the Land Acquisition Act, 1894, or any other corresponding law for the time being in force and of all other charges incurred by the State Government on account of the acquisition, within such period and in such manner as the State Government may, by general or special order, determine and on such transfer the land shall vest in the market committee."

24. The learned counsel for the appellants strongly relied on Section 63 of the 1963 Act, which excludes the application of Bombay Markets and Fairs Act, 1862 or any other law for the time being in force relating to the establishment, maintenance and regulation of a market. Section 63 runs as under:

"63. Nothing contained in the Bombay Markets and Fairs Act, 1862, or in any law for the time being in force relating to the establishment, maintenance or regulation of a market shall apply to any market area or affect in any way the powers of a market committee or the rights of a holder of a licence granted under this Act to set up, establish or continue any place for the purchase or sale of any agricultural produce notified under sub-section (1) of section 6 in such area."

25. The main argument of the learned counsel for the appellants on the basis of the aforesaid statutory framework is that if the State Government wants to acquire any land for the establishment of a vegetable market, the State Government must take steps under the later and the special Act, which is the 1963 Act. In other words, the State Government cannot, in view of specific later legislative enactment, i.e. the 1963 Act and Section 63 thereof, initiate acquisition proceedings to establish a vegetable market on the basis of resolution of SMC under Section 78 of BPMC Act.

26. The learned counsel for the respondents opposed the

aforesaid contentions and took us through the judgment of the High Court and submitted that the 1963 Act is meant for the cultivators and traders and is not meant for common man. The learned counsel also relied on various provisions of the Gujarat Town Planning and Urban Development Act and also urged that in view of sections 63(12) and 78 of the BPMC Act, the impugned action of SMC, which has been affirmed by the High Court, is valid in law and this Court may dismiss the special leave petition.

27. After considering the rival submissions of the parties, this court is of the opinion that the contentions raised by the learned counsel for the appellants deserved serious consideration by the High Court.

28. However, the High Court in the impugned judgment, with great respect, proceeded on various issues but has not at all touched the questions discussed above. In fact in paragraph 18 of the impugned judgment, the High Court refused to answer this question, inter alia, on the ground that the appellants are neither agriculturalists nor the purchasers of agricultural produces as specified in the schedule nor dealers in such commodities nor office bearers of Surat Agricultural Produce Market Committee, nor have any right to make grievance on behalf of Surat Agricultural Produce Market Committee.

29. We are of the considered view that the High Court was clearly in error in refusing to deal with the aforesaid question on the grounds mentioned in paragraph 18.

30. This court is further of the opinion that since the property of the appellants is taken away as a result of the aforesaid acquisition proceedings, the appellants are entitled to raise the question of non-applicability of the BPMC Act to initiate an acquisition proceedings for establishing a vegetable market, in view of the clear provisions of the 1963 Act, which is a special and a later Act.

31. The right of property, may no longer be a fundamental right, but it enjoys the protection of Article 300A of the Constitution to the extent that there can be no deprivation of property save by authority of law. Authority of law would obviously mean valid authority of law. In a case of deprivation of property by acquisition, ultimately by Land Acquisition Act, 1894, which is a drastic and expropriatory piece of legislation, the owners of property, the appellants herein, are admittedly entitled to raise all legally permissible objections to the legality of an acquisition proceeding.

32. Here as the High Court has proceeded on an erroneous approach, its judgment cannot be sustained in as much as the High Court refused to examine the validity of the main challenge raised by the appellants on a ground of their lack of locus. This approach of the High Court, with great respect, goes to the root of the issue and makes its judgment very vulnerable.

33. For the reasons aforesaid, this Court cannot sustain the impugned judgment of the High Court, which is accordingly set aside. The matter is remitted to the High Court for decision of the writ petition afresh on the questions discussed above and are specifically formulated below.

34. The High Court may deal with all issues but specifically the two following questions:

(i) Whether the 1963 Act, a later and a special Act as compared to the 1949 Act would prevail over the 1949 Act or whether a harmonious construction is possible between the 1963 Act and the 1949 Act on the footing that they seem to govern two distinct and separate spheres of markets.

(ii) The impugned acquisition proceeds under Section 78 of the BPMC Act. Section 78 peculiarly uses the term "property vested in the corporation". A plain

reading of the term seem to prima facie imply that the SMC can only acquire property vested in it and not private property. Thus, High Court may decide the scope and extent of the said expression in Section 78 of the BPMC Act and determine issue of validity of the impugned acquisition.

35. Since considerable time has elapsed, the High Court is requested to take steps to hear out the writ petition in light of the observations made above, as early as possible, but definitely within a period of 6 months from the date of the production of this order before the High Court. However, the High Court is free to decide the questions without being in any way inhibited by any observation made in this judgment, save and except its finding on two issues. They are (i) the 1963 Act is a later and special statute dealing with agricultural produce and agricultural market, and (ii) the appellants have, in view of the provisions of Article 300A and the drastic provision of Land Acquisition Act, the locus to challenge the acquisition proceeding.

36. It is, however, made clear that it is open to the parties to raise all legally permissible contentions before the High Court. The appeal is allowed to the extent indicated above.

37. No order as to costs.

D.G. Appeal allowed.

MAN KAUR (DEAD) BY LRS.
v.
HARTAR SINGH SANGHA
(Civil Appeal Nos. 147-148 of 2001)

OCTOBER 05, 2010

[R.V. RAVEENDRAN AND AFTAB ALAM, JJ.]

Specific Relief Act, 1963:

s. 16(c) – Compliance of – Agreement of sale of property between parties through their attorney holders – Payment of earnest money by plaintiff-vendee – Plaintiff alleging failure of defendant-vendor to execute sale deed though he was ready and willing to perform his part of contract – Suit for specific performance of agreement of sale by plaintiff against defendant, through another attorney holder – Suit decreed by trial court – Upheld by High Court – On appeal, held: Plaintiff neither signed agreement of sale nor plaint nor appeared and gave evidence, about his readiness and willingness – Plaintiff's attorney holder who executed agreement of sale not examined and one who signed the plaint had no personal knowledge of the transaction – No evidence of readiness and willingness of plaintiff to perform his part of the obligations in terms of the contract, thus, non-compliance of s. 16(c) – Agreement did not bar specific performance – Plaintiff could seek the relief subject to proving breach by defendant and plaintiff's readiness and willingness to perform the contract – Material on record shows that plaintiff committed breach – Courts below ignored the relevant evidence and drew adverse inference from the evidence – Thus, earnest money is forfeited and plaintiff not entitled for the refund – Decree for specific performance set aside.

s. 16(c) – Specific performance of contract – When barred – Explained.

Specific performance of contract – Readiness and willingness to perform – Proving of, by plaintiff – Examination of persons-attorney holders having personal knowledge about the transaction – Discussed - Evidence.

The appellant-defendant was the owner of certain property. The respondent-plaintiff was an NRI. The defendant represented by her husband and attorney-holder 'KS'-DW 1 entered into an agreement to sell the said property to the plaintiff represented by attorney-holder 'PS'. The agreement of sale was signed by the attorney holders of the parties. The plaintiff paid Rs. 10,000/- as earnest money. The plaintiff alleged that in spite of notice, the defendant did not execute sale deed though the plaintiff was ready and willing to perform his part of the contract and get the sale deed registered by paying the balance consideration. The plaintiff then represented by his attorney-holder 'JS'-PW 1, filed a suit for specific performance of the agreement of sale against the defendant. The property dealer 'BS'-PW 2, PW 1 and DW 1 were examined. The trial court decreed the suit. The High Court upheld the order passed by the trial court. Therefore, the appellant filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 Section 16(c) of the Specific Relief Act 1963 bars the specific performance of a contract in favour of a plaintiff who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms, the performance of which has been prevented or waived by the defendant). Explanation (ii) to Section 16 provides that for purposes of clause (c) of Section 16, the plaintiff must aver performance of, or readiness and willingness to

perform, the contract according to its true construction. Thus, in a suit for specific performance, the plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract. [Para 9]

1.2 To succeed in a suit for specific performance, the plaintiff has to prove: that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; that the defendant committed breach of the contract; and that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore, a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned. [Para 11]

1.2 The position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder *shall* be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if

evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. [Para 12]

1.3 In the instant case, the matter was handled by different persons at different points of time on behalf of the plaintiff-the negotiations and execution of agreement on 20.10.1978 were handled by the plaintiff's attorney holder 'PS'; on 7.6.1979; the plaintiff was personally present and dealt with the matter himself; and from 1.3.1980, the matter was dealt with by the plaintiff's new attorney holder-PW 1. The plaintiff neither signed the agreement of sale nor signed the plaint nor gave evidence, in particular, about his readiness and willingness. The agreement of sale was executed by the plaintiff's attorney holder 'PS' who was not examined. The plaint was signed by the plaintiff's attorney holder-PW 1 in whose favour the plaintiff had executed the power of attorney on 1.3.1980 and who had no personal knowledge of the transaction. PW 1 was not aware of the execution of the agreement, nor what happened till the last date fixed for performance had elapsed, nor what transpired on 7.6.1979. PW1 clearly stated in his evidence that he was not aware of anything that transpired prior

to 1.3.1980 when the power of attorney was executed in his favour. Nothing of relevance transpired after 1.3.1980 except the issue of the suit notice dated 5.3.1980. He did not know whether the defendant committed breach nor did he know about the readiness and willingness of the plaintiff. Therefore, the evidence of PW 1 is of no assistance in a suit for specific performance except to prove that he was authorized by the plaintiff to file a suit for specific performance. [Para 13]

1.4 The plaintiff, who ought to have given evidence, never appeared and gave evidence. As his attorney holder PW 1 had no knowledge of the transaction, the plaintiff solely relied on the evidence of the property dealer-PW 2 to prove the execution of the agreement, the terms of the agreement, his readiness and willingness to perform the agreement and the alleged breach by the defendant. But PW 2 cannot become a substitute for the plaintiff to give evidence about the finances or intentions or the readiness and willingness of the plaintiff which were within the personal knowledge of the plaintiff. PW 2 was a property dealer engaged by the plaintiff and supporting the plaintiff. He was not an attorney holder acting on behalf of the plaintiff. Therefore, neither the evidence of PW 1 nor the evidence of PW2 could be relied upon to prove that plaintiff was always ready and willing to perform his obligations, in terms of the contract. Therefore, though there were necessary averments in the plaint about the readiness and willingness of the plaintiff, and though PW1 and PW2 gave evidence about his readiness and willingness, the suit fails for failure to comply with section 16(c) of the Specific Relief Act, as there was no acceptable or valid evidence of such readiness and willingness of the plaintiff to perform his part of the obligations in terms of the contract. [Para 14]

N.P. Thirugnanam v. R. Jagan Mohan Rao **AIR 1996 SC 116;** *Pushparani S.Sundaram v. Pauline Manomani James* **2002 (9) SCC 582;** *Manjunath Anandappa v. Tammanasa* **2003 (10) SCC 390, relied on.**

P.D'Souza v. Shondrilo Naidu **2004 (6) SCC 649;** *Aniglase Yohannan v. Ramlatha* **2005 (7) SCC 534 – distinguished.**

Vidhyadhar v. Manikrao **1999 (3) SCC 573;** *Janki Vashdeo Bhojwani vs. Indusind Bank Ltd.* **2005 (2) SCC 217;** *Shankar Finance & Investments vs. State of AP* **(2008) 8 SCC 536 – referred to.**

2.1 For a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated damages in case of breach and does not contain any provision for specific performance, the party in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a provision for specific performance, the court cannot grant specific performance. But where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible. [Para 18]

2.2 In the instant case, the agreement does not specifically provide for specific performance nor does it bar specific performance. It provides for payment of damages in the event of breach by either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific performance. Therefore, the plaintiff would be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract. [Para 19]

3.1 The time fixed for the performance in the agreement was 20.12.1978. But time was not considered by the parties, to be essence of the contract. The correspondence clearly showed that defendant's attorney holder DW 1 was willing to perform the contract on 7.6.1979, nearly six months after the last date stipulated in the agreement. [Para 20]

3.2 PW 2 attempted to give some evidence about the readiness and willingness of the plaintiff. But the evidence of PW 2 cannot be a substitute for the evidence of the plaintiff regarding the plaintiff's readiness and willingness. The correspondence between PW 2 and DW 1 demonstrates that the version and stand of DW 1 appears to be more probable and correct. The correspondence clearly established that the plaintiff was not ready and willing to get the sale deed executed within the time prescribed or even as on 7.6.1979 which was the last day of the extended period. The evidence also demonstrates that the plaintiff was not in a position to perform the contract as PW 2 admitted in his evidence that the purchaser had to purchase the stamp paper and that on 7.6.1979, the stamp paper was not purchased;

and that the plaintiff had in his bank account Rs.1,14,000/- but that amount was not drawn from the bank. PW 2 and PW 1 also referred to the assets owned by the plaintiff. Such evidence is of no assistance in the absence of evidence as to availability of money for purchase and about the readiness and willingness of plaintiff to perform the contract. There is also something doubtful about the version given by PW 2 in his evidence as to what happened at the Sub-Registrar's office on 7.6.1979. [Paras 21 and 22]

3.4 The submission that in terms of the agreement, the defendant had to furnish an NOC from Chandigarh Administration, as also ULC clearance and income tax clearance required for the sale and there was nothing to show that she had obtained them and, therefore, the question of the plaintiff proving his readiness and willingness to perform his obligations did not arise, cannot be accepted. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the plaintiff that readiness and willingness on the part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct. [Para 23]

3.5 The evidence clearly showed that the defendant's attorney holder DW 1 had entrusted the work of securing the clearances to the property dealer PW 2, who was acting on behalf of the plaintiff. This was within the knowledge of 'PS', attorney holder of the plaintiff at the relevant point of time. PW 2 also admitted in his evidence that he was to get the NOC and ULC clearance. PW 2 sent a telegram to DW 1 at the instance of the plaintiff, asking him to come to place 'C' on 7.6.1979 and execute the sale deed. Therefore, PW 2 had either secured the certificates necessary for the sale or had deliberately called DW 1 to come over to place 'C' even though the plaintiff was not ready and the clearances had not been secured, to create evidence that plaintiff was ready. In neither case, the defendant could be faulted. [Para 24]

3.6 None of the courts below referred to the relevant evidence or the significance of the plaintiff not tendering evidence. They merely went by the evidence of PW 2 to hold that the plaintiff was ready and willing and the defendant committed a breach. The material on record shows that the respondent-plaintiff committed breach. The earnest money stands forfeited and the respondent is not entitled for refund of the earnest money. The judgments of the courts below are set aside and the suit for specific performance is dismissed. [Paras 25 and 26]

Case Law Reference:

AIR 1996 SC 116	**Relied on.**	**Para 9**
2002 (9) SCC 582	**Relied on.**	**Para 9**
2003 (10) SCC 390	**Relied on.**	**Para 9**
1999 (3) SCC 573	**Referred to.**	**Para 9**
2005 (2) SCC 217	**Referred to.**	**Para 10**

(2008) 8 SCC 536	**Referred to.**	**Para 10**
2004 (6) SCC 649	**Distinguished.**	**Para 15**
2005 (7) SCC 534	**Distinguished.**	**Para 15**

CIVIL APPELLTAE JURISDICTION : Civil Appeal No. 147-148 of 2001.

From the Judgment & Order dated 26.10.1999 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 3447 of 1997 and Order dated 17.1.2000 in Review Applicatin No. 3-C of 2000.

Rakesh Dwivedi, Vijay Hansaria, P.I. Jose, Anupam Mishra, Vivek Kandari, Mukti and Sneha Kalita for the Appellant.

Amit Rawal, Amit Kumar Sharma, Nitin Setia and E.C. Agrawala for the Respondent.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN J. 1. The appellant (Man Kaur, who died during the pendency of this appeal and is represented by her Legal Representatives) was the defendant in a suit for specific performance of an agreement of sale, filed by the respondent. For convenience the appellant and respondent will also be referred by their ranks in the suit as 'defendant' and 'plaintiff' respectively.

2. The appellant Man Kaur was the owner of the suit property, a plot admeasuring 1000 sq.yards with the building thereon, identified as 'Annexe No 508' situated in Sector-18B, Chandigarh. The respondent-plaintiff was, at all the relevant points of time, a Non-Resident Indian living in United Kingdom. An agreement of sale dated 20.10.1978 was entered between defendant represented by her husband and attorney holder Kartar Singh, as vendor, and plaintiff represented by his attorney

holder Paramjit Singh, as purchaser. The material terms of the said agreement were :

(i) The defendant shall sell the suit property to plaintiff for a consideration of Rs.1,50,000/-.

(ii) As the premises was tenanted the defendant was liable to deliver vacant possession of only a small portion which was in her occupation. If the vendor was able to get the tenant vacated and deliver vacant possession of the entire premises, then the sale price shall be Rs.1,60,000/-.

(iii) A sum of Rs.10,000/- was paid in cash as earnest money by the attorney holder of the purchaser to the attorney holder of the vendor.

(iv) The sale had to be completed by 20.12.1978 and the balance sale price shall be paid at the time of registration of the sale deed.

(v) The vendor had to deliver at the time of registration of the sale deed, her title deed, as also the NOC from the Estate Office, Chandigarh, permission for the sale under Urban Land (Ceiling and Regulation) Act 1976, and Clearance Certificate under section 230A of the Income Tax Act, 1961 and other relevant documents if any.

(vi) If the vendor committed default, he had to pay double the amount of earnest money to the purchaser and if the purchaser committed any default, the sum of Rs.10,000/- paid as earnest money would stand forfeited; and

(vii) The bargain was entered through the property dealer — M/s R. P. Sethi & Co. to whom both the parties should pay 2% commission on the total price; and in the event of default, the defaulting party shall pay 4% commission.

The agreement of sale was signed by the attorney holder of the vendor and attorney holder of the purchaser and witnessed by

Hari Singh (Property Dealer) and Balraj Singh (property dealer carrying on business under the name and style of M/s R. P. Sethi & Co.). The agreement also contained an endorsement by Kartar Singh acknowledging the receipt of Rs.10000/- as earnest money in addition to another sum of Rs.1500/-.

3. On 25.4.1980 the respondent (represented by his attorney holder Jagtar Singh Sangha under power of attorney dated 1.3.1980), filed a suit for specific performance of the said agreement of sale, against the appellant. The plaint after referring to the terms of the agreement of sale, averred that the bargain was struck through property dealer Balraj Singh of M/s. R.P. Sethi & Co; that the time for performance was extended from time to time till 7.6.1979; that the defendant's attorney holder and plaintiff reached Chandigarh on 7.6.1979; that though defendant's attorney holder stated that he had come to Chandigarh to execute the sale deed, he did not go over to the Sub-Registrar's office nor executed the sale deed; that plaintiff remained present in the Sub-Registrar's office at Chandigarh, and recorded his presence on 7.6.1979 by presenting an application and getting an acknowledgement from the Sub-Registrar; that after 7.6.1979, neither the defendant nor her attorney holder Kartar Singh came to Chandigarh; that they did not also contact the plaintiff or the property dealer Balraj Singh; and that the repeated attempts of the property dealer Balraj Singh to contact defendant were futile. The plaint also averred that the plaintiff was always ready and willing to perform his part of the contract and get the sale deed registered by paying the balance consideration; and that in spite of a notice dated 5.3.1980 calling upon the defendant to complete the sale, the defendant had failed to execute the sale deed. The plaintiff therefore prayed for specific performance of the agreement of sale dated 20.10.1978 or in the alternative, if he was found not entitled to specific performance, then for a decree of recovery of Rs.21,500/- (that is Rs.11500/- paid to defendant's attorney holder and Rs.10000/- as liquidated damages) with costs.

4. The defendant resisted the suit. The defendant alleged that as she and her husband were residents of Rourkela, it was agreed that the property dealer Balraj Singh, who was acting on behalf of the purchaser-plaintiff would be responsible for securing the required clearances for the sale; that a sum of Rs.1500/- was paid by plaintiff's attorney holder to Balraj Singh (shown as advance payment to vendor in the receipt portion of the agreement of sale) to secure the said NOC/permission/clearance; that defendant signed and delivered to Balraj Singh the necessary papers for getting the clearances/certificates; that time stipulated for sale (20.12.1978) was the essence of the contract; that Balraj Singh sent a telegram dated 2.6.1979 requiring defendant's husband Kartar Singh to reach Chandigarh on 7.6.1979 for registration, assuring that registration of sale deed would definitely take place on that day and no further extension would be sought; that in response to it, the defendant's husband, who was intent to maintain cordial relationship, in spite of the expiry of the last date fixed for sale, went to Chandigarh and met the plaintiff and Balraj Singh, in the office of Balraj Singh; that the plaintiff informed him that he (plaintiff) could not arrange the entire funds for making full payment and therefore could not proceed with the sale; that defendant's husband informed the plaintiff and Balraj Singh that he had come all the way from Rourkela to get the sale deed registered, and it was evident that the plaintiff did not have the money and not interested in purchasing of the property and that therefore the agreement stood cancelled, and he would not execute the sale deed; and that the defendant's husband thereafter left for Rourkela and also wrote a letter to Balraj Singh confirming the termination of the agreement in view of the plaintiff's conduct on 7.6.1979. The defendant contended that as plaintiff was not ready and willing to perform the contract by paying the balance of the sale price and get the sale completed, he was not entitled to specific performance; and that in view of the breach committed by the plaintiff, the earnest money amount paid by him stood forfeited. The defendant also contended that the suit was not maintainable as it was not filed

by a duly authorized person. Subsequently the defendant amended her written statement to contend that plaintiff was a Non-Resident Indian and he had not obtained the permission of the Reserve Bank of India under the Foreign Exchange Regulation Act, 1973, and therefore he was not entitled to purchase any immovable property in India.

5. On the said pleadings, the trial court framed the following issues:

(1) Whether the suit has been filed by a duly authorized person?

(2) Whether the suit is not maintainable in the present form?

(3) Whether the suit for specific performance is not maintainable?

(4) Whether the suit is hit by laches and delay? If so, its effect?

(5) Whether the agreement dated 20.10.1978 has been rescinded and the suit is thus not maintainable?

(6) Whether the plaintiff is estopped by his own act and conduct from filing the present suit?

(7) Whether the time was the essence of the contract?

(8) Whether the plaintiff was and is ready and willing to perform his part of the agreement? If not its effect?

(9) Whether the plaintiff is entitled to the specific performance and in alternative damages as claimed?

(9A) Whether the suit is barred in view of preliminary objection No.7 in the written statement?

(10) Relief.

6. The parties went to trial on the said issues. On behalf of the plaintiff, his attorney holder Jagtar Singh Sangha was examined as PW1, and the property dealer Balraj Singh was examined as PW2. On behalf of the defendant, her husband and attorney holder Lt. Col. Kartar Singh was examined as DW-1. After appreciating the evidence, the trial court by judgment dated 15.3.1983, decreed the suit. It held that as the plaintiff had executed a power of attorney dated 1.3.1980 in favour of his brother Jagtar Singh Sangha and as Jagtar Singh Sangha has asserted in his evidence that he was the attorney holder of the plaintiff, and as Balraj Singh had given evidence that plaintiff executed the power of attorney in favour of Jagtar Singh Sangha in his presence, the suit was filed by a duly authorized person and was maintainable. The trial court held that the time was not of essence of the contract; that defendant had failed to prove that the agreement dated 20.10.1978 was rescinded; that the plaintiff had proved that he was ready and willing to perform his part of the contract; that the suit was not barred by time; that the Reserve Bank's permission was not necessary for obtaining a decree for specific performance, but was required only for execution of the sale deed in pursuance of a decree for specific performance; and therefore plaintiff was entitled to specific performance.

7. The appeal filed by the defendant was dismissed by the District Judge, Chandigarh, by judgment dated 3.6.1997 affirming the findings of fact recorded by the trial court. The second appeal filed by the appellant was dismissed by the Punjab & Haryana High Court, by the impugned judgment dated 26.10.1999. The appellant has challenged the said judgment in this appeal by special leave.

8. The contentions of the appellant in brief are :

(i) The plaintiff did not sign the agreement of sale nor sign the plaint, nor gave evidence. His attorney holder (Paramjit Singh) who entered into the agreement of sale on behalf of the plaintiff and who represented the plaintiff initially, was not examined. The second attorney holder (Jagtar Singh Sangha) examined as PW1 was not personally aware of the transaction and admitted that he was not aware of what transpired prior to the execution of the power of attorney in his favour on 1.3.1980. There was therefore no acceptable or valid evidence about the readiness and willingness of the plaintiff to perform the contract. The courts below ought to have dismissed the suit by drawing a presumption that the plaintiff's case was false and for non-compliance with Section 16(c) of the Specific Relief Act, 1963 as the plaintiff did not enter the witness box.

(ii) The agreement of sale only provided for damages in the event of breach by either party. The agreement (Clause 11) provided that if the vendor failed to perform his part of the contract by executing the sale deed and getting it registered on receiving the balance consideration, he shall be liable to pay double the amount of earnest money received by her from the purchaser. The agreement did not provide for specific performance in the event of breach by the vendor. The clear intention of the parties was that in the event of breach by the vendor, the purchaser will be entitled to double the earnest money (that is refund of earnest money plus liquidated damages of Rs.10,000/-) and nothing more. Therefore, even if breach by the appellant – vendor was made out, the remedy of respondent – purchaser was only to get Rs.20,000/- and not for specific performance.

(iii) The evidence clearly established that plaintiff was not ready and willing to perform the contract and committed breach and as a consequence, the defendant rescinded the contract. The courts below ignored the relevant

evidence in this behalf and drew invalid inferences from the evidence. The courts below therefore ought to have dismissed the suit.

Re : Contention (i)

9. Section 16(c) of the Specific Relief Act 1963 ('Act' for short) bars the specific performance of a contract in favour of a plaintiff who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than terms of the performance of which has been prevented or waived by the defendant). Explanation (ii) to section 16 provides that for purposes of clause (c) of section 16, the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. Thus in a suit for specific performance, the plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove his readiness and willingness to perform his obligations under the contract in terms of the contract. (See : *N.P. Thirugnanam to R. Jagan Mohan Rao* – AIR 1996 SC 116; *Pushparani S.Sundaram v. Pauline Manomani James* - 2002 (9) SCC 582; and *Manjunath Anandappa v. Tammanasa* - 2003 (10) SCC 390). In the first case, this Court held :

> "The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to ay to the

defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."

In *Vidhyadhar v. Manikrao* - 1999 (3) SCC 573, this Court reiterated the following well recognized legal position:

"Where a party to the suit does not appear in the witness-box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct."

10. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of attorney holders. This Court in *Janki Vashdeo Bhojwani vs. Indusind Bank Ltd.* – 2005 (2) SCC 217, held as follows:

"Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. *In other words, if the power of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a*

personal knowledge and in respect of which the principal is entitled to be cross-examined.

....In the case of *Shambhu Dutt Shastri v. State of Rajasthan*, 1986 2 WLN 713 (Raj) it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

The aforesaid judgment was quoted with the approval in the case of *Ram Prasad v. Hari Narain* – AIR 1998 Raj 185. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but be cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC. ....

We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* followed and reiterated in the case of *Ramprasad* is the correct view."

In *Shankar Finance & Investments vs. State of AP* – (2008) 8 SCC 536, this Court explained in what circumstances, the evidence of an attorney holder would be relevant, while dealing with a complaint under section 138 of the Negotiable Instruments Act, 1881 signed by the attorney holder of the payee. This Court held :

"A power of attorney holder of the complainant, who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the complainant and the attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the complainant payee, there is no reason why the attorney holder cannot be examined as the complainant…..In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined."

11. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal

knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder *shall* be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

13. In this case, the matter has been handled by different persons at different points of time on behalf of the plaintiff – (a) the negotiations and execution of agreement on 20.10.1978 were handled by plaintiff's attorney holder Paramjit Singh; (b) on 7.6.1979, the plaintiff was personally present and dealt with the matter himself; and (c) from 1.3.1980, the matter was dealt with by plaintiff's new attorney holder Jagtar Singh Sangha. The plaintiff neither signed the agreement of sale nor signed the

plaint nor gave evidence, in particular, about his readiness and willingness. The agreement of sale was executed by plaintiff's attorney holder Paramjit Singh who was not examined. The plaint was signed by plaintiff's attorney holder Jagtar Singh Sangha (PW1) in whose favour plaintiff had executed the power of attorney on 1.3.1980 and who had no personal knowledge of the transaction. The said attorney holder (PW1) was not aware of the execution of the agreement, nor what happened till the last date fixed for performance had elapsed, nor what transpired on 7.6.1979. The said attorney holder (PW1) clearly stated in his evidence that he was not aware of anything that transpired prior to 1.3.1980 when the power of attorney was executed in his favour. Nothing of relevance transpired after 1.3.1980 except the issue of the suit notice dated 5.3.1980. He did not know whether defendant committed breach nor did he know about the readiness and willingness of the plaintiff. He admitted in his evidence :

> "I do not know the detailed terms and conditions of the transaction…. I do not know the facts of this transaction before my appointment in the year 1980….. I do not know whether plaintiff wrote any letter that he is ready to purchase this plot…. I do not know if anybody else also did any bargain in the transaction or not. I do not know who has been in correspondence on behalf of the plaintiff till June 1979".

The evidence of PW 1 is therefore of no assistance in a suit for specific performance except to prove that he was authorized by the plaintiff to file a suit for specific performance.

14. The plaintiff who ought to have given evidence never appeared and gave evidence. As his attorney holder PW1 had no knowledge of the transaction, the plaintiff solely relied on the evidence of the property dealer Balraj Singh (PW2) to prove the execution of the agreement, the terms of the agreement, his readiness and willingness to perform the agreement and

the alleged breach by the defendant. But Balraj Singh cannot become a substitute for the plaintiff to give evidence about the finances or intentions or the readiness and willingness of plaintiff which were within the personal knowledge of the plaintiff. Balraj Singh was a property dealer engaged by plaintiff and supporting the plaintiff. He was not an attorney holder acting on behalf of plaintiff. Therefore, neither the evidence of Jagtar Singh (PW 1) nor the evidence of Balraj Singh (PW2) can be relied upon to prove that plaintiff was always ready and willing to perform his obligations under the contract, in terms of the contract. Therefore, it has to be held that though there were necessary averments in the plaint about the readiness and willingness of the plaintiff, and though PW1 and PW2 gave evidence about his readiness and willingness, the suit has to fail for failure to comply with section 16(c) of the Specific Relief Act, as there was no acceptable or valid evidence of such readiness and willingness of plaintiff to perform his part of the obligations in terms of the contract.

15. The respondent relied upon the following observation of this Court in *P.D'Souza v. Shondrilo Naidu* - 2004 (6) SCC 649 :

> "It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of the contract. The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf."

The respondent next relied upon the following observations of this Court in *Aniglase Yohannan v. Ramlatha* [2005 (7) SCC 534] :

> "12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the *grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

This Court further held that the averments relating to readiness and willingness are not a mathematical formula which should be expressed in specific words and if the averments in the plaint as a whole, do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract, the fact that the wording was different, will not militate against the readiness and willingness of the plaintiff. The above observations cannot be construed as requiring only a pleading in regard to readiness and willingness and not 'proof' relating to readiness and willingness. In fact, in the very next para, this Court clarified that Section 16(c) of the Act mandates the plaintiff to aver in the plaint and *establish the fact by evidence aliunde* that he has always been ready and willing to perform his part of the contract. Therefore, the decision merely reiterates the need for both pleadings and proof in regard to readiness and willingness of the plaintiff.

16. The said decisions do no assist the respondent. The respondent also relied upon some decisions which observe that increase in value of the property is not a relevant consideration to deny specific performance. On the facts and circumstances that issue does not arise for consideration in this case.

Re : Contention (ii)

17. Section 10 of the Act deals with cases in which specific performance of contract is enforceable. It provides that except as otherwise provided in that Chapter (dealing with Specific Performance of Contracts) of the Act, specific performance of any contract may, in the discretion of the court,

be enforced when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief. Explanation (i) to section 10 provides that unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Sub-sections (2) and (5) of section 21 of the Act provide that in a suit for specific performance, if the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly; and that no compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint. Section 23 of the Act provides that a contract otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

18. It is thus clear that for a plaintiff to seek specific performance of a contract of sale relating to immovable property, and for a court to grant such specific performance, it is not necessary that the contract should contain a specific provision that in the event of breach, the aggrieved party will be entitled to specific performance. The Act makes it clear that if the legal requirements for seeking specific enforcement of a contract are made out, specific performance could be enforced as provided in the Act even in the absence of a specific term for specific performance in the contract. It is evident from section 23 of the Act that even where the agreement of sale contains only a provision for payment of damages or liquidated

damages in case of breach and does not contain any provision for specific performance, the party in breach cannot contend that in view of specific provision for payment of damages, and in the absence of a provision for specific performance, the court cannot grant specific performance. But where the provision naming an amount to be paid in case of breach is intended to give to the party in default an option to pay money in lieu of specific performance, then specific performance may not be permissible. We may attempt to clarify the position by the following illustrations (not exhaustive):

(A). *The agreement of sale provides that in the event of breach by the vendor, the purchaser shall be entitled to an amount equivalent to the earnest money as damages. The agreement is silent as to specific performance.* In such a case, the agreement indicates that the sum was named only for the purpose of securing performance of the contract. Even if there is no provision in the contract for specific performance, the court can direct specific performance by the vendor, if breach is established. But the court has the option, as per Section 21 of the Act, to award damages, if it comes to the conclusion that it is not a fit case for granting specific performance.

(B). *The agreement provides that in the event of the vendor failing to execute a sale deed, the purchaser will not be entitled for specific performance but will only be entitled for return of the earnest money and/or payment of a sum named as liquidated damages.* As the intention of the parties to bar specific performance of the contract and provide only for damages in the event of breach, is clearly expressed, the court may not grant specific performance, but can award liquidated damages and refund of earnest money.

(C). *The agreement of sale provides that in the event of breach by either party the purchaser will be entitled to specific performance, but the party in breach will have the*

option, instead of performing the contract, to pay a named amount as liquidated damages to the aggrieved party and on such payment, the aggrieved party shall not be entitled to specific performance. In such a case, the purchaser will not be entitled to specific performance, as the terms of the contract give the party in default an option of paying money in lieu of specific performance.

19. In this case, clauses 11 and 12 of the agreement deal with consequences of breach. They are extracted below :

"11. That in case the seller fails to perform his part of contract of sale according to the terms and conditions agreed upon in this agreement to sell in matter of execution of the sale deed and its registration, on the receipt of the balance sale price, he shall be liable to pay double the amount of the earnest money received by her from the purchaser.

12. That in case the purchaser fails to get the transaction of the sale completed by means of execution and registration of sale deed according to the terms of this agreement for sale, he shall forfeit his earnest money of Rs.10,000/- advanced by the purchaser to the said seller."

The agreement does not specifically provide for specific performance. Nor does it bar specific performance. It provides for payment of damages in the event of breach by either party. The provision for damages in the agreement is not intended to provide the vendor an option of paying money in lieu of specific performance. Therefore, we are of the view that plaintiff will be entitled to seek specific performance (even in the absence of a specific provision therefor) subject to his proving breach by the defendant and that he was ready and willing to perform his obligation under the contract, in terms of the contract.

Re : Contention (iii)

20. The time fixed for the performance in the agreement was 20.12.1978. But time was obviously not considered by the parties, to be of essence of the contract. The correspondence clearly shows that defendant's attorney holder Lt.Col. Kartar Singh, was willing to perform the contract on 7.6.1979, nearly six months after the last date stipulated in the agreement. The evidence shows that the defendant had entrusted the work of securing the necessary permission/NOC/clearance for the sale to the property dealer to Balraj Singh who was also acting on behalf of the plaintiff. Balraj Singh sent a telegram dated 2.6.1979 to Kartar Singh who was staying at Rourkela to come over to Chandigarh on 7.6.1979 to execute the sale deed. The wording of the telegram is "*Reach Chandigarh as Mr. Sangha is here. Sale deed registration is final. Date 7th June. No extension*." The evidence of DW1 (Kartar Singh) and the evidence of Balraj Singh (PW2) show that Kartar Singh accordingly visited Chandigarh on 7.6.1979 and met the plaintiff in the office of Balraj Singh on 7.6.1979. Kartar Singh's evidence shows that he stated that he was ready to receive the balance of the sale price and execute the sale deed and had in fact came all the way from Rourkela to execute the sale deed, and that plaintiff told him that the entire amount was not available. Kartar Singh (DW1) also stated that after the meeting, plaintiff went away stating that he would try to arrange for money; that he (Kartar Singh) went back to the office of Balraj Singh at about 5.30 PM; that at that time, Balraj Singh showed the writing of Sub-Registrar (about plaintiff's presence and Kartar Singh's absence); that he (Kartar Singh) got irritated by the conduct of plaintiff and told Balraj Singh to tell plaintiff that plaintiff was trying to be too clever, and he may treat the transaction as cancelled. Kartar Singh categorically stated :

"He (plaintiff) did not give any proof of money with him. He did not buy the stamp throughout the day and he did not

show any inclination to buy. I was fully ready to register the sale deed on 7.6.79."

There is no evidence to rebut the said evidence of Kartar Singh as plaintiff was not examined.

21. Balraj Singh (PW2) who was examined as PW2 attempted to give some evidence about the readiness and willingness of the plaintiff. But the evidence of Balraj Singh can not be a substitute for the evidence of plaintiff regarding plaintiff's readiness and willingness. Further the correspondence between Balraj Singh and Kartar Singh demonstrates that the version and stand of Kartar Singh (DW1) appears to be more probable and correct. After Kartar Singh returned from Chandigarh after the visit on 7.6.1979, by letter dated 29.6.1979 Balraj Singh informed Kartar Singh that the purchaser was now ready to get the sale deed executed in July 1979. Immediately, Kartar Singh sent a reply dated 2.7.1979 referring to his visit to Chandigarh on 7.6.1979 and about plaintiff informing him that full amount of sale price was not available with him for proceeding with the sale, which showed that plaintiff was not ready and willing to complete the sale. Balraj Singh sent a reply dated 7.7.1979 which does not deny the version given by Kartar Singh in his letter dated 2.7.1979, (as to what happened on 7.6.1979) but concentrated on trying to persuade Kartar Singh to come again and execute the sale deed by receiving the higher price of Rs.1,60,000/- even without delivering possession. The said letter dated 7.7.1979 of Balraj Singh also admits that marking the presence of plaintiff in the office of Sub- Registrar on 7.6.1979 was only to save the position of plaintiff. The said letter also states: "Now he is ready to pay you the balance amount, considering Rs.160,000/- as the sale price". The correspondence therefore clearly established that plaintiff was not ready and willing to get the sale deed executed within the time prescribed or even as on 7.6.1979 which was the last day of the extended period. The evidence also demonstrates that plaintiff was not in a position

to perform the contract as Balraj Singh admits in his evidence that the purchaser had to purchase the stamp paper and that on 7.6.1979, the stamp paper was not purchased; and that the plaintiff had in his bank account Rs.114000 but that amount was not drawn from the bank. Balraj Singh and PW1 have also referred to the assets owned by plaintiff. Such evidence is of no assistance in the absence of evidence as to availability of money for purchase and about the readiness and willingness of plaintiff to perform the contract.

22. There is also something doubtful about the following version given by Balraj Singh (PW2) in his evidence as to what happened at the Sub-Registrar's office on 7.6.1979 :

"Then we i.e. myself, Hartar Singh plaintiff, Paramjit Singh, all went to the office of the Sub-Registrar. The plaintiff signed the application dated 7.6.1979 in my presence and likewise Paramjit Singh also signed the same and we then submitted the same which is Ex.P21 to the Sub-Registrar, Chandigarh. He then called Kartar Singh, through his Peon. Kartar Singh did not appear before the Sub.Registrar, Chandigarh, who then made an endorsement Ex.22 on the said application in my presence (objected to).

In the plaint, the incident is described thus :

"Ultimately, the general attorney of the Defendant namely Kartar Singh reached Chandigarh on 7.6.1979 and the plaintiff was also there in Chandigarh on the said date. The said Kartar Singh who hold the general attorney for the Defendant had disclosed that he had come on the said date for execution of the sale deed, but neither Kartar Singh nor the Defendant came to the office of Sub-Registrar, Chandigarh to execute the sale deed in favour of the plaintiff in respect of the above said plot, though the plaintiff remained present in the office of Sub-Registrar, Chandigarh on the said day and got himself marked present by moving an application."

But Exs.21 and 22 (the letter dated 7.6.1979 to the Sub-Registrar containing the Sub-Registrar's endorsement) reads thus :

"To,

The Sub-Registrar,
Chandigarh.

Sir,

We, Hartar Singh Sangha, S/o Shri Bikramjit Singh Sangha and Ms. Avtar Kaur D/o S. Charan Singh, 58, Sector-26, Madhya Marg, Chandigarh had entered into agreement with Mrs. Man Kaur, wife of Shri Jartar Singh through her general attorney and husband Major Kartar Singh for purchase of her annexe No.509, Sector-18B, Chandigarh. Today is the last date for the registration of said annexe and we (Purchasers) are ready with the payment to pay the balance full and final amount relating to the above mentioned property before the Sub-Registration, but the seller herself or through her general attorney have not turned up so far. We request you to mark out presence in your court.

Thanking you,

Yours faithfully,
(Hartar Singh Sangha)
(Avtar Kaur)
through attorney Paramjit Singh

Dated : 7.6.1979

The applicant Hartar Singh Sangha is present. Respondent Col. Kartar Singh name was called out, but was not found present.

(sd/-) Sub-Registrar"

This letter describes plaintiff and Ms. Avtar Kaur, daughter of S. Charan Singh as purchasers and states that plaintiff and Ms. Avtar Singh entered into agreement with defendant for purchase of the property (Annexe No.509, Sector-18B, Chandigarh). The letter is said to have been signed by plaintiff and Avtar Singh through Paramjit Singh (Attorney Holder). There is absolutely no reference or explanation either in the pleading or evidence as to who is Ms. Avtar Kaur, and how she became a purchaser under the agreement of sale. There is also no explanation as to why Avtar Kaur and Paramjit Singh, if they were present on 7.6.1979, were not examined. The said letter is not marked through either any of the sender or the receiver of the letter and has no evidentiary value.

23. The learned counsel for the respondent contended that in terms of the agreement, the defendant had to furnish an NOC from Chandigarh Administration, as also ULC clearance and income tax clearance required for the sale and there was nothing to show that she had obtained them, and therefore the question of plaintiff proving his readiness and willingness to perform his obligations did not arise. This contention has no merit. There are two distinct issues. The first issue is the breach by the defendant – vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance by persons enumerated in section 16 of the Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific

performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of plaintiff is something which need not be proved, if the plaintiff is able to establish that defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10 lakhs and earnest money of Rs.1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15 lakhs. In such a case there is a clear breach by defendant. But in that case, if plaintiff did not have the balance Rs.9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by defendant, as he was not 'ready and willing' to perform his obligations.

24. In this case, the evidence clearly showed that defendant's attorney holder Kartar Singh had entrusted the work of securing the clearances to the property dealer Balraj Singh, who was acting on behalf of plaintiff. This was within the knowledge of Paramjit Singh, who was the attorney holder of plaintiff at the relevant point of time. Balraj Singh also admitted in his evidence that he was to get the NOC and ULC clearance. Balraj Singh sent a telegram to Kartar Singh at the instance of plaintiff, asking him to come to Chandigarh on 7.6.1979 and execute the sale deed. Therefore, Balraj Singh had either secured the certificates necessary for the sale or had deliberately called Kartar Singh to come over to Chandigarh, even though the plaintiff was not ready and the clearances had not been secured, to create evidence that plaintiff was ready. In neither case, the defendant could be faulted. Be that as it may.

25. None of the courts below have referred to the relevant evidence or the significance of plaintiff not tendering evidence. They have merely gone by the evidence of Balraj Singh to hold

that the plaintiff was ready and willing and defendant committed a breach. The material on record shows that the respondent-plaintiff committed breach. Therefore, the earnest money stood forfeited and respondent is not entitled for refund of the earnest money.

Conclusion

26. Having regard to our findings on contentions (i) and (iii), the appellant is bound to succeed in these appeals. We therefore allow these appeals, set aside the judgments of the courts below and dismiss the suit for specific performance.

N.J. Appeals allowed.

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION CO. LTD. & ANR.
v.
DATAR SWITCHGEAR LTD. & ORS.
(Criminal Appeal No. 1979 of 2010)

OCTOBER 08, 2010

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

Code of Criminal Procedure, 1973 – s. 482 – Power under – Exercise of – Contract between Maharashtra State Electricity Board (MSEB) and a company – Dispute between parties – Termination of contract by company – Reference of dispute to arbitral tribunal – Final award with observation as regards fabrication of certain documents tendered in evidence by MSEB – Criminal complaint by the company and its senior officials against MSEB, its Chairman and others for commission of offences u/ss. 192 and 199 r/w s. 34 – Issuance of summons to all named in the complaint – Petition u/s. 482 Cr.P.C. – Dismissed by High Court – On appeal, held: Prima facie case of offences u/ss. 192 and 199 made out against MSEB – Thus, not a fit case for exercise of power u/s. 482 in favour of MSEB – As regards the Chairman of MSEB, no specific averment demonstrating his role in fabricating false evidence before arbitral tribunal – No indication of existence of pre-arranged plan – Thus, no prima facie case made out against Chairman in respect of offences u/ss. 192 and 199 r/w s. 34 – Order of magistrate taking cognizance against Chairman in complaint case quashed – Penal Code, 1860 – ss. 192 and 199 r/w s. 34 – Liability – Vicarious liability – Common intention.

Appellant No. 1 is the successor-in-interest of Maharashtra State Electricity Board (MSEB) and appellant No. 2 is its Chairman. Respondent No. 1 is an

incorporated company and respondent Nos. 2 and 3 are senior officials of respondent No.1. Respondent No. 1 and MSEB entered into various contracts. Dispute arose between the parties and respondent No. 1 terminated the contract. The dispute was referred to the arbitral tribunal. The arbitral tribunal passed the final award directing MSEB to pay certain amount to respondent No. 1 as damages. The award also contained certain observations that MSEB had fabricated certain documents as evidence. On basis thereof, respondent No. 1 to 3 filed a criminal complaint against the appellants alleging commission of offences under Sections 192 and 199 read with section 34 IPC. The magistrate took cognizance of the complaint and issued summons against all the accused named therein. Aggrieved, the appellants filed petition u/s. 482 Cr.P.C. for quashing the complaint. The High Court dismissed the petition. Therefore, the appellants filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1 Wherever by a legal fiction the principle of vicarious liability is attracted and a person who is otherwise not personally involved in the commission of an offence is made liable for the same, it has to be specifically provided in the statute concerned. Neither Section 192 nor Section 199 IPC, incorporate the principle of vicarious liability, and, therefore, it was incumbent on the complainant to specifically aver the role of each of the accused in the complaint. [Para 29]

S.K. Alagh Vs. State of Uttar Pradesh and Ors. **(2008) 5 SCC 662, referred to.**

1.2. A bare perusal of the complaint shows that the gravamen of the allegation is that a fabricated document containing the offending endorsement was tendered in

evidence before the arbitral tribunal on behalf of MSEB by accused No. 6, who was in-charge of 'S' section. It is evident from the complaint that the other accused were named in the complaint because according to the complainant, MSEB-accused No. 1 was acting under their control and management. The only averment made against appellant No. 2 is that appellant No.1, MSEB was acting under the control and management of appellant No. 2 along with the other three accused. Appellant No. 2 happened to be the Chairman of MSEB at the relevant time but one cannot draw a presumption that a Chairman of a company is responsible for all acts committed by or on behalf of the Company. In the entire body of the complaint there is no allegation that appellant No. 2 had personally participated in the arbitration proceedings or was monitoring them in his capacity as the Chairman of MSEB and it was at his instance the subject interpolation was made in the document. [Para 28]

S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Anr **(2005) 8 SCC 89 – referred to.**

1.3 The Board Resolution adduced by the complainant does not establish that appellant No.2 was involved in the alleged fabrication of false evidence or adducing the same in evidence before the arbitral tribunal. In the absence of any such specific averment demonstrating the role of appellant No.2 in the commission of the offence, it is difficult to hold that the complaint, even assuming it to be correct in its entirety, disclosed the commission of an offence by appellant No.2 under Sections 192 and 199 IPC. [Para 30]

1.4 Section 34 IPC does not constitute a substantive offence, and is merely in the nature of a rule of evidence, and liability is fastened on a person who may have not been directly involved in the commission of the offence

on the basis of a pre-arranged plan between that person and the persons who actually committed the offence. [Para 33]

1.5 It is manifest that common intention refers to a prior concert or meeting of minds, and though, it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop at the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a pre-arranged plan. Therefore, in order to attract Section 34 IPC, the complaint must, *prima facie,* reflect a common prior concert or planning amongst all the accused. In the instant case, the complaint did not indicate the existence of any pre-arranged plan whereby appellant No. 2 had, in collusion, with the other accused decided to fabricate the document in question and adduce it in evidence before the arbitral tribunal. There was not even a whisper in the complaint indicating any participation of appellant No. 2 in the acts constituting the offence, and that being the case, Section 34 IPC is not attracted in his case. No *prima facie* case has been made out against appellant No.2 in respect of offences under Sections 192 and 199 IPC, even with the aid of Section 34 of the IPC. Therefore, it was a fit case where the High Court should have exercised its powers under Section 482 of the Code by quashing the complaint against appellant No. 2. [Paras 34, 35]

Chandrakant Murgyappa Umrani & Ors. v. State of Maharashtra **1998 SCC (Cri) 698;** *Hamlet @ Sasi & Ors. v. State of Kerala* **(2003) 10 SCC 108;** *Surendra Chauhan v. State of M. P*. **(2000) 4 SCC 110 – referred to.**

2.1 Regarding the case of appellant No.1 company, bearing in mind the fact that the document was submitted

with the intention to support the averments in the written statement filed on their behalf, which could possibly influence the decision of the arbitral tribunal in relation to the conduct of the respondent No. 1 while discharging their obligations under the contract between them and appellant No. 1, it cannot be held that *prima facie* a case of offences under Sections 192 and 199 IPC is not made out against them. It is evident from the observations of the tribunal that had the tribunal not doubted the veracity of the said document, it could have made a material difference to the result of the arbitral proceedings. [Para 31]

2.2 The submission that the arbitral award on the basis whereof the said complaint was filed has been set aside and therefore, the complaint is liable to be quashed on this ground is untenable as the offences under Sections 192 and 199 IPC, if made out, exist independent of the final arbitral award. Therefore, it is not a fit case for the exercise of power under Section 482 Cr.P.C. in favour of appellant No. 1. [Para 32]

4. The appeal is dismissed *qua* appellant No.1. It is allowed in relation to appellant No.2, and consequently order of the Magistrate taking cognizance against appellant No. 2 in the complaint is quashed. [Para 36]

R.P. Kapur Vs. State of Punjab **AIR 1960 SC 866;** *Rupan Deol Bajaj and Anr. Vs. Kanwar Pal Singh Gill and Anr.* **(1995) 6 SCC 194 – relied on.**

Inder Mohan Goswami and Anr. Vs. State of Uttaranchal and Ors. **(2007) 12 SCC 1;** *K.L.E. Society and Ors. vs. Siddalingesh* **(2008) 4 SCC 541;** *Baijnath Jha Vs. Sita Ram and Anr.* **(2008) 8 SCC 77;** *Suneet Gupta Vs. Anil Triloknath Sharma and Ors.* **(2008) 11 SCC 670; *G.*** *Sagar Suri and Anr. Vs. State of U.P. and Ors.* **(2000) 2 SCC 636;** *Pepsi Foods*

Ltd. & Anr. Vs. Special Judicial Magistrate & Ors. **(1998) 5 SCC 749;** *Keki Hormusji Gharda and Ors. Vs. Mehervan Rustom Irani and Anr. (***2009) 6 SCC 475;** *N.K. Wahi Vs. Shekhar Singh and Ors.* **(2007) 9 SCC 481;** *Sharon Michael & Ors. Vs. State of Tamil Nadu* **(2009) 3 SCC 375;** *Maksud Saiyed vs. State of Gujarat and Ors.* **(2008) 5 SCC 668;** *Sunita Jain Vs. Pawan Kumar Jain* **(2008) 2 SCC 705;** *Som Mittal Vs. Government of Karnataka* **(2008) 3 SCC 574;** *Tarun K. Shah Vs. C.R. Alimchandani & Ors.* **(2001) 9 SCC 728;** *K.M. Mathew Vs. K.A. Abraham and Ors*. **(2002) 6 SCC 670;** *In Re: Suo Moto Proceedings Against R. Karuppan,* ***Advocate*** **(2001) 5 SCC 289;** *Sushil Kumar Vs. Rakesh Kumar* **(2003) 8 SCC 673;** *Murray and Co. vs. Ashok Kr. Newatia and Anr.* **(2000) 2 SCC 367;** *Babulal Vs. State of Uttar Pradesh and Ors.* **AIR 1964 SC 725 – referred to.**

Case Law Reference:

(2007) 12 SCC 1	**Referred to.**	**Para 13**
(2008) 4 SCC 541	**Referred to.**	**Para 13**
(2008) 8 SCC 77	**Referred to.**	**Para 13**
(2008) 11 SCC 670	**Referred to.**	**Para 13**
(2000) 2 SCC 636	**Referred to.**	**Para 13**
(1998) 5 SCC 749	**Referred to.**	**Para 14**
(2005) 8 SCC 89	**Referred to.**	**Para 14**
(2009) 6 SCC 475	**Referred to.**	**Para 14**
(2007) 9 SCC 481	**Referred to.**	**Para 14**
(2009) 3 SCC 375	**Referred to.**	**Para 14**
(2008) 5 SCC 662	**Referred to.**	**Para 14**
(2008) 5 SCC 668	**Referred to.**	**Para 14**

(2008) 2 SCC 705	**Referred to.**	**Para 15**
(2008) 3 SCC 574	**Referred to.**	**Para 15**
(2001) 9 SCC 728	**Referred to.**	**Para 16**
(2002) 6 SCC 670	**Referred to.**	**Para 16**
(2001) 5 SCC 289	**Referred to.**	**Para 17**
(2003) 8 SCC 673	**Referred to.**	**Para 17**
(2000) 2 SCC 367	**Referred to.**	**Para 17**
AIR 1960 SC 866	**Relied on.**	**Para 19**
(1995) 6 SCC 194	**Relied on.**	**Para 19**
AIR 1964 SC 725	**Referred to.**	**Para 26**
(2008) 5 SCC 662	**Referred to.**	**Para 29**
(2005) 8 SCC 89	**Referred to.**	**Para 33**
1998 SCC (Cri) 698	**Referred to.**	**Para 33**
(2003) 10 SCC 108	**Referred to.**	**Para 33**
(2000) 4 SCC 110	**Referred to.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1979 of 2010.

From the Judgment & Order dated 09.10.2007 of the High Court of Judicature at Bombay in Criminal Application No. 3715 of 2005.

Nagendra Rai, Vikas Singh, Ashok Desai, Shekhar Naphade, Ranjit Kumar, Lakshmi Raman Singh, Ravi Prakash, Varun Agarwal, Chandra Prakash, Amrita Singh, Udita Singh, Raunak Jain, Abhishek Mitra, Mukul Taly, Swati Deshpande, Sneha Datar, Jatin Zaveri for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. This appeal, by special leave, is directed against the judgment, dated 9th October 2007, delivered by the High Court of Bombay in Criminal Application No. 3715 of 2005, in a petition filed by the two appellants herein under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code"). By the impugned judgment, the High Court has declined to quash a criminal complaint filed by respondents No.1 to 3 in this appeal against the appellants and others for offences under Sections 192 and 199 read with Section 34 of the Indian Penal Code, 1860 (for short "the IPC").

3. Shorn of unnecessary details, the facts, material for adjudication of the issue arising in this appeal may be stated thus:

Appellant No.1, viz. Maharashtra State Electricity Distribution Co. Ltd.; constituted in terms of the provisions of the Electricity Act, 2003 is the successor in interest of Maharashtra State Electricity Board (for short "MSEB") and appellant No. 2 is its Chairman. Respondent No.1 is an incorporated company, viz. M/s Datar Switchgear Ltd. and respondents No.2 and 3, senior officials of respondent No.1, are the complainants and respondents No.4 to 7 are the co-accused.

4. Pursuant to various contracts entered into between respondent No. 1 and MSEB in the year 1993-94 for installation of "Low Tension Load Management Systems" (for short "LTLMS"), MSEB issued a work order on 27th March 1997 whereby respondent No. 1 was required to install at various locations and lease out 47,987 LTLMS to MSEB for a period of 10 years at a monthly rent of ` 825/- for the first six years, and about ` 650/- per month for the remaining four years.

5. Clause 8.1 of the said contract stipulated that respondent No.1 would send intimation to the Section-in-charge

of MSEB regarding the installation of the equipment, and thereafter, a commissioning report was to be prepared in that regard, which was to be signed jointly by the representative of the complainant and the concerned Section-in-charge of the MSEB.

6. During the validity period of the contract, various disputes arose between respondent No.1 and MSEB. On 19th February 1999, respondent No.1 partially terminated the contract, conveying to MSEB that it would not install any more LTLMS, and would only maintain the installed items.

7. On 21st April 1999, respondent No.1 terminated the contract in entirety. Nevertheless, they offered to maintain the installed objects provided MSEB continued to pay rent during the duration of the work order. As the dispute arose between respondent No. 1 and MSEB vide order dated 5th May 1999, the High Court of Bombay referred the disputes to Arbitral Tribunal.

8. The arbitration proceedings commenced on 19th February 1999. The controversy in the instant case pertains to the amended written statement filed by the MSEB on 7th February 2000, the relevant extract of which reads as follows:

> "9A. The Respondents submit that the Claimants are not entitled to claim any amount from the Respondents as claimed or otherwise. In fact, as stated hereinafter, the Claimants are bound to refund to the Respondents all the amounts recovered by them from the Respondents along with interest thereon. The Respondents submit that the Claimants are guilty of having practiced fraud upon the Respondents. The Claimants have fabricated documents as also are guilty of misrepresentation of material facts in the matter of commissioning objects, installing them, taking out print outs therefrom and submitting bills in respect thereof…. ...

(a) *COMMISSIONING/COMMISSIONING REPORTS*

> The provisions of Clause 8.1 of the work order provided for installation and commissioning of LTLMS systems in presence of Section in Charge of every Section. The Claimants not only did not inform the concerned/Section in Charge as required by Clauses (a) and (b) thereof, but submitted commissioning reports for the LM systems making it appear as if the objects were installed on a given date in presence of the representatives of the Section in charge as mentioned in the said reports, and thereafter submitted the same for the signature of the Sections in charge. With a view that the sub divisions, divisions and circles of the Respondents are not able to find out the same, the Claimants failed and neglected to send copies of the Commissioning reports as provided in Clause 8.0(d), thereby making it impossible for the officers mentioned in clause (e) thereof to depute representatives to inspect the commissioned objects in the circle. The Claimants thus obtained payments from the dates mentioned in the said reports fraudulently by misrepresentation of the facts…."

9. The Arbitral Tribunal passed the final award on 18th June 2004 whereby it directed MSEB to pay '185,97,86,399/- as damages to respondent No.1, and pay interest at the rate of 10% p.a. on the sum of '179,15,87,009/-. The award contained the following observations suggesting that the MSEB had introduced certain fabricated documents as evidence:

> "As regards the Commissioning Reports produced by the Respondents at Exhs. C-64 and C-74, the Claimants submitted, and with considerable merit that the Respondents had indulged in tampering the commissioning reports produced on the record. The submission is correct."

10. On the basis of the said observations in the arbitral

award, on 23rd June 2004 respondent Nos. 1 to 3 filed criminal complaint No. 476 of 2004 before the Judicial Magistrate, First Class, Nasik for offences under Sections 192 and 199 read with Section 34 of the IPC. The Judicial Magistrate, First Class, Nasik took cognizance of the said complaint and issued summons against all the accused named in the complaint.

11. Being aggrieved by the order of the Magistrate taking cognizance of the complaint, appellants preferred the afore-stated petition under Section 482 of the Code before the High Court of Bombay for quashing of the complaint.

12. As stated above, the High Court, vide the impugned judgment has dismissed the said petition. The High Court has *inter alia* observed that a *prima facie* case has been made out against the accused and the complaint clearly establishes the joint action of the accused to attract vicarious liability under the IPC. Hence, the present appeal by two of the accused.

13. Mr. Vikas Singh, learned senior counsel appearing on behalf of the appellants assailed the impugned judgment on the ground that the dispute between the parties was purely civil in nature, and the criminal justice system has been set in motion only to pressurize the appellants. In order to buttress the contention that the High Court would be justified in exercising its powers under Section 482 of the Code to quash a vexatious criminal complaint to prevent an abuse of the process of the Court, learned counsel commended us to the decisions of this Court in *Inder Mohan Goswami & Anr. Vs. State of Uttaranchal and Ors.*[1], *K.L.E. Society & Ors. Vs. Siddalingesh*[2], *Baijnath Jha Vs. Sita Ram & Anr.*[3], *Suneet Gupta Vs. Anil Triloknath Sharma & Ors.*[4] and *G. Sagar Suri & Anr. Vs. State of U.P. & Ors.*[5]

1. (2007) 12 SCC 1.
2. (2008) 4 SCC 541.
3. (2008) 8 SCC 77.
4. (2008) 11 SCC 670.
5. (2000) 2 SCC 636.

14. Relying on the decisions in *Pepsi Foods Ltd. & Anr. Vs. Special Judicial Magistrate & Ors.*[6], *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla & Anr*[7] and *Keki Hormusji Gharda & Ors. Vs. Mehervan Rustom Irani & Anr.*[8], learned counsel contended that the IPC, save and except in some specific cases, does not contemplate vicarious liability of a person who is not directly charged for the commission of an offence, and a person cannot be made an accused merely by reason of his official position. Further, it was contended that in order to launch prosecution against the officers of a company, the complainant must make specific averments as to the role played by each of the officials accused in the complaint. In order to buttress the contention, learned counsel placed reliance on the decisions of this Court in *N.K. Wahi Vs. Shekhar Singh & Ors.*[9], *Sharon Michael & Ors. Vs. State of Tamil Nadu*[10], *S.K. Alagh Vs. State of Uttar Pradesh & Ors.*[11] and *Maksud Saiyed Vs. State of Gujarat & Ors.*[12].

15. Mr. Ashok Desai, learned senior counsel appearing for respondents No.1 & 2, on the other hand, while emphasizing that power under Section 482 of the Code is to be exercised sparingly and with circumspection, argued that in the instant case, in light of the averments in the complaint, a *prima facie* case is made out against the appellants and, therefore, the High Court was fully justified in declining to exercise its jurisdiction under the said provision. In the written submissions filed on behalf of the respondents reliance is placed on the decisions of this Court in *Sunita Jain Vs. Pawan Kumar Jain*[13]

6. (1998) 5 SCC 749.
7. (2005) 8 SCC 89.
8. (2009) 6 SCC 475.
9. (2007) 9 SCC 481.
10. (2009) 3 SCC 375.
11. (2008) 5 SCC 662.
12. (2008) 5 SCC 668.
13. (2008) 2 SCC 705.

and *Som Mittal Vs. Government of Karnataka*[14] to contend that the present case does not fall in the category of "rarest of rare" cases, warranting exercise of jurisdiction by the High Court under Section 482 of the Code. Learned counsel contended that the offence of fabrication of false evidence cannot be described as a civil act, and in any event, the existence of a civil remedy does not preclude the maintainability of criminal complaint.

16. Relying on the decisions of this Court in *Tarun K. Shah Vs. C.R. Alimchandani & Ors.*[15] and *K.M. Mathew Vs. K.A. Abraham & Ors.*[16], it was next contended that it was not necessary to allege an overt act by each of the accused, and in that regard, the averments in the complaint were sufficient. Moreover, the use of the expression "*whoever causes any circumstance to exist"* in Section 192 of the IPC indicates that vicarious liability is in-built within the Section, and the complaint contains specific averments to that effect.

17. Learned counsel urged that the offences under Sections 192 and 199 IPC were complete when the accused had adduced the fabricated commissioning reports in proceedings before the arbitrators, who had adversely commented on the conduct of the appellants. It was argued that the said offences would survive irrespective of the sustenance or otherwise of the arbitral award. Commending us to the decisions of this Court in *In Re: Suo Moto Proceedings Against R. Karuppan, Advocate*[17], *Sushil Kumar Vs. Rakesh Kumar*[18] and *Murray & Co. Vs. Ashok Kr. Newatia & Anr.*[19], learned counsel pleaded that the offences of perjury and

14. (2008) 3 SCC 574.
15. (2001) 9 SCC 728.
16. (2002) 6 SCC 670.
17. (2001) 5 SCC 289.
18. (2003) 8 SCC 673.
19. (2000) 2 SCC 367.

fabrication of false evidence require stern action to be taken against persons indulging in such acts.

18. Before embarking on an evaluation of the rival submissions, it would be apposite to briefly examine the nature of the power of the High Court under Section 482 of the Code.

19. It is well settled that though the inherent powers of the High Court under Section 482 of the Code are very wide in amplitude, yet they are not unlimited. However, it is neither feasible nor desirable to lay down an absolute rule which would govern the exercise of inherent jurisdiction of the Court. Nevertheless, it is trite that powers under the said provision have to be exercised sparingly and with caution to secure the ends of justice and to prevent the abuse of the process of the Court. Where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged, the High Court would be justified in invoking its powers under Section 482 of the Code to quash the criminal proceedings. (See: *R.P. Kapur Vs. State of Punjab*[20] and *Rupan Deol Bajaj & Anr. Vs. Kanwar Pal Singh Gill & Anr.*[21]*.)*

20. In *Som Mittal* (supra*)*, a three judge bench of this Court, while holding that the power under Section 482 of the Code to quash criminal proceedings should be used sparingly, and with circumspection in the "rarest of rare cases", observed that:

> "When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and

20. AIR 1960 SC 866.
21. (1995) 6 SCC 194.

caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection. Judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation."

21. Thus, the question for consideration is whether or not in light of the allegations in the complaint against the appellants, the High Court was correct in law in declining to exercise its jurisdiction under Section 482 of the Code?

22. In order to appreciate the rival contentions of the parties, it would be expedient to refer to the relevant portions of the complaint:

"5. In the said Arbitration proceedings it was falsely contended by the Accused at para 9(A)(a) of the Written Statement that the Complainant No. 1 had submitted false and fabricated Commissioning Reports and the equipment particularized therein was installed without the presence of the MSEBs Section-in-Charge and the Accused relied upon a copy of the Commissioning Report inter alia pertaining to Shirpur Section in Dhule Circle. The said Commissioning Report as relied upon by the Accused was tendered as Exhibit 'C-64' by the witness examined on

behalf of the Accused No. 1. The said Commissioning Report contained an endorsement 'not installed in presence' to allege that the Commissioning of the equipment particularized in the said Commissioning Report at Exhibit 'C-64' was not done in the presence of MSEBs Section Officer. The said Commissioning Report contained the signature of the representative of the Complainant No. 1 and the said endorsement was made above the said signature of the Complainant No. 1's representative in a manner to depict as if the Complainant No. 1's representative had accepted the fact alleged in the said endorsement.

6. On the other hand, the Complainant No. 1 brought on record their copy of the Commissioning Report pertaining to Shirpur Section in Dhule Circle as Exhibit 'C-74' which had no such endorsement as is found on the face of Exhibit 'C-74'. It is the case of the Complainant No.1 *that the Accused with common criminal intent caused the impugned endorsement "not installed in presence" to be superscribed on Exhibit 'C-64' after it was duly signed by the representative of the Complainant No. 1 and the Section in charge of MSEB so as to convey the impression that the Complainant No.1's representative had accepted the fact alleged in the said endorsement*. The said falsification and fabrication of the record was brought to the notice of the Ld. Arbitrators in the Arbitration proceedings and the Ld. Arbitrators observed in their award dated 18.06.2004 as under:…. …

The Complainants say and submit that the Ld. Arbitrators have thus held that the said endorsement was fabricated and was admittedly tendered in evidence by *the Accused No.1 acting under the control and management of Accused Nos. 2, 3, 4 and 5. The Accused No. 6 was*

particularly responsible for the conduct of the MSEBs officers in the Shirpur Section which falls under the Dondaicha Division of Dhule District. The Complainants say and submit that the Accused acted with common criminal intent to falsify and fabricate the said endorsement with the intention to support the case of the Accused No. 1 that the equipment was installed by the Complainant No. 1 without the presence of the officers of the MSEB. The Complainants say and submit that the said action was therefore clearly intended to pervert the course of justice and misled (sic) the Ld. Arbitrator into entertaining in erroneous opinion touching upon the point of material determination as to whether the Complainant No. 1 had installed the equipment without the presence of the MSEBs Section-in-charge. The Complainants say and submit that the Accused fabricated false evidence which has been tendered by them in the course of judicial proceedings before the Ld. Arbitrators and the Accused are guilty of offence u/s 192, 199 r/w Sec. 34 of the Indian Penal Code. The Complainants say and submit that the Accused acted with common criminal intention to play fraud on the Ld. Arbitral Tribunal and deny justice to the Complainant No. 1."

(Emphasis supplied by us)

23. It is manifest that the allegation against the appellants herein is that appellant No.1 had, acting under the control and management of all the accused, including appellant No. 2 and in particular accused No. 6, superscribed an endorsement on Exhibit C-64 with an intention to support its case and tendered the same in the course of judicial proceedings before the Arbitral Tribunal, thereby committing offence of fabricating false evidence in terms of Section 192 and 199 read with Section 34 IPC.

24. At this juncture, it would be apposite to refer to the relevant statutory provisions and examine the legal position.

25. Sections 192 and 199 IPC, read as follows:

"192. Fabricating false evidence.-Whoever causes any circumstance to exist or makes any false entry in any book or record, or electronic record or makes any document or electronic record containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence"."

"199. False statement made in declaration which is by law receivable as evidence.- Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence."

26. It is plain that for constituting an offence under Section 192 IPC, the following ingredients must be satisfied:

(i) Causing any circumstance to exist, or making any false entry in any book or record or making any document containing a false statement.

(ii) Doing one of the above acts with the intention that it may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant or an arbitrator.

(iii) Doing such act with the intention that it may cause any person, who in such proceeding, is to form an opinion upon the evidence to entertain an erroneous opinion touching any point material to the result of such proceeding. (See: *Babulal Vs. State of Uttar Pradesh & Ors.*[22].)

27. Similarly, Section 199 IPC requires the following ingredients to be established:

"(i) Making of a declaration which a Court or a public servant is bound or authorised by law to receive in evidence.

(ii) Making of a false statement in such declaration knowing or believing it to be false.

(iii) Such false statement must be touching any point material to the object for which the declaration is made or used."

28. A bare perusal of the complaint shows that the gravamen of the allegation is that a fabricated document containing the offending endorsement was tendered in evidence before the Arbitral Tribunal on behalf of MSEB by accused No. 6, who was in-charge of Shirpur section. It is evident from the afore-extracted paragraphs of the complaint that other accused have been named in the complaint because, according to the complainant, MSEB-accused No. 1 was acting under their control and management. It bears repetition that the only averment made against appellant No. 2 is that appellant No.1, i.e. MSEB was acting under the control and management of appellant No. 2 along with other three accused. There is no denying the fact that appellant No. 2 happened to be the Chairman of MSEB at the relevant time but it is a settled proposition of law that one cannot draw a presumption that a Chairman of a company is responsible for all acts committed

22. AIR 1964 SC 725.

by or on behalf of the Company. In the entire body of the complaint there is no allegation that appellant No. 2 had personally participated in the arbitration proceedings or was monitoring them in his capacity as the Chairman of MSEB and it was at his instance the subject interpolation was made in Exhibit C-64. At this stage, we may refer to the extract of a Board resolution, pressed into service by the respondents in support of their plea that appellant No. 2 was responsible for the conduct of business of appellant No. 1. The said resolution merely authorises the Chief-Engineer to file counter claim before the Arbitral Tribunal in proceedings between appellant No. 1 and respondent No. 1. It rather demonstrates that it was the Chief Engineer who was made responsible for looking after the interest of the appellant No. 1 in those proceedings. In this regard, it would be useful to advert to the observations made by a three judge bench of this Court in *S.M.S. Pharmaceuticals* (*supra*) :-

"There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary."

29. It is trite law that wherever by a legal fiction the principle of vicarious liability is attracted and a person who is otherwise not personally involved in the commission of an offence is made liable for the same, it has to be specifically provided in the statute concerned. In our opinion, neither Section 192 IPC nor Section 199 IPC, incorporate the principle of vicarious liability, and therefore, it was incumbent on the complainant to specifically aver the role of each of the accused in the complaint. It would be profitable to extract the following

observations made in *S.K. Alagh* (supra) :-

> "As, admittedly, drafts were drawn in the name of the Company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself."

30. Therefore, we are of the view that even the Board Resolution, adduced by the complainant, does not establish that appellant No.2 was involved in the alleged fabrication of false evidence or adducing the same in evidence before the arbitral tribunal. In the absence of any such specific averment demonstrating the role of appellant No.2 in the commission of the offence, we find it difficult to hold that the complaint, even assuming it to be correct in its entirety, discloses the commission of an offence by appellant No.2 under Sections 192 and 199 of IPC.

31. However, in so far as the case of appellant No.1 company is concerned, bearing in mind the fact that Exhibit C-64 was submitted with the intention to support the averments in the written statement filed on their behalf, which could possibly influence the decision of the arbitral tribunal in relation to the conduct of the respondent No. 1 while discharging their obligations under the contract between them and appellant No. 1, we are unable to hold that *prima facie,* a case of offences under Sections 192 and 199 IPC is not made out against them. It is evident from the observations of the Tribunal quoted in para 9 (supra) that had the tribunal not doubted the veracity of the said document, it could have made a material difference to the result of the arbitral proceedings.

32. It was faintly argued that the arbitral award on the basis

whereof the said complaint has been filed has been set aside and therefore, the complaint is liable to be quashed on this ground. The submission is untenable as the offences under Sections 192 and 199 IPC, if made out, exist independent of the final arbitral award. We are, therefore, of the opinion, that it is not a fit case for the exercise of power under Section 482 of the Code, in favour of appellant No. 1.

33. We shall now examine whether appellant No.2 could be made liable for the afore-mentioned offences by operation of Section 34 of IPC. It is trite that Section 34 IPC does not constitute a substantive offence, and is merely in the nature of a rule of evidence, and liability is fastened on a person who may have not been directly involved in the commission of the offence on the basis of a pre-arranged plan between that person and the persons who actually committed the offence. In order to attract Section 34 IPC, the following ingredients must be established:

> "(i) there was common intention in the sense of a pre-arranged plan;
>
> (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence." (See: *Chandrakant Murgyappa Umrani & Ors. Vs. State of Maharashtra*[23]*; Hamlet @ Sasi & Ors. Vs. State of Kerala*[24]*; Surendra Chauhan Vs. State of M.P.*[25])

34. It is manifest that common intention refers to a prior concert or meeting of minds, and though, it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop at the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a pre-

23. 1998 SCC (CRI) 698.

24. (2003) 10 SCC 108.

25. (2000) 4 SCC 110.

arranged plan. Therefore, in order to attract Section 34 of the IPC, the complaint must, *prima facie,* reflect a common prior concert or planning amongst all the accused. In our opinion, in the present case, the complaint does not indicate the existence of any pre-arranged plan whereby appellant No. 2 had, in collusion, with the other accused decided to fabricate the document in question and adduce it in evidence before the arbitral tribunal. There is not even a whisper in the complaint indicating any participation of appellant No. 2 in the acts constituting the offence, and that being the case we are convinced that Section 34 IPC is not attracted in his case.

35. In the final analysis, we are of the opinion that no *prima facie* case has been made out against appellant No.2 in respect of offences under Sections 192 and 199 of the IPC, even with the aid of Section 34 of the IPC. Therefore, it was a fit case where the High Court should have exercised its powers under Section 482 of the Code by quashing the complaint against appellant No. 2.

36. For the aforegoing reasons, the appeal is dismissed qua appellant No. 1; it is allowed in relation to appellant No.2; and consequently order of the Magistrate taking cognizance against appellant No. 2 in Complaint No.476 of 2004 is quashed.

N.J. Appeal partly allowed.

VITHAL LAXMAN CHALAWADI & ETC.
v.
STATE OF KARNATAKA REP. BY P. PROSECUTOR
(Criminal Appeal Nos. 69-70 of 2008)

OCTOBER 19, 2010

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

Penal Code, 1860 – ss. 302/34 and 323 – Murder and voluntarily causing hurt – Altercation between two families – Assault by accused persons resulting in death of deceased and injuries to mother and brother of deceased – Conviction of two accused u/ss. 323 and 324 – Acquittal of remaining four accused – High Court convicting accused nos. 1 to 4 u/s. 302/34 and acquitting the remaining two – On appeal, held: Strained relationship between two families sufficiently established – Homicidal death of deceased – Testimony of injured eye-witnesses that accused no. 1 responsible for inflicting injuries resulting in death of deceased – No overt act attributed to accused no. 3 except that he gave chappel blow to mother of deceased – Thus, conviction and sentence u/s. 302/34 of accused no. 1 upheld whereas that of accused no. 3 set aside – Conviction of accused no. 3, u/s. 323 upheld but sentence reduced to the period already undergone – Accused no. 2 acquitted of all charges on benefit of doubt – Evidence – Witnesses.

According to the prosecution case, 'R' was engaged to get married to 'P'-sister of accused nos. 1 to 4 but he instead married younger sister of 'P' without the consent of the accused persons. When the accused persons questioned 'R' about the same, it resulted in an altercation between the two parties. It is alleged that accused 'VL' assaulted 'R' with a knife which resulted in his death. PW-1, brother of 'R' and PW-6, mother of 'R' were also assaulted. Accused No. 3 gave a chapel blow to PW-6.

The trial court convicted two accused under Section 323 and Section 324 IPC and acquitted the remaining four. In appeal, the High Court convicted accused Nos. 1 to 4 for the commission of offence punishable under Section 302 read with Section 34 IPC and sentenced them to imprisonment for life. The remaining accused were acquitted. Therefore, the appellants filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 The relationship between the two families was strained on account of the refusal of the deceased to marry 'P' and in preference tying the knot with the younger sister of the accused without their consent, which has been sufficiently established by the material on record. It was also not disputed either before the High Court or even before this Court that deceased-'R' died a homicidal death having suffered as many as 17 injuries out of which two were fatal. PW-16, doctor, noticed the injuries in the course of post-mortem examination. The prosecution relied upon the depositions of four eye-witnesses to the incident in support of its case. PW-1 and PW-6 are the brother and the mother respectively of the deceased who were themselves injured in the incident. PW-7 and PW-8 reached the spot when they heard noise coming out of the house of the deceased only to find accused nos. 1 to 4 assaulting the deceased with a knife. A careful analysis of the depositions of the eye-witnesses leaves no manner of doubt, that 'N' who has since died was the first to assault the deceased with his knife. The version given by the injured eye-witnesses PW-1 and PW-6 that appellant, 'VL' had then taken the knife from 'N' to inflict injuries on the body of the deceased is credible and was rightly relied upon by the High Court. Therefore, there is no hesitation in holding that 'VL' was responsible for

inflicting injuries attributed to him by the eye-witnesses that resulted in the death of the deceased. Thus, the conviction and sentence imposed upon appellant 'VL' for the offence under Section 302/34 IPC recorded by the High Court is upheld. [Paras 8 and 11]

1.2 As regards the role of appellant No. 3-'G' the evidence on record suggests that he gave a chappal blow to PW-6. There is no other overt act attributed to appellant No.3 to have joined the melee when tempers ran high. The allegation that he exhorted accused Nos. 1 and 2 to kill the deceased was not satisfactorily proved to justify his conviction for murder with the help of Section 34 IPC. The nature of the evidence on record and the role that appellant No. 3 is alleged to have played, does not establish that he shared the common intention with 'N' and 'VL' to commit the murder of deceased 'R'. The conviction of appellant No. 3 for the offence of murder punishable under Section 302 IPC read with Section 34 IPC is not sustainable. The evidence, however, proved beyond a reasonable doubt that appellant No. 3 assaulted PW-6 with a chappal. His conviction under Section 323 IPC by the trial court and the High Court is upheld but the sentence is reduced to the period already undergone. [Paras 9 and 11]

1.3 According to the prosecution, appellant-'ULC', used the same knife which the accused No.1 had used for inflicting injuries on the deceased and which was then taken by 'VL' to assault the deceased. While the prosecution version is accepted to the extent it suggests that 'VL' had taken the knife from 'N', it is wholly unsafe to attribute any injury to the deceased by the use of the same knife having regard to the nature of the evidence on record. The prosecution case against 'ULC' is not free from doubt, the benefit whereof must go to the said appellant. The conviction and sentence of appellant-'ULC'

is set aside and he is acquitted of the charges framed against him giving him the benefit of doubt. [Paras 10 and 11]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 69-70 of 2008.

From the Judgment & Order dated 22.09.2006 in Crl. A. No. 715 of 705 of 2000 and order dated 12.12.2006 in I.A. No. 1 of 2006 in Crl. A. No. 715 of 2000 of the High Court of Karnataka at Bangalore.

Rajani K. Prasad (for T.V. Ratnam) for the Appellant.

Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals under Section 379 of the Cr.P.C. read with Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 arise out of a judgment and order dated 22nd September 2006 and 12th December 2006 passed by the High Court of Karnataka whereby State appeal No.715 of 2000 has been partly allowed and Crl. Appeal No. 705/2000 allowed, the appellants convicted under Section 302 IPC and sentenced to undergo imprisonment for life with a fine of Rs.5,000/- each and in default of payment of the same to undergo rigorous imprisonment for six months. The facts giving rise to the filing of these appeals may be summarized as under:

Padavva one of the sisters of accused no. 1 to 4 was engaged to get married to the deceased-Ramesh brother of PW-1 Guralingappa. Soon after the engagement was over a loan of Rs.30,000/- was advanced to the accused for purchase of a commercial vehicle. Since the loan was not repaid by the accused, the vehicle was taken over and parked in front of the house of PW-1 Guralingappa. This led to some bitterness between the two families which took a turn for the worse when deceased-Ramesh refused to marry Padavva on the ground that she was hard of hearing. To add confusion to the situation,

Survana (PW-9) younger sister of Padavva and the accused, fell in love with Ramesh and decided to marry him. The things came to a head when the deceased took Survana away to Bijapur and got his and Survana's marriage registered. This enraged the accused no end as they felt that the deceased had spoiled the life of their sister Padavva by refusing matrimony even after getting engaged to her.

2. According to the prosecution on 25th December, 1995 at about 4.00 p.m. accused nos.1 to 4 went to the house of Mahadevappa Basappa Dodamani (accused no.5) and Yellappa Yamanappa Neelanaik (accused no. 6) for a meeting. From there they came to the house of the Guralingappa (PW-1) around 6.30 p.m. looking for Ramesh-deceased. They were let into the house where they questioned the deceased about his marriage to Survana (PW-9) without their consent. This led to an altercation between the two parties in the course whereof accused Vithal Laxman Chalawadi is alleged to have assaulted the deceased with a knife. When Guralingappa (PW-1) and his mother, Smt. Putalawwa (PW-6) intervened, they too were assaulted. PW-6 mother of the deceased is alleged to have received a chappal blow from accused No.3 on her face. The injured Ramesh was rushed to the hospital but declared dead on arrival. A charge-sheet was eventually filed against six persons for commission of offences punishable under Sections 143, 451, 323, 324, 355, 504, 506, 302, 109 and 149 IPC. Principal Sessions Judge, Bijapur, before whom the accused were tried, acquitted four of them while convicting the remaining two under Section 323 and Section 324 IPC respectively. The Court held that the prosecution had failed to prove the charge of murder against the accused. According to it all that was proved was that a quarrel had taken place at the house of Guralingappa (PW-1) and his brother deceased-Ramesh and that accused no.1 Nijappa had caused an injury to the deceased using a dangerous weapon constituting an offence punishable under Section 324 IPC. Accused no.3 was also convicted but only for causing a simple injury with a Chappal to PW-6 mother of the deceased and convicted under Section

323 IPC.

3. Two appeals were filed against this judgment and order of the Sessions Judge. While Criminal Appeal No.705 of 2000 was filed by the convicts, Criminal Appeal No.715 of 2000 was filed by the State against the acquittal of the accused. The High Court has, as noticed earlier, allowed Criminal Appeal No.705 of 2000 while partly allowing Criminal Appeal No.715 of 2000 filed by the State. The High Court has taken the view that the prosecution had established its case against accused 1 to 4, namely, Vithal Laxman Chalawadi, Umesh Laxman Chalawadi, Gangappa Laxman Chalawadi and Nijappa Laxman Chalawadi for the commission of an offence punishable under Section 302 read with Sec. 34 IPC. They were accordingly sentenced to undergo imprisonment for life for the offence of murder. The acquittal of the remaining accused persons, Mahadevappa Basappa Dodamani and Yellappa Yamanappa Neelanaik was affirmed by the High Court. The present appeals assail the correctness of the said order of conviction and sentence.

4. Appearing for the appellants Ms. Rajni K. Prasad argued that the evidence adduced by the prosecution did not establish the charges framed against the appellants and that the Trial Court was justified in holding so. She contended that there were material contradictions between the depositions of the alleged eye-witnesses to the occurrence. She submitted that while Guralingappa (PW-1) and PW-6 were the brother and the mother respectively of the deceased, the other two eye-witnesses, namely, Chandrakant (PW-7) and Lakshman (PW-8) were not present on the spot at the time of the occurrence and were wrongly described by the prosecution as eye-witnesses. She contended that even if the prosecution version was taken as proved against appellant, Umesh Laxman Chalawadi, who is alleged to have taken the knife from appellant, Vithal Laxman Chalawadi to assault the deceased, appellant, Gangappa Laxman Chalawadi was unarmed and is not alleged to have inflicted any injury on the deceased or anyone else except a chappal blow allegedly given to the mother

of the deceased. Conviction of appellant no.3 for the offence of murder was in that view not justified argued the learned counsel.

5. As regard appellant, Umesh Laxman Chalawadi, learned counsel urged that there was no evidence to show that he was armed with a knife nor was any knife recovered from him. The allegation that accused no. 4 had assaulted Ramesh-deceased with the very same knife as was used by the other two accused was a clear attempt to rope in as many members of the opposite party as possible. Given the strained relationship between the parties an attempt to falsely implicate persons who had not caused any hurt to the deceased or other members of his family could not be ruled out. The case against appellant, Umesh Laxman Chalawadi was at any rate doubtful, contended the learned counsel.

6. Mr. Sanjay R. Hegde, counsel for the respondents on the other hand argued that the High Court had correctly appreciated the evidence and come to the conclusion that the accused-appellant had gone to the spot with the common intention of committing the murder of the deceased-Ramesh against whom the accused had animosity on account of the insult which they perceived had been caused to their sister Padavva by refusing to marry her and instead marrying Survana (PW-9) without their consent. The depositions of the eye-witnesses to the incident had stood the test of cross-examination and were rightly believed by the High Court, argued Mr. Hegde.

7. That the relationship between the two families was strained on account of the refusal of the deceased to marry Padavva and in preference tying the knot with the younger sister of the accused without their consent has been sufficiently established by the material on record. It was also not disputed either before the High Court or even before us that the deceased-Ramesh had died a homicidal death having suffered as many as 17 injuries which Dr. Goudappa Shankareppa Baragi (PW-16) noticed in the course of post-mortem

examination. Out of the said injuries injury nos. 16 and 17 were fatal injuries resulting in shock and hemorrhage and eventual death of the victim. In support of its case the prosecution had relied upon the depositions of four eye-witnesses to the incident. While PW-1 Guralingappa and PW-6 Smt. Putalawwa are the brother and mother respectively of the deceased who were themselves injured in the incident, PW-7 Chandrakanta and PW-8 Lakshman reached the spot when they heard noise coming out of the house of the deceased only to find accused 1 to 4 assaulting the deceased with a knife. A careful analysis of the depositions of the eye-witnesses leaves no manner of doubt in our mind that Nijappa who has since died was the first to assault the deceased with his knife. We are also satisfied that the version given by the injured eye-witnesses PW-1 Guralingappa and PW-6 Smt. Putalawwa that appellant, Vithal Laxman Chalawadi had then taken the knife from Nijappa to inflict injuries on the body of the deceased is credible and has been rightly relied upon by the High Court. We, therefore, have no hesitation in holding that Vithal Laxman Chalawadi was responsible for inflicting injuries attributed to him by the eye-witnesses that resulted in the death of the deceased-Ramesh. We accordingly uphold the conviction and sentence imposed upon appellant, Vithal Laxman Chalawadi.

8. As regards the role of appellant, Gangappa the evidence on record suggests that he gave a chappal blow to PW-6 the mother of the deceased-Ramesh. There is no other overt act attributed to accused-appellant No.3 who appears to have joined the melee when tempers ran high. The allegation that he exhorted accused 1 and 2 to kill the deceased has not in our opinion been satisfactorily proved to justify his conviction for murder with the help of Section 34 IPC. The nature of the evidence on record and the role that appellant, Gangappa is alleged to have played, does not, in our opinion, establish that the appellant no. 3 shared the common intention with Nijappa and Vithal to commit the murder of deceased-Ramesh. The conviction of accused-appellant No.3 for the offence of murder

punishable under Section 302 IPC read with Section 34 IPC is, therefore, not sustainable. The evidence, however, proves beyond a reasonable doubt that appellant, Gangappa assaulted PW-6 Putalavva with a chappal. His conviction under Section 323 IPC by the Trial Court and the High Court deserves to be affirmed.

9. That leaves us with the case of appellant, Umesh Laxman Chalawadi about whom the depositions of the prosecution witnesses has not made out a clear case to justify his conviction for the offence of murder. Appellant, Umesh Laxman Chalawadi has, according to the prosecution, used the same knife which the accused no.1 had used for inflicting injuries on the deceased and which was then taken by Vithal Laxman Chalawadi to assault the deceased. While we have accepted the prosecution version to the extent it suggests that Vithal Laxman Chalawadi had taken the knife from Nijappa, we consider it wholly unsafe to attribute any injury to the deceased by the use of the same knife having regard to the nature of the evidence on record. Suffice it to say that the prosecution case against Umesh Laxman Chalawadi is not free from doubt, the benefit whereof must go to said appellant.

10. In the result, conviction and sentence of appellant, Vithal Laxman Chalawadi for the offence under Section 302/34 IPC recorded by the High Court is affirmed. Conviction and sentence of appellant, Gangappa Laxman Chalawadi is set aside and he is acquitted of all the charges framed against him except the charge under Section 323 IPC. His conviction under Section 323 IPC is maintained but the sentence reduced to the period already undergone. The conviction and sentence of appellant, Umesh Laxman Chalawadi is set aside and he is acquitted of the charges framed against him giving him the benefit of doubt. Appellants, Umesh Laxman Chalawadi and Gangappa Laxman Chalawadi, if in jail, shall be released forthwith if not required in any other case. The appeals are accordingly disposed of.

N.J. Appeals disposed of.

SANSAR CHAND
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 2024 of 2010)

OCTOBER 20, 2010

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

Wildlife Protection Act, 1972 – Illegal trade in wildlife by accused – Accused into this illegal trade for past 30 years – Accused prosecuted and convicted by various courts – In the instant case, disclosure statement by one that he was carrying leopard skins which were to be handed over to accused – Conviction of accused on basis thereof, by courts below – On appeal, held: Extra-judicial confession corroborated by other material on record establishing the guilt of accused – Large amount of oral and documentary evidence – Thus, accused rightly held guilty beyond reasonable doubt – Evidence.

Wildlife – *Poaching of wildlife – Resulting in extinction of wild animals like tiger, leopard and bison – Direction to the Government and its agencies to take steps to preserve wildlife of the country – Stringent action against those indulging in such crimes.*

The appellant is into the illegal trade in wild life since the year 1974 when he was barely 16 years. The appellant and his gangs have established an interlinking smuggling network. He has been arrested for 680 skins including tigers, leopards and others.

In the instant case, 'B' was traveling in a train with a carton containing leopard's skin. The police arrested him. During investigation, 'B' made a disclosure statement to the SHO that the said two leopard skins were to be handed over to the appellant. The appellant was charge

sheeted for the offence and was convicted by the courts below. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The instant case reveals how avaricious and rapacious persons have by organized crime destroyed large parts of the wild life of India and brought many animals e.g. tigers, leopards, bison, etc. almost to the brink of extinction, thereby seriously jeopardizing and destroying the ecological chain and ecological balance in the environment. [Para 3]

1.2 India, at one time, had one of the richest and most varied fauna in the world. However, over the last several decades there has been rapid decline of India's wild animals and birds which is a cause of grave concern. Some wild animals and birds have already become extinct e.g. the cheetah and others are on the brink of extinction. Areas which were once teeming with wild life have become devoid of it, and many sanctuaries and parks are empty or almost empty of animals and birds. The Sariska Tiger Reserve in Rajasthan and the Panna Tiger Reserve in Madhya Pradesh today have no tigers. The wild life in India has already been considerably destroyed. At one time there were hundreds of thousands of tigers, leopards and other wild animals, but today there are only about 1400 tigers left, according to the Wildlife Institute. [Paras 5 and 13]

1.3 There is virtually no market for the skins or bones of tigers and leopards within India. The evidence available points out that tigers and leopards, poached in the Indian wilderness, are then smuggled across the border to meet the demand for their products in neighbouring countries such as China. When dealing with tiger and leopard poachers and traders, it is,

therefore, important to bear in mind that one is dealing with trans-national organized crime. The accused in these cases represents a link in a larger criminal network that stretches across borders. This network starts with a poacher who in most cases is a poor tribal and a skilled hunter. Poachers kill tigers and leopards so as to supply the orders placed by a trader in a larger city centre such as Delhi. These traders are very wealthy and influential men. [Para 16]

2.1 The persons like the appellant are the head of a gang of criminals who do illegal trade in wildlife. They themselves do not do poaching, but they hire persons to do the actual work of poaching. Thus, a person like the appellant (leader of the gang remains behind the scene, and for this reasons it is not always possible and easy to get direct evidence against him. [Paras 23 and 31]

2.2 The appellant has been doing the said illegal trade for more than 30 years. He is habitual of doing this illegal business of trade in skins and parts of panthers and tigers. In 1974, he committed his first crime when he was barely 16 years of age and the conviction was upheld by this Court. A large number of cases are pending against him in Delhi, Uttar Pradesh and Rajasthan. Taking all these materials into account there is no doubt that the appellant is guilty of the offence charged. [Para 32]

3.1 There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other material. [Para 33]

Thimma vs. The State of Mysore **AIR 1971 SC 1871;** *Mulk Raj vs. The State of U.P.* **AIR 1959 SC 902;** *Sivakumar vs. State by Inspector of Police* **AIR 2006 SC 563;** *Shiva Karam Payaswami Tewar vs. State of Maharashtra* **AIR 2009**

SC 1692; *Mohd. Azad vs. State of West Bengal* **AIR 2009 SC 1307 – relied on.**

3.2 In the instant case, the extra-judicial confession by 'B' was referred to in the judgments of the Magistrate and the Special Judge, and it has been corroborated by the other material on record. The confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act. The Magistrate and the Special Judge have discussed in great detail the prosecution evidence, oral as well as documentary and have found the appellant guilty. Thus, the appellant has rightly been held guilty beyond reasonable doubt. The High Court upheld the order and there is no reason to take a different view. [Paras 30 and 34]

4. The Central and State Governments and their agencies are requested to make all efforts to preserve the wild life of the country and take stringent actions against those who are violating the provisions of the Wildlife (Protection) Act, as this is necessary for maintaining the ecological balance in our country. [Para 35]

Case Law Reference:

AIR 1971 SC 1871	**Relied on.**	**Para 33**
AIR 1959 SC 902	**Relied on.**	**Para 33**
AIR 2006 SC 563	**Relied on.**	**Para 33**
AIR 2009 SC 1692	**Relied on.**	**Para 33**
AIR 2009 SC 1307	**Relied on.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2024 of 2010.

From the Judgment & Order dated 10.12.2008 of the High Court of Rajasthan at Jaipur in S.B. Criminal Revision Petition No. 1385 of 2008.

Sidharth Luthra, Pramod Kr. Dubey, Gaurav Kejriwal, Kunal Sood, Ashish Dixit, Yashpreet Singh, Irshad Ahmad, Anitha Shenoy, Rohit Sharma, Saurabh Sharma, B.S. Gautham, Ritwik Dutta for the appearing parties.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. Shera was the symbol of the recent Commonwealth Games, but ironically Shera has been almost exterminated in our country. The Sher Khan of Rudyard Kipling's 'Jungle Book', which once abounded in India, is rarely to be seen today.

3. This case reveals how avaricious and rapacious persons have by organized crime destroyed large parts of the wild life of India and brought many animals e.g. tigers, leopards, bison, etc. almost to the brink of extinction, thereby seriously jeopardizing and destroying the ecological chain and ecological balance in our environment.

4. The appellant herein has been convicted under the Wildlife (Protection) Act, 1972 by all the three courts below and now he is in appeal before us.

5. Before dealing with the facts of this case, we would like to comment upon the background. India, at one time, had one of the richest and most varied fauna in the world. However, over the last several decades there has been rapid decline of India's wild animals and birds which is a cause of grave concern. Some wild animals and birds have already become extinct e.g. the cheetah and others are on the brink of extinction. Areas which were once teeming with wild life have become devoid of it, and many sanctuaries and parks are empty or almost

empty of animals & birds. Thus, the Sariska Tiger Reserve in Rajasthan and the Panna Tiger Reserve in Madhya Pradesh today have no tigers.

6. One of the main causes for this depredation of the wild life is organized poaching which yields enormous profits by exports to China and other countries.

7. Article 48A of the Constitution states as follows :

"48A. Protection and improvement of environment and safeguarding of forest and wild life. – The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country".

8. Article 51A (g) of the Constitution states that it is the duty of every citizen of India to protect and improve the natural environment including the wild life.

9. The Wildlife (Protection) Act, 1972 was enacted for this constitutional purpose. Chapter III of the said Act prohibits hunting of wild animals except in certain limited circumstances. Chapter IV enables the State Government to declare any area as a sanctuary or national park, and destruction or removal of animals from those areas is prohibited except under very limited circumstances. Chapter V & VA prohibits trade or commerce of wild animals, animal articles or trophies. Chapter VI makes violation of the provisions of the Act a criminal offence. By the Wildlife Protection (Amendment) Act, 2002 the punishment has been increased vide Section 51 as amended, and the property derived from illegal hunting and trade is liable to forfeiture vide Chapter VIA.

10. Before dealing with the facts of this case, we may consider why preservation of wild life is important for human society.

11. Preservation of wild life is important for maintaining the

ecological balance in the environment and sustaining the ecological chain. It must be understood that there is inter-linking in nature. To give an example, snakes eat frogs, frogs eat insects and insects eat other insects and vegetation. If we kill all the snakes, the result will be that number of frogs will increase and this will result in the frogs eating more of the insects and when more insects are eaten, then the insects which are the prey of other insects will increase in number to a disproportionate extent, or the vegetation will increase to a disproportionate extent. This will upset the delicate ecological balance in nature. If we kill the frogs the insects will increase and this will require more insecticides. Use of much insecticide may create health problems. To give another example, destruction of dholes (wild dogs) in Bhutan was intended to protect livestock, but this led to greater number of wild boar and to resultant crop devastation causing several cases of abandonment by humans of agricultural fields. Destruction of carnivorous animals will result in increase of herbivorous animals, and this can result in serious loss of agricultural crops and other vegetation.

12. It must be realized that our scientific understanding of nature, and in particular of the ecological chain and the linkages therein is still very primitive, incomplete and fragmentary. Hence, it is all the more important today that we preserve the ecological balance because disturbing it may cause serious repercussions of which we may have no idea today.

13. As already stated above, the wild life in India has already been considerably destroyed. At one time there were hundreds of thousands of tigers, leopards and other wild animals, but today there are only about 1400 tigers left, according to the Wildlife Institute.

14. Until recently habitat loss was thought to be the largest threat to the future of tigers, leopards etc. However, it has now been established that illegal trade and commerce in skins and other body parts of tigers, leopards etc. has done even much

greater decimation. Poaching of tigers for traditional Chinese medicine industry has been going on in India for several decades. Tigers and leopards are poached for their skins, bones and other constituent parts as these fetch high prices in countries such as China, where they are valued as symbols of power (aphrodisiacs) and ingredients of dubious traditional medicines. This illegal trade is organized and widespread and is in the hands of ruthless sophisticated operators, some of whom have top level patronage. The actual poachers are paid only a pittance, while huge profits are made by the leaders of the organized gangs who have international connection in foreign countries. Poaching of wild life is an organized international illegal activity which generates massive amount of money for the criminals.

15. Interpol says that trade in illegal wild life products is worth about US$ 20 billion a year, and India is now a major source market for this trade. Most of the demand for wildlife products comes from outside the country. While at one time there were hundreds of thousands of tigers in India, today according to the survey made by the Wildlife Institute of India (an autonomous body under the Ministry of Environment and Forests), there were only 1411 tigers left in India in 2008. There are no reliable estimates of leopards as no proper census has been carried out, but the rough estimates show that the leopard too is a critically endangered species.

16. There is virtually no market for the skins or bones of tigers and leopards within India. The evidence available points out that tigers and leopards, poached in the Indian wilderness, are then smuggled across the border to meet the demand for their products in neighbouring countries such as China. When dealing with tiger and leopard poachers and traders, it is therefore important to bear in mind that one is dealing with trans-national organized crime. The accused in these cases represents a link in a larger criminal network that stretches across borders. This network starts with a poacher who in

most cases is a poor tribal and a skilled hunter. Poachers kill tigers and leopards so as to supply the orders placed by a trader in a larger city centre such as Delhi. These traders are very wealthy and influential men. Once the goods reach the trader, he then arranges for them to be smuggled across the border to his counterpart in another country and so on till it reaches the end consumer. It is impossible for such a network to sustain itself without large profits and intelligent management.

17. Under the Wildlife (Protection) Act, 1972, trading in tiger, leopard and other animal skins and parts is a serious offence. Apart from that, India is a signatory to both the UN Convention on International Trade in Endangered Species (CITES) and the UN Convention against Transnational Organized Crime (CTOC). However, despite these National and International laws many species of wildlife e.g. tigers, leopards, bison etc. are under threat of extinction, mainly due to the poaching organized by international criminal traders and destruction of the habitats.

18. Sansar Chand, the appellant before us has a long history of such criminal activities, starting with a 1974 arrest for 680 skins including tigers, leopards and others. In the subsequent years the appellant and his gang has established a complex, interlinking smuggling network to satisfy the demand for tiger and leopard parts and skins outside India's borders, particularly to China. It is alleged that the appellant and his gang are accused in 57 wildlife cases between 1974 and 2005.

19. Sansar Chand the appellant herein has a long history of involvement with wildlife crime. A brief account of the same is given below:

(i) In a seizure dated 11.09.1974 having criminal case No. 20/3 Sansar was held guilty by the Court of Shri H.P. Sharma ACMM, Delhi on 1.8.1981 and sentenced on 3.8.1981 to rigorous imprisonment for one year and six months. This Court vide it's judgment dated 13.5.1994

ordered the release of Sansar Chand on the ground that he was a juvenile on the date of the offence and his sentence be considered to have undergone.

(ii) In another seizure dated 20.11.1974 he was held guilty and sentenced to pay a fine of Rs. 20,000/-.

(iii) The third conviction of Sansar Chand was by the Special Railways Court vide it's order dated 20.4.2004 which was pleased to award Sansar Chand rigorous imprisonment for 5 years. The said judgment has been subsequently affirmed by the Sessions Court on 19.10.2006 and the High Court of Rajasthan vide it's order dated 10.12.2008 against which Sansar Chand has preferred this special leave petition.

(iv) In addition to the above there are other cases pending against the appellant which provide details of his pending cases in various Courts and which were admitted by him in his statement under Section 313 Cr.P.C. and which are Ex. P-46 and P-47. These exhibits show the extent of involvement of Sansar Chand in wildlife crime.

(v) In order to highlight the extent of the organized nature of wildlife crimes being committed by the appellant, it is important to mention here that it is not just Sansar Chand, but other members of his family and associations who are also involved in the illegal trade in wildlife. It is alleged that the appellant's younger brother Narayan Chand is mentioned in FIR No. 82/2005, Kamla Market Police Station, New Delhi, involving the seizure of, *inter alia*, 2 tiger skins, 38 leopard skins and 1 snow leopard skin and has been named as an accused in the complaint filed under Section 55 of the Wild Life (Protection) Act, 1972 in this case. Narayan Chand is also an accused in Court Case No. 1145/2009 being tried before the Additional Chief Judicial Magaistrate, Haldwani, arising from Preliminary Offence Report No. 13/Fatehpur/2008-2009,

involving the seizure of 1 tiger skin and a tiger skeleton. Sansar Chand's wife Rani and son Akash are accused in the case arising from FIR No. 362/2004, Manak Chowk Police Station, Jaipur, involving the seizure of leopard paws and claws. CBI in the year 2005 invoked MCOCA against Sansar Chand and his family members and associates which case is pending trial in a Delhi Court.

20. The present case is only one of the cases in which the appellant has been accused. The facts of the case have been set out in detail in the judgment of the High Court and hence we are not repeating the same here. Briefly stated, on January 5, 2003 the police arrested one Balwan who was traveling in a train with a carton containing leopard's skin. During investigation the said Balwan on January 7, 2003 made a disclosure statement to the SHO, GRP Bhilwara that the two leopard skins were to be handed over to Sansar Chand at Sadar Bazar, Delhi. The appellant was charge sheeted and after trial he was convicted by the Additional Chief Judicial Magistrate (Railways), Ajmer, Rajasthan by his judgment dated 29.4.2004. The appellant filed an appeal which was dismissed by the Special Judge, SC/ST (Prevention of Atrocities) Cases, Ajmer vide his judgment dated 19.8.2006. Thereafter the appellant filed a Revision Petition, which was dismissed by the Rajasthan High Court by the impugned judgment dated 10.12.2008. Hence, this appeal.

21. Thus, all the courts below have found the appellant guilty of the offences charged.

22. Learned counsel for the appellant submitted that the prosecution case is solely based on the extra judicial confession made by co-accused Balwan vide Ex.P-33. We do not agree. Apart from the extra judicial confession of Balwan there is a lot of other corroborative material on record which establishes the appellant's guilt.

23. It must be mentioned that persons like the appellant

are the head of a gang of criminals who do illegal trade in wildlife. They themselves do not do poaching, but they hire persons to do the actual work of poaching. Thus a person like the appellant herein remains behind the scene, and for this reasons it is not always possible to get direct evidence against him.

24. In the courts below the prosecution filed a list of pending cases against Sansar Chand, in some of which he has been found guilty and punished. The appellant has been prosecuted by the Wildlife Department in various courts as mentioned in the letter of the Deputy Inspector General of Police, CBI, New Delhi to the Inspector General of Police, Jaipur dated October 20, 2004.

25. Ex.P-33 which contains the confession of the appellant, was written by PW-11 Arvind Kumar on the instructions given by the accused Balwan while in custody. Prior to Ex.P-33, Balwan has also disclosed the name of the appellant vide Ex.P-6 on January 6, 2003.

26. In our opinion, Ex.P-33 supported by the evidence of Arvind PW 11 and Ex.P-6 cannot be treated to be concocted documents which cannot be relied upon. As per the disclosure statement of Balwan the other co-accused persons were also arrested and articles used for killing and removing skins from the bodies of leopards were also recovered.

27. The accused Balwan was released on bail on 18.01.2003, and thereafter he sent the written confession Exh.P-33 on 23.01.2003 during judicial custody at Central Jail, Ajmer. In our opinion it cannot be held that the accused Balwan was under any pressure of the police. The said letter Ex.P-33 dictated by Balwan to Arvind Kumar was directly sent from the Central Jail, Ajmer to the Chief Judicial Magistrate's Court, Ajmer. We are of the opinion that the letter P-33 was not fabricated or procured by pressure. The accused Balwan has clearly stated in Exh.P-33that he was paid Rs.5000/- and

Rs.10000/- by the appellant. The appellant has several houses in Delhi, purchased in his name and in the name of his wife. It appears that these houses were purchased with the help of gains made out of his illegal activities stated above.

28. Pw-11 Arvind Kumar has stated in his deposition before the Court that he wrote the letter Ex.P-33 at the instance of the accused Balwan. The thumb impression of the accused Balwan is on that letter.

29. At the instance of the appellant one Bhua Gameti was questioned who stated that the panther's skin had been taken by various persons e.g. Khima, Nawa, Kheta Ram, Mohan and Chuna, who were also arrested. At their pointing out the equipment used for hunting the leopard and poaching it were seized. Panther's nails were also recovered from accused Bhura and the guns, cartridges, and knives for removing the skins of panthers were recovered from the accused.

30. There is a large amount of oral and documentary evidence on record which has been discussed in great detail by the learned Magistrate and the learned Special Judge and hence we are not repeating the same here. Thus the appellant has rightly been held guilty beyond reasonable doubt.

31. As already stated above, in such cases it is not easy to get direct evidence, particularly against the leader of the gang (like the appellant herein).

32. The appellant, Sansar Chand has been doing this illegal trade for more than 30 years. He is habitual of doing this illegal business of trade in skins and parts of panthers and tigers. He has, as far back as in 1974, committed his first crime when he was barely 16 years of age and the conviction was upheld by the Supreme Court in Criminal Case No. 15 of 2001. A large number of cases are pending against him in Delhi, Uttar Pradesh and Rajasthan. Taking all these materials

into account there is no doubt that the appellant is guilty of the offence charged.

33. There is no absolute rule that an extra judicial confession can never be the basis of a conviction, although ordinarily an extra judicial confession should be corroborated by some other material vide *Thimma vs. The State of Mysore* – AIR 1971 SC 1871, *Mulk Raj vs. The State of U.P.* – AIR 1959 SC 902, *Sivakumar vs. State by Inspector of Police* – AIR 206 SC 563 (para 41 & 42), *Shiva Karam Payaswami Tewar vs. State of Maharashtra* – AIR 2009 SC 1692, *Mohd. Azad vs. State of West Bengal* – AIR 2009 SC 1307. In the present case, the extra judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act.

34. The learned Magistrate and the Special Judge have discussed in great detail the prosecution evidence, oral as well as documentary and have found the appellant guilty. The High Court has affirmed that verdict and we see no reason to take a different view. The appeal, therefore, stands dismissed.

35. Before we part with this case, we would like to request the Central and State Governments and their agencies to make all efforts to preserve the wild life of the country and take stringent actions against those who are violating the provisions of the Wildlife (Protection) Act, as this is necessary for maintaining the ecological balance in our country.

N.J. Appeal dismissed.