BRAHM SWAROOP & ANR.
v.
STATE OF U.P.
(Criminal Appeal No. 1235 of 2005)

OCTOBER 26, 2010

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

Penal Code, 1860 – ss. 302/34 and 307/34 – Prosecution under – 6 accused causing death of 4 persons – Trial court convicted accused Nos. 2 and 3 u/s. 302/34 and accused Nos. 1 and 4 u/ss. 302/34 and 307/34 – Accused Nos. 5 and 6 acquitted of all the charges i.e. u/s. 148, 302, 149, 307, 396, 424 IPC and s.25 of Arms Act – High Court confirming the conviction order and setting aside the acquittal order, convicted accused Nos. 5 and 6 u/ss. 302/34 and 307/34 and upheld the acquittal u/s. 25 of Arms Act – On appeal, held: In view of the trustworthy evidence of the injured eye-witness and other eye-witnesses, conviction of the accused persons is justified – Acquittal u/s. 25 was correct – Arms Act, 1959 – s. 25.

Code of Criminal Procedure, 1973 – s. 174 – Inquest report – Evidentiary value of – Held: Inquest report cannot be treated as substantive evidence - It can be utilized only for contradicting the evidence of witnesses of the inquest – Omissions in the inquest report are not sufficient to put the prosecution out of court.

Witnesses:

Evidence of witnesses – Discrepancies in – Effect of – Held: Minor discrepancies which do not shake the basic version of the prosecution case, cannot itself prompt the court to reject the evidence in its entirety.

Eye-witness – Evidentiary value of – Held: Evidence of

eye-witnesses cannot be discarded if their names do not figure in the inquest report – If the evidence of eye-witnesses is credible, question of motive becomes irrelevant – Motive.

Related witness – Evidentiary value of – Held: Relationship of the witness with the deceased is not a factor which effects his credibility – However, in such cases the court has to adopt a careful approach and analyse the evidence so as to find out its credibility.

Injured witness – Evidentiary value of – Held: Generally such witness is considered to be reliable – Convincing evidence is required to discredit an injured witness.

Criminal Trial – Delay in sending FIR to the Magistrate – Effect of – Held: An unexplained delay by itself may not be fatal.

Appeal – Appeal against acquittal – Interference with – Scope of – Discussed.

Appellants-accused, alongwith other accused, were prosecuted for having caused death of 4 persons. The prosecution case was that deceased No. 1 had an enmity with the family of accused No. 1. On the day of the incident, accused Nos. 1 to 6 surrounded the deceased persons and the informant (PW1), and started firing at them with their respective weapons. Deceased No. 1 died on the spot. Deceased Nos. 2 and 4 sustained serious injuries and as a result, became unconscious. Deceased No. 3 and PW1 also sustained injuries. Accused No. 5 took away the rifle of deceased No. 2 and accused No. 6 took away the licensed gun of one 'G' who had kept the same in his jeep. PW2 and one 'S' were also the eye-witnesses to the incident. Deceased Nos. 2, 3 and 4 later succumbed to the injuries. The trial court acquitted accused Nos. 5 and 6 of all the charges i.e. u/ss. 148, 302,

149, 307, 396 and 424 IPC and u/s. 25 of the Arms Act, 1959. Accused Nos. 3 and 2 were convicted for the offence punishable u/s. 302/34 IPC and were awarded death sentence. Accused Nos. 1 and 4 were convicted for the offences punishable u/s. 302/34 and 307/34 and were awarded imprisonment for life. Accused persons as well as the State filed appeals before the High Court against the orders of conviction and acquittal respectively. The High Court dismissed the appeals filed by the accused persons with the modification that the death sentence was altered to life imprisonment. Allowing the appeal filed by the State, the High Court convicted accused Nos. 5 and 6 for the offences punishable u/ss. 302/34 and 307/34 IPC and awarded life imprisonment.

In the instant appeals, the appellant-accused contended that the prosecution did not disclose the genesis of the case correctly; that the inquest was manipulated; that the use of the weapons alleged were not established; that there was delay in sending the special report to the Magistrate; that the deceased Nos. 2 and 4 were history-sheeters and had large number of enemies, and thus there was possibility of somebody else having killed them; that the evidence of the first informant could not be relied on as he could not tell the names of fathers of PWs 5 and 6; that the prosecution failed to examine independent witnesses; and that reversal of the acquittal order of accused Nos. 5 and 6 by the High Court was unjustified.

Dismissing the appeals, the Court

HELD: 1.1. Evidence of eye-witnesses can not be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The object of the proceedings u/s. 174 Cr.PC is merely to ascertain whether a person died under suspicious circumstances or met

with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned. Omissions in the inquest report are not sufficient to put the prosecution out of court. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. The inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witnesses of inquest. [Para 7] [20-G-H; 21-A-B]

Podda Narayana and Ors. v. State of Andhra Pradesh **AIR 1975 SC1252;** *Khujji v. State of Madhya Pradesh* **AIR 1991 SC 1853;** *Georgeand Ors. v. State of Kerala and Anr.* **(1998) 4 SCC 605;** *Shaikh Ayub v. State of Maharashtra* **(1998) 9 SCC 521;** *Suresh Rai v. State of Bihar* **(2000) 4 SCC 84;** ***Amar Singh v. Balwinder Singh and Ors.*** **(2003) 2 SCC 518;** *Radha Mohan Singh alias Lal Sahab and Ors. v. State of Uttar Pradesh* **(2006) 2 SCC 450;** *Aqeel Ahmad v. State of Uttar Pradesh* **AIR 2009 SC 1271 – relied on.**

1.2 Even where, the attention of the author of the inquest is drawn to the alleged discrepancy, overwriting, omission or contradiction in the inquest report and the author in his deposition has also admitted that through a mistake he omitted to mention the crime number in the inquest report, just because the author of the report had not been diligent did not mean that reliable and clinching evidence adduced by the eye-witnesses should be discarded by the court. [Para 9] [21-G-H; 22-A]

Dr. Krishna Pal and Anr. v. State of Uttar Pradesh **(1996) 7 SCC 194 – relied on**

1.3 In the instant case, it cannot be said that any omission or discrepancy in the inquest is fatal to the prosecution's case and such omissions would necessarily lead to the inference that FIR is ante-timed. The Sub Inspector (PW.7) had denied the suggestion made by defence that till the time of preparing the report, the names of the accused persons were not available. He further stated that the column for filling up the nature of weapons used in the crime was left open as it could be ascertained only by the Doctor what weapons had been used in the crime. [Para 10] [22-B-C]

Balram Singh and Anr. v. State of Punjab **(2003) 11 SCC 286;** *State of Rajasthan v. Teja Singh and Ors.* **(2001) 3 SCC 147;** *Ramesh Baburao Devaskar and Ors. v. State of Maharashtra* **(2007) 13 SCC 501;** *Sarvesh Narain Shukla v. Daroga Singh and Ors.* **AIR 2008 SC 320;** *Aqeel Ahmad v. State of Uttar Pradesh* **AIR 2009 SC 1271 – relied on.**

Badam Singh v. State of M.P. **(2003) 12 SCC 792 – referred to.**

2.1 The report to the Magistrate is indispensable and absolute and it must be sent at the earliest, promptly and without any undue delay as the purpose is to avoid the possibility of improvement in the prosecution's case and the introduction of a distorted version by deliberations and consultation and to enable Magistrate concerned to keep a watch on progress of investigation. However, no rule of universal application can be laid down that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. It would depend upon the facts of each case. If there has been some lapse on the part of the Investigating Officer

that would not affect the credibility of the prosecution's witnesses. In case the prosecution offers a satisfactory explanation for the delay, the court has to test it. An unexplained delay by itself may not be fatal, but it is certainly a relevant aspect which can be taken note of while considering the role of the accused persons for the offence. [Paras 15 and 16] [23-F-H; 24-A-D]

2.2 In the instant case, the prosecution had not been asked to explain the delay in sending the special report. More so, the plea that the FIR was ante-timed, cannot be accepted in view of the evidence available on record which goes to show that the FIR had been lodged promptly within 20 minutes of the incident as the Police Station was only 1 k.m. away from the place of occurrence and names of all the accused had been mentioned in the FIR. [Para 18] [25-B]

State of Kerala v. Anilachandran @ Madhu and Ors. **AIR 2009 SC *1866;*** *Pala Singh v. State of Punjab* **AIR 1972 SC 2679;** *Sarwan Singh v. State of Punjab* **AIR 1976 SC 2304;** *PandurangChandrakant Mhatre and Ors. v. State of Maharashtra* **(2009) 10 SCC 773;** *Akbar Sheikh and Ors. v. State of W.B.* **(2009) 7 SCC 415 – relied on.**

3. Courts attach great importance to the prompt lodging of FIR and prompt interrogation of a witness u/s. 161 Cr.P.C. as the same substantially eliminates the chances of embellishment and concoction creeping into the account contained therein. The prompt lodging of the FIR is proved from the chik report and the statement of the complainant u/s. 161 Cr.P.C., which was recorded immediately after lodging the FIR. Any defect in the preparation of the inquest report by the investigating officer cannot lead to an inference that the FIR was not registered at the alleged time. The FIR contains all the essential features of the prosecution's case including names of eye-witnesses, time and place of incident,

names of the victim, motive, name of the accused persons, weapons in their hands and manner of assault. Thus, all these things lend a seal of assurance not only to the presence of eye-witnesses at the place of the incident, but also to the participation of the appellants in the crime. [Para 18] [25-F-H; 26-A]

4. The eye-witnesses have been cross-examined thoroughly, but nothing useful to the accused could be elicited from them. The testimony of the eye- witnesses is credible and worthy of confidence. If the evidence of the eye-witnesses is trustworthy and believed by the court, the question of motive becomes totally irrelevant. [Para 37] [35-E; 36-B]

5. The plea of the accused that the place of occurrence is not free from doubt as it has been stated by the Investigating Officer (PW.10) that on receiving the phone call purported to have been made from the residence of D.1 that dacoits had attacked them, he made an entry in the General Diary, and proceeded to that place and recorded the statement of some persons there; and that vehicle in which D.2 and D.4 were sitting did not have any blood marks and no blood stains were found near the jeep and no pellets had been recovered from the said place, is not acceptable. If this plea is accepted then the question of collecting the blood stained cement from the counter of the repairing shop could not arise. The I.O. (PW.10) has stated that the tool box was found marked with splinters and badly damaged. More so, the statement of PW.1, the informant, cannot be ignored as he has stated that D.3 was bleeding but blood did not fall on the ground as his clothes absorbed all the blood. He had further stated that D.1 was sitting at the counter and there was quite a lot of blood from the wounds of D.1 which fell on the ground and not on the counter. [Paras 19 and 20] [26-B-H]

6. Merely because the witnesses were close relatives of the deceased, that cannot be a ground to discard their evidence. Their relationship to one of the parties is not a factor that effects the credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence. [Paras 21] [27-B-C]

Dalip Singh and Ors. v. State of Punjab **AIR 1953 SC 364;** *Masalti v. State of U.P.* **AIR 1965 SC 202;** *Lehna v. State of Haryana* **(2002) 3 SCC 76;** *Rizan and Anr. v. State of Chhattisgarh Through The Chief Secretary, Government of Chhatisgarh, Raipur, Chhatisgarh* **(2003) 2 SCC 661 – relied on.**

7.1 Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Para 22] [27-F-G]

State of U.P. v. Kishan Chand and Ors. **(2004) 7 SCC 629;** *Krishan and Ors. v. State of Haryana* **(2006) 12 SCC 459;** *Dinesh Kumar v. State of Rajasthan* **(2008) 8 SCC 270;** *Jarnail Singh and Ors. v. State of Punjab* **(2009) 9 SCC 719;** *Vishnu and Ors. v. State of Rajasthan* **(2009) 10 SCC 477;** *Anna Reddy Sambasiva Reddy and Ors.v. State of Andhra Pradesh* **AIR 2009 SC 2661;** *Balraje @ Trimbak v. State of Maharashtra* **(2010) 6 SCC 673 – relied on.**

7.2 In the instant case, the injured witness PW.1 has

been examined, his testimony cannot be discarded, as his presence on the spot cannot be doubted, particularly, in view of the fact that immediately after lodging of FIR, the injured witness had been medically examined on the same day. without any loss of time. The injured witness had been put through a grueling cross-examination but nothing can be elicited to discredit his testimony. [Para 21] [27-E]

8. In the fact-situation of the instant case, though D.1 was history-sheeter and D.2 and D.4 had criminal cases against them and they had large number of enemies, it cannot be inferred that somebody else had killed them. [Para 23] [28-B]

9.1 While appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. [Paras 25] [28-H; 29-A-C]

9.2 In the facts and circumstances of the case, there was no conflict between the direct evidence and medical evidence. Even if deceased were having some minor abrasions and contusions for the reason that they might have reacted to the assault and tried to save themselves, cannot create a doubt in the prosecution case about the presence of the witnesses. The High Court has furnished a cogent explanation for contradiction between the medical and ocular evidence. [Paras 25 and 37] [35-H; 36-A]

State of U.P. v. M.K. Anthony **AIR 1985 SC 48;** *State of Rajasthan v.Om Prakash* **AIR 2007 SC 2257;** *State v. Saravanan and Anr.* **AIR 2009 SC 152;** *Prithu @ Prithi Chand and Anr. v. State of Himachal Pradesh* **(2009) 11 SCC 588 – referred to.**

10.1 The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law. Similarly, the incorrect placing of the burden of proof may also be a subject matter of scrutiny by the appellate court. The court of appeal may not interfere where two views are possible for the reason that in such a case it can be held that prosecution failed to prove the case beyond reasonable doubt and accused is entitled for benefit of doubt. [Para 26] [29-F-G; 30-A]

Balak Ram and Anr. v. State of U.P. **AIR 1974 SC 2165;**

Allarakha KMansuri v. State of Gujarat **(2002) 3 SCC 57;** *Raghunath v. State ofHaryana* **(2003) 1 SCC 398;** *State of U.P. v. Ram Veer Singh and Ors.* **AIR 2007 SC 3075;** *S. Rama Krishna v. S. Rami Reddy (D) by his LRs. and Ors.* **AIR 2008 SC 2066;** *Sambhaji Hindurao Deshmukh and Ors. v. State of Maharashtra* **(2008) 11 SCC 186;** *Arulvelu and Anr. v. State* **(2009) 10 SCC 206;** *Perla Somasekhara Reddy and Ors. v. State of A.P.* **(2009) 16 SCC 98;** *Ram Singh alias Chhaju v. State of Himachal Pradesh* **(2010) 2 SCC 445 – relied on.**

10.2 In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference. [Para 30] [32-D]

Sheo Swaroop and Ors. v. King Emperor **AIR 1934 PC 227;** Chandrappa and Ors. v. State of Karnataka **(2007) 4 SCC 415;** *Stateof Uttar Pradesh v. Banne @ Baijnath and Ors.* **(2009) 4 SCC 271, relied on.**

11.1 The acquittal of Accused Nos. 5 and 6 by the trial court cannot be held to be based on cogent reasons. The High Court has rightly reversed their acquittals for offences u/ss. 302/34 and 307/34 IPC, but has rightly upheld their acquittal u/s. 25 of the Arms Act. [Para 37] [36-C]

11.2 The fact that PW-1 failed to name the fathers of the two accused persons namely A-5 and A-6, alone could not discount their involvement in the crime. More so, it is evident from the record that there was no suggestion to

PW.1 that the names of the fathers of the two accused persons were mentioned at the instance of some other persons. He had not been asked as to how the name of their father had been mentioned in the FIR. Such an inference could not have been drawn by the trial court without giving an opportunity of explanation to PW.1. [Paras 33] [34-A-B]

Sone Lal and Ors. v. State of U.P. **AIR 1978 SC 1142;** *Rotash v. State of Rajasthan* **(2006) 12 SCC 64– relied on.**

11.3 The inference of the trial court that the FSL report did not corroborate the usage of the gun recovered from A5, in the crime and was a major flaw in the prosecution's case was rightly held by High Court as perverse. The case of the prosecution had all along been that A-5 was armed with a DBBL gun (which is a different type of gun from the recovered gun), and the said gun was not mentioned either in the FIR or in the testimonies of any of the prosecution witnesses. It was the statement of A-5 that he had used the said gun in the crime. Further, this statement was inadmissible as A-5 had made the statement to a police officer, while he was in custody. [Para 34] [34-C-E]

11.4. So far as the question of the other gun, which A-6 took from one 'G' from the complainant party and its recovery from A-5 is concerned, both the trial court and the High Court disbelieved the recovery. However, the High Court took the view that no benefit can be given to the accused persons on the ground that the recovery of the said gun was not worth to be believed. Even in the absence of the proper recovery of the said gun, there was enough evidence to prove beyond reasonable doubt, the guilt of the accused. The High Court took the view that in the light of the fact that the eye-witness accounts and the medical evidence were in harmony with each other and clearly established the guilt of A-5 and A-6, the

decision of the trial court to acquit them could not be in consonance with the evidence available on record and thus, perverse. [Para 35] [34-G-H; 35-A]

Case Law Reference:

AIR 1975 SC 1252	**Relied on.**	**Para 7**
AIR 1991 SC 1853	**Relied on.**	**Para 7**
(1998) 4 SCC 605	**Relied on.**	**Para 7**
(1998) 9 SCC 521	**Relied on.**	**Para 7**
(2000) 4 SCC 84	**Relied on.**	**Para 7**
(2003) 2 SCC 518	**Relied on.**	**Para 7**
(2006) 2 SCC 450	**Relied on.**	**Para 7**
AIR 2009 SC 1271	**Relied on.**	**Paras 7 and 15**
(1996) 7 SCC 194	**Relied on.**	**Para 9**
(2003) 12 SCC 792	**Referred to.**	**Para 11**
(2003) 11 SCC 286	**Relied on.**	**Para 12**
(2001) 3 SCC 147	**Relied on.**	**Para 13**
(2007) 13 SCC 501	**Relied on.**	**Para 13**
AIR 2008 SC 320	**Relied on.**	**Para 14**
AIR 2009 SC 1866	**Relied on.**	**Para 16**
AIR 1972 SC 2679	**Relied on.**	**Para 16**
AIR 1976 SC 2304	**Relied on.**	**Para 16**
(2009) 10 SCC 773	**Relied on.**	**Para 16**
(2009) 7 SCC 415	**Relied on.**	**Para 17**
AIR 1953 SC 364	**Relied on.**	**Para 21**

AIR 1965 SC 202	**Relied on.**	**Para 21**
(2002) 3 SCC 76	**Relied on.**	**Para 21**
(2003) 2 SCC 661	**Relied on.**	**Para 21**
(2004) 7 SCC 629	**Relied on.**	**Para 22**
(2006) 12 SCC 459	**Relied on.**	**Para 22**
(2008) 8 SCC 270	**Relied on.**	**Para 22**
(2009) 9 SCC 719	**Relied on.**	**Para 22**
(2009) 10 SCC 477	**Relied on.**	**Para 22**
AIR 2009 SC 2661	**Relied on.**	**Para 22**
(2010) 6 SCC 673	**Relied on.**	**Para 22**
AIR 1985 SC 48	**Relied on.**	**Para 25**
AIR 2007 SC 2257	**Relied on.**	**Para 25**
AIR 2009 SC 152	**Relied on.**	**Para 25**
(2009) 11 SCC 588	**Relied on.**	**Para 25**
AIR 1974 SC 2165	**Relied on.**	**Para 26**
(2002) 3 SCC 57	**Relied on.**	**Para 26**
(2003) 1 SCC 398	**Relied on.**	**Para 26**
AIR 2007 SC 3075	**Relied on.**	**Para 26**
AIR 2008 SC 2066	**Relied on.**	**Para 26**
(2008) 11 SCC 186	**Relied on.**	**Para 26**
(2009) 10 SCC 206	**Relied on.**	**Para 26**
(2009) 16 SCC 98	**Relied on.**	**Para 26**
(2010) 2 SCC 445	**Relied on.**	**Para 26**

AIR 1934 PC 227	**Relied on.**	**Para 27**
(2007) 4 SCC 415	**Relied on.**	**Para 28**
(2009) 4 SCC 271	**Relied on.**	**Para 29**
AIR 1978 SC 1142	**Relied on.**	**Para 32**
(2006) 12 SCC 64	**Relied on.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1235 of 2005.

From the Judgment & Order dated 4.5.2005 of the High Court of Judicature at Allahabad in Govt. Appeal No. 6180 of 2003.

WITH

Crl.A.No. 1295-1296 of 2005.

KTS Tulsi, Ravinder Singh, Anurag Dubey, D.P. Pande, S.R. Setia for the Appellants.

Shail Kr. Dwivedi, AAG, Ashutosh Kumar Sharma, Anuvrat Sharma, Raj Singh Rana for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the judgment and order dated 4th May, 2005, of the High Court of Judicature at Allahabad, passed in Criminal Appeal No. 6180 of 2003, along with Criminal Appeal Nos.3749 of 2003 and 4648 of 2004, against the judgment and order of the Sessions court, Bareilly dated 5th August, 2003, in Sessions Trial No. 855 of 2001 in Crime No. 384/2000.

2. Fact and circumstances giving rise to these appeals are as under:

(A) First Information Report No.239/2000 was lodged on

31st May, 2000 at 3.20 P.M. by Atar Singh (PW.1) at Police Station Bahedi, Distt. Bareilly. It stated that his grand father Natthu Singh @ Raghunath Singh had an enmity with the family of one Nem Chand Gangwar and on that date he along with Natthu Singh @ Raghunath Singh, Rajendra Singh @ Goli, Virendra Singh, Dharam Pal Singh, Rajendra Singh and Satyapal Singh had come to Bahedi to get the Dynamo of their Jeep No. DDA 6162 repaired. Natthu Singh @ Raghunath Singh was sitting at the counter of the repairing shop, while Dharam Pal Singh and Rajendra Singh were sitting in the Jeep. Virendra Singh was standing in front of the Jeep. Gyanendra Singh kept his gun in the Jeep near Dharam Pal Singh and went towards the grove to urinate. At about 3.00 P.M., Nem Chand Gangwar (A.1) and his sons Balwant (A.2) and Chandra Pal (A.3), Jogendra (A.4), Brahm Swaroop (A.5) and Jagdish Baggar (A.6) armed with deadly weapons came there and started firing, after surrounding these persons with their respective weapons. Nem Chand Gangwar (A.1) assaulted Natthu Singh (D.1) with his Kanta. He died on the spot. Rajendra Singh (D.2) and Dharampal Singh (D.4) received serious injuries by fire arm and became unconscious. Virendra Singh (D.3) fell near the Jeep after receiving fire arm injuries. The informant, Atar Singh (PW.1) also received injuries in the incident. Brahm Swaroop (A.5) took away the rifle of Rajendra Singh (D.2) and Jagdish Baggar (A.6) took away the licensed gun of Gyanendra. It was also alleged that the chap Serial No. 5809 of the gun of the accused had fallen on the spot. All the three injured persons were taken to the hospital at Bahedi. Rajendra Singh (PW.2) and Satyapal Singh also witnessed the incident.

(B) After investigation of the case, the prosecution submitted the chargesheet under Sections 396, 148, 302 read with 149, 307/149 of the Indian Penal Code, 1860 (hereinafter called the IPC). Brahm Swaroop (A.5) and

Balwant (A.2) were further charged under Section 25 of the Arms Act (hereinafter referred to as 'Arms Act'). During the trial, the prosecution examined 12 witnesses to prove its case. After considering the whole case and appreciating the evidence, on the conclusion of the trial, the Sessions court vide judgment and order dated 5th August, 2003, in Sessions Trial No. 855 of 2001 acquitted Brahm Swaroop (A.5) and Jagdish Baggar (A.6) of all the charges under Sections 148, 302, 149, 307, 396, 424 I.P.C. and Section 25 of the Arms Act. Chandra Pal (A.3) and Balwant (A.2) were convicted under Section 302 read with 34 I.P.C. and were awarded death sentence and a fine of Rs.5,000/- and, in case of failure to deposit the fine, six months imprisonment in addition. Nem Chand Gangwar (A.1) and Jogendra (A.4) were convicted under Sections 302/34 I.P.C. and awarded imprisonment for life with fine of Rs. 10,000/- each, and in case of failure to deposit the fine, one year further imprisonment. Nem Chand Gangwar (A.1) and Jogendra (A.4) were further convicted under Sections 307/34 I.P.C. and awarded 10 years rigorous imprisonment and fine of Rs.5000/- each and in case of failure to deposit the fine, they would undergo 6 months imprisonment in addition.

(C) Being aggrieved by the aforesaid judgment and order of the Sessions Court, three appeals bearing Criminal Appeal No. 4648 of 2004, Criminal Appeal No. 3749 of 2003 and Government Appeal No. 6180 of 2003 were filed before the High Court of Judicature at Allahabad. The High Court vide its judgment and order dated 4th May, 2005, disposed of the aforesaid three appeals by the impugned common judgment and order dismissing the appeals filed by the convicts, however, with the modification that the sentence of death imposed by the trial court on Chandra Pal (A.3) and Balwant (A.2) was altered to life imprisonment. The Government appeal against acquittal of Braham Swaroop (A.5) and Jagdish Baggar (A.6) stood

allowed, and they were convicted under Section 302 read with 34 I.P.C. and sentenced to undergo imprisonment for life with a fine of Rs.10,000/- and, in default of payment of fine, rigorous imprisonment for a further period of one year. Both the said accused were further convicted under Sections 307/34 I.P.C. and sentenced to undergo 10 years rigorous imprisonment with a fine of Rs.5,000/- each and, in default of payment of fine, for a further period of six months R.I. The High Court directed that all the punishments would run concurrently. However, their acquittal for the offences under Section 25 of the Arms Act, was upheld.

3. Shri K.T.S. Tulsi, learned senior counsel appearing for the appellants in all three appeals, has submitted that the place of occurrence is not free from doubt for the reason that no blood stained earth had been lifted from the place near the Jeep and no blood stains were found in the Jeep. The incident had occurred at the residence of Natthu Singh @ Raghunath Singh (D.1) as an entry has been made in this regard in the General Diary at about 11.00 A.M. and the investigating officer Raj Guru, Inspector, P.S. Bahedi (PW.10) had gone to that place. The prosecution did not disclose the genesis of the case correctly. Natthu Singh @ Raghunath Singh (D.1) was a history-sheeter and a large number of criminal cases were pending against him. Virendra Singh (D.3) and Dharampal Singh (D.4) were involved in criminal cases and facing trial in the said cases. Therefore, they have large number of enemies and the whole case of the prosecution becomes totally improbable. Had the incident occurred as alleged by the prosecution, the Jeep should have got some bullet marks as Rajendra Singh (D.2) and Virendra Singh (D.3) were sitting in the Jeep. Neither were any bullet marks on the Jeep nor had any pellets been recovered from the Jeep or the nearby area. An FIR had initially been registered under Section 396 I.P.C. and, in view of the fact, that one of the victims died on the spot and another died enroute to the hospital, had the prosecution given the correct version

of events, the FIR ought to have been registered under Sections 302 and 307 I.P.C. along with other Sections. The inquest has been manipulated and there are five blanks therein which make the whole prosecution case doubtful. The use of weapons was not established. The Magistrate received the Special Report after five days. Atar Singh (PW.1) could not tell names of the father of Brahm Swaroop (A.5) as well as of Jagdish Baggar (A.6) though the same had been mentioned in the FIR lodged by him. The prosecution did not examine any independent witness. The reversal of the acquittal of Brahm Swaroop (A.5) and Jagdish Baggar (A.6) by the High Court is totally unwarranted and unjustified. Thus, the appeals deserve to be allowed.

4. On the contrary, Shri Shail Kumar Dwivedi, learned Additional Advocate General for the State of U.P., has vehemently opposed the appeals, contending that the FIR had been lodged promptly; without any loss of time. The incident occurred at 3.00 P.M. and the FIR had been lodged at 3.20 P.M. on the same day giving the names of all the accused; the soil containing blood was mentioned in General Diary. The omission of the names of fathers of Brahm Swaroop (A.5) and Jagdish Baggar (A.6) cannot be fatal to the prosecution case and it is not necessary that the informant must be aware of all the contents of the FIR itself. The prosecution examined the injured witness, who would not spare the real culprits and involve someone falsely. The deposition of the injured witness has to be given due weightage. The manner in which the inquest report is made, has to be ignored as law does not require to it to furnish all the information and it is not necessary to fill up the names of all the accused. Even if the Special Report reached the Judicial Magistrate at a belated stage, it would not be fatal to the prosecution case. The prosecution case is duly supported by the medical evidence and though the eye witnesses were closely related to the deceased persons, their depositions are required to be examined with care and caution, but cannot be ignored. Minor discrepancies in the evidence, cannot adversely

affect the prosecution case. Thus, the appeals are liable to be dismissed.

5. We have considered the rival contentions of the parties and perused the evidence on record.

Legal Issue

Inquest : Section 174 Cr.P.C.

6. Undoubtedly, there are five blanks in the inquest report. The crime number and names of the accused have not been filled up. The column for filling up the penal provisions under which offences have been committed is blank. The time of incident and time of dispatch of the special report have not been mentioned. Therefore, Shri Tulsi has submitted that the FIR is ante-timed and there is manipulation in the case of the prosecution.

7. The whole purpose of preparing an inquest report under Section 174 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C') is to investigate into and draw up a report of the apparent cause of death, describing such wounds as may be found on the body of the deceased and stating as in what manner, or by what weapon or instrument such wounds appear to have been inflicted. For the purpose of holding the inquest it is neither necessary nor obligatory on the part of the Investigating Officer to investigate into or ascertain who were the persons responsible for the death. The object of the proceedings under Section 174 Cr.PC is merely to ascertain whether a person died under suspicious circumstances or met with an unnatural death and, if so, what was its apparent cause. The question regarding the details of how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of such proceedings i.e. the inquest report is not the statement of any person wherein all the names of the persons accused must be mentioned. *Omissions in the*

inquest report are not sufficient to put the prosecution out of court. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses can not be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witnesses of inquest. (See *Podda Narayana & Ors. v. State of Andhra Pradesh,* AIR 1975 SC 1252; *Khujji v. State of Madhya Pradesh,* AIR 1991 SC 1853; *George & Ors. v. State of Kerala & Anr.,* (1998) 4 SCC 605; *Shaikh Ayub v. State of Maharashtra,* (1998) 9 SCC 521; *Suresh Rai v. State of Bihar,* (2000) 4 SCC 84; *Amar Singh v. Balwinder Singh & Ors.,* (2003) 2 SCC 518; *Radha Mohan Singh alias Lal Sahab & Ors. v. State of Uttar Pradesh,* (2006) 2 SCC 450; and *Aqeel Ahmad v. State of Uttar Pradesh,* AIR 2009 SC 1271).

8. In *Radha Mohan Singh* (supra), a three judge bench of this Court held:

> *"No argument on the basis of an alleged discrepancy, overwriting, omission or contradiction in the inquest report can be entertained unless the attention of the author thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in court."*
>
> (Emphasis added)

9. Even where, the attention of the author of the inquest is drawn to the alleged discrepancy, overwriting, omission or contradiction in the inquest report and the author in his deposition has also admitted that through a mistake he omitted to mention the crime number in the inquest report, this Court has held that just because the author of the report had not been

diligent did not mean that reliable and clinching evidence adduced by the eyewitnesses should be discarded by the Court. (Vide: *Dr. Krishna Pal & Anr. v. State of Uttar Pradesh,* (1996) 7 SCC 194).

10. In view of the law referred to hereinabove it cannot be held that any omission or discrepancy in the inquest is fatal to the prosecution's case and such omissions would necessarily lead to the inference that FIR is ante-timed. Shri N.K. Sharma Sub Inspector (PW.7) had denied the suggestion made by defence that till the time of preparing the report the names of the accused persons were not available. He further stated that the column for filling up the nature of weapons used in the crime was left open as it could be ascertained only by the Doctor what weapons had been used in the crime. Thus, the submissions made in this regard are preposterous.

Delay in sending report to the Magistrate :

11. Undoubtedly, there is delay of 5 days in sending the Special Report. This Court in *Badam Singh v. State of M.P.,* (2003) 12 SCC 792, while considering this issue held that where the investigating officer categorically stated that he was not in a position to give any explanation for the delay in sending the Special Report, it may be fatal to the prosecution's case.

12. However, a larger Bench of three Judges in *Balram Singh & Anr. v. State of Punjab,* (2003) 11 SCC 286, held as under:

> "10…..we notice that in reality there is no delay in preparing the FIR but there was some delay in transmitting the said information to the Jurisdictional Magistrate. Having been satisfied with the fact that the FIR in question was registered in the morning of 6-5-1990, we do not think that the delay thereafter in communicating it to the Jurisdictional Magistrate on the facts of this case, has really given any room to doubt that the said document (FIR) was created

after much deliberations. At any rate, while considering the complaint of the appellants in regard to the delay in the FIR reaching the Jurisdictional Magistrate, we will have to also bear in mind the creditworthiness of the ocular evidence adduced by the prosecution and if we find that such ocular evidence is worthy of acceptance, the element of delay in registering a complaint or sending the same to the Jurisdictional Magistrate by itself would not in any manner weaken the prosecution case."

13. In *State of Rajasthan v. Teja Singh & Ors.,* (2001) 3 SCC 147, this Court held that the receipt of special report by the Magistrate is a question of fact and the prosecution may explain the delay in sending the special report. However, the explanation so furnished by the prosecution must be convincing and acceptable. The same view has been re-iterated in *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra,* (2007) 13 SCC 501.

14. In *Sarvesh Narain Shukla v. Daroga Singh & Ors.,* AIR 2008 SC 320, this Court held that delay in forwarding the Special Report to the Magistrate could not raise a suspicion that FIR had been written later and was ante-timed. Suspicion of manipulation of the documents prepared during the initial investigation would not dislodge the documentary and oral evidence on the spontaneity of the lodging of the FIR.

15. In *Aqeel Ahmad* (supra), this Court held that the forwarding of the report to the Magistrate is indispensable and absolute and it must be sent at the earliest, promptly and without any undue delay as the purpose is to avoid the possibility of improvement in the prosecution's case and the introduction of a distorted version by deliberations and consultation and to enable Magistrate concerned to keep a watch on progress of investigation. However, no rule of universal application can be laid down that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. It would depend upon the facts of each case. *If there has been*

some lapse on the part of the Investigating Officer that would not affect the credibility of the prosecution's witnesses.

16. In *State of Kerala v. Anilachandran @ Madhu & Ors.,* AIR 2009 SC 1866, this Court placed reliance upon its earlier judgments in *Pala Singh v. State of Punjab,* AIR 1972 SC 2679; and *Sarwan Singh v. State of Punjab,* AIR 1976 SC 2304 and held that the police should not unnecessarily delay sending the FIR to the Magistrate as the delay affords the opportunity to introduce improvement and embellishment thereby resulting in a distorted version of the occurrence. However, in case the prosecution offers a satisfactory explanation for the delay, the court has to test it. *An un-explained delay by itself may not be fatal, but it is certainly a relevant aspect which can be taken note of while considering the role of the accused persons for the offence.*

A similar view has been re-iterated in *Pandurang Chandrakant Mhatre & Ors. v. State of Maharashtra,* (2009) 10 SCC 773.

17. In *Akbar Sheikh & Ors. v. State of W.B.,* (2009) 7 SCC 415, this Court held as under:

"44. Submission of Mr Ghosh that the first information report is ante-timed cannot be accepted. It is possible that PW 1 because of lapse of time has made certain statements which go beyond the record viz. holding of inquest before the FIR was recorded. The number of accused persons in the first information report might have also been put by the investigating officer at a later point of time. The fact that the post-mortem examination had been held on 16-5-1982 itself goes a long way to establish the genesis of the occurrence. While saying so, we are not unmindful of the fact that the first information report was sent to the Magistrate after twenty-four hours. But then, in a case of this nature such a delay may not, by itself, be held to be fatal".

18. In the instant case, the defence did not put any question in this regard to the investigating officer Raj Guru (PW.10), thus, no explanation was required to be furnished by him on this issue. Thus, the prosecution had not been asked to explain the delay in sending the special report. More so, the submission made by Shri Tulsi that the FIR was ante-timed cannot be accepted in view of the evidence available on record which goes to show that the FIR had been lodged promptly within 20 minutes of the incident as the Police Station was only 1 k.m. away from the place of occurrence and names of all the accused had been mentioned in the FIR. Dr. Nar Singh Bahadur (PW.4) examined Virendra Singh (D.3) on 31st May, 2000 itself at 5.40 p.m. and had noted fire arm injures on his body and opined that the injuries were fresh in nature. Dr. Anshu Kumar Agrawal (PW.6) had examined Atar Singh (PW.1) on 31st May, 2000 itself at 3.50 p.m. and had noted multiple pellet wounds with surrounding charring over anterior surface of left thigh middle part and a single pellet wound over the anterior surface at right arm lower part. Dr. K.K. Saxena (PW.5), Radiologist conducted an X-Ray examination of Attar Singh (PW.1) on 31.5.2000 and found three small rounded radio opaque with metallic density and F.B. Shadow on middle of left thigh and right arm.

The prompt lodging of the FIR is proved from the chik report and the statement of the complainant under section 161 Cr.P.C., which was recorded immediately after lodging the FIR. Any defect in the preparation of the inquest report by the investigating officer cannot lead to an inference that the FIR was not registered at the alleged time. The FIR contains all the essential features of the prosecution's case including names of eye witnesses, time and place of incident, names of the victim, motive, name of the accused persons, weapons in their hands and manner of assault. Thus, all these things lend a seal of assurance not only to the presence of eye witnesses at the place of the incident, but also to the participation of the appellants in the crime. Courts attach great importance to the

prompt lodging of FIR and prompt interrogation of a witness under Section 161 Cr.P.C. as the same substantially eliminates the chances of embellishment and concoction creeping into the account contained therein.

19. It has further been submitted by Shri Tulsi that the place of occurrence is not free from doubt as it has been stated by the investigating officer, Raj Guru, Inspector, P.S. Bahedi (PW.10) that on receiving the phone call at 11.00 A.M. purported to have been made from the residence of Natthu Singh @ Raghunath Singh (D.1) that dacoits had attacked them he made an entry in the General Diary, and proceeded to that place and recorded the statement of some persons there. The vehicle in which Rajendra Singh (D.2) and Dharampal Singh (D.4) were sitting did not have any blood marks and no blood stains were found near the jeep and no pellets had been recovered from the said place. On the contrary, Shri Shail Kumar Dwivedi, Addl. Advocate General has submitted that cement containing blood stains from the counter had been collected and proved. So far as the alleged incident at 11.00 A.M. is concerned, the investigating officer, Raj Guru, Inspector, P.S. Bahedi (PW.10) had stated that "this was the conspiracy to misguide the police and to drive it out of the Kasba."

20. If we accept the submissions made by Shri Tulsi then the question of collecting the blood stained cement from the counter of the repairing shop could not arise. Shri Raj Guru I.O. (PW.10) has stated that the tool box was found marked with splinters and badly damaged. More so, the statement of Atar Singh (PW.1), the informant, cannot be ignored as he has stated that Virendra Singh (D.3) was bleeding but blood did not fall on the ground as Virendra Singh's (D.3) clothes absorbed all the blood. He had further stated that Natthu Singh @ Raghunath Singh (D.1) was sitting at the counter and there was quite a lot of blood from the wounds of Natthu Singh (D.1) which fell on the ground and not on the counter. In view of the

above, we do not find any force in the submissions made by Shri Tulsi in this regard.

21. Merely because the witnesses were closely related to the deceased persons, their testimonies cannot be discarded. Their relationship to one of the parties is not a factor that effects the credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. However, in such cases, the court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible evidence. (Vide: *Dalip Singh & Ors. v. State of Punjab,* AIR 1953 SC 364; *Masalti v. State of U.P.,* AIR 1965 SC 202; *Lehna v. State of Haryana,* (2002) 3 SCC 76; and *Rizan & Anr. v. State of Chhattisgarh Through The Chief Secretary, Government of Chhatisgarh, Raipur, Chhatisgarh,* (2003) 2 SCC 661).

Injured witness Attar Singh (PW.1) has been examined, his testimony cannot be discarded, as his presence on the spot cannot be doubted, particularly, in view of the fact that immediately after lodging of FIR, the injured witness had been medically examined without any loss of time on the same day. The injured witness had been put through a grueling cross-examination but nothing can be elicited to discredit his testimony.

22. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide: *State of U.P. v. Kishan Chand & Ors.,* (2004) 7 SCC 629; *Krishan & Ors.v. State of Haryana,* (2006) 12 SCC 459; *Dinesh Kumar v. State of Rajasthan,* (2008) 8 SCC 270; *Jarnail Singh & Ors. v. State*

of Punjab, (2009) 9 SCC 719; *Vishnu & Ors. v. State of Rajasthan,* (2009) 10 SCC 477; *Anna Reddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh,* AIR 2009 SC 2661; and *Balraje @ Trimbak v. State of Maharashtra,* (2010) 6 SCC 673).

23. In such a fact-situation though Natthu Singh @ Raghunath Singh (D.1) was history-sheeter and Rajendra Singh (D.2) and Dharampal Singh (D.4) had criminal cases against them and they had large number of enemies, it cannot be inferred that somebody else had killed them.

Discrepancies and inconsistencies in depositions of witnesses:

24. It has been submitted by learned Senior counsel for the appellants that there is a contradiction between the medical and ocular evidence. From the post mortem report of Virendra Singh (D.3) (Ext.Ka-8), it is evident that his body was having contusions; the post mortem report of Rajendra Singh (D.2) (Ext.Ka-9) reveals that he was having abrasions; and the post mortem report of Nathu Singh (D.1) (Ext.Ka-10) also reveal several abrasions. The High Court has given cogent reasons explaining these discrepancies by saying that at the time of firing, the deceased must have reacted to the assault and might have received some abrasions and contusions in order to save themselves. Rajendra Singh (PW.2) has stated that he remained at the place of occurrence till 7 p.m. and he denied his signatures. The High Court has furnished a cogent explanation for such contradiction, and held that his statement had been recorded after 3 years of the incident and thus, such infirmity is bound to occur but does not affect the credibility of the witnesses.

25. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the Court to reject the evidence in its entirety.

"*Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."* Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. (See: *State of U.P. v. M.K. Anthony,* AIR 1985 SC 48; and *State of Rajasthan v. Om Prakash,* AIR 2007 SC 2257; *State v. Saravanan & Anr.,* AIR 2009 SC 152; and *Prithu @ Prithi Chand & Anr. v. State of Himachal Pradesh,* (2009) 11 SCC 588).

Appeal against Acquittal :

26. It is well established in law that the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law. Similarly, the incorrect placing of the burden of proof may also be a subject matter of scrutiny by the appellate court. The court of appeal may not interfere where two views are possible

for the reason that in such a case it can be held that prosecution failed to prove the case beyond reasonable doubt and accused is entitled for benefit of doubt. (Vide: *Balak Ram & Anr. v. State of U.P., AIR 1974 SC 2165; Allarakha K Mansuri v. State of Gujarat,* (2002) 3 SCC 57; *Raghunath v. State of Haryana,* (2003) 1 SCC 398; *State of U.P. v. Ram Veer Singh & Ors.,* AIR 2007 SC 3075; *S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors.,* AIR 2008 SC 2066; *Sambhaji Hindurao Deshmukh & Ors. v. State of Maharashtra,* (2008) 11 SCC 186; *Arulvelu & Anr. v. State,* (2009) 10 SCC 206; *Perla Somasekhara Reddy & Ors. v. State of A.P.,* (2009) 16 SCC 98; and *Ram Singh alias Chhaju v. State of Himachal Pradesh,* (2010) 2 SCC 445).

27. In *Sheo Swaroop and Ors. v. King Emperor,* AIR 1934 PC 227, the Privy Council held as under:

> "...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...."

28. In *Chandrappa and Ors. v. State of Karnataka,* (2007) 4 SCC 415, this Court observed as under:

> "(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach

its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

29. In *State of Uttar Pradesh v. Banne @ Baijnath & Ors.,* (2009) 4 SCC 271, this Court gave illustrations of certain circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include:

(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.

30. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference with the decision of the trial court in a routine manner, where the other view is possible should be avoided, unless there are good reasons for such interference.

31. The trial Court had acquitted two accused persons, namely, Brahm Swaroop (A.5) and Jagdish Baggar (A.6) mainly on the grounds that Attar Singh (PW.1) did not tell the names of their respective fathers though it has so been mentioned in the FIR. Secondly, the prosecution could not explain how could the gun of Gyanendra be recovered from Brahm Swaroop (A.5) if it was taken away by Jagdish Baggar (A.6) and third ground had been that on 3.6.2000 a gun was recovered on the pointing out of Brahm Swaroop and he had admitted that he had used the gun in the crime. The said gun was sent for ballistic expert and the report (Ext.Ka-28) shows

that the barrel of the gun did not have any residue and it had not been used recently.

32. So far as the first issue is concerned, the names of the father of two persons accused could not be given by Atar Singh, informant, (PW.1) in the court, though mentioned in the FIR. The question does arise as to whether, it is fatal to the case of the prosecution. In *Sone Lal & Ors. v. State of U.P.,* AIR 1978 SC 1142, this Court while dealing with the issue held:

> *"……informant was not aware of some of the contents of the FIR itself……..If the accused had any reason to think otherwise it was permissible for him to cross-examine the witness concerned and to lay the foundation for his own version. Lastly, it was suggested by the Sessions Judge that although the parentage of the accused Dularey was not mentioned in the FIR yet it was mentioned in the general diary which shows that the FIR was prepared subsequently. The High Court has clearly pointed out that it was fully explained that due to inadvertence the parentage of Dularey was not mentioned in the FIR but after being ascertained from the informant it was mentioned in the general diary. In these circumstances, therefore, the omission, if any, does not appear to be of any significance. These were the main reasons given by the Sessions Judge for disbelieving the FIR and, in our opinion, the High Court was right in pointing out that the reasons given by the Sessions Judge were both unsound and untenable.*"

33. In the case of *Rotash v. State of Rajasthan,* (2006) 12 SCC 64, this Court held:

> "……..The question is as to whether a person was implicated by way of an afterthought or not must be judged having regard to the entire factual scenario obtaining in the case. PW.6 received as many as four injuries…."

Thus, in the fact-situation of the present case, this factor alone could not discount their involvement in the crime. More so, it is evident from the record that there was no suggestion to Atar Singh (PW.1) that the names of the fathers of the two accused persons were mentioned at the instance of some other persons. He had not been asked as how the name of their father had been mentioned in the FIR. Such an inference could not have been drawn by the trial Court without giving an opportunity of explanation to Atar Singh (PW.1).

34. On 3.6.2000, a gun was recovered on its being pointed out by appellant Brahm Swaroop and he stated that he had used the said gun in the commission of the crime. However, the FSL report suggested that the gun had not been fired recently and from this the trial court concluded that the report did not corroborate the usage of the said gun in the crime and was a major flaw in the prosecution's case. The High Court held that this inference of the trial court was perverse. The case of the prosecution had all along been that Brahm Swarup was armed with a DBBL gun (which is a different type of gun from the said gun), and the said gun was not mentioned either in the FIR or in the testimonies of any of the prosecution witnesses. It was the statement of Brahm Swaroop that he had used the said gun in the crime. Further, this statement was inadmissible as Brahm Swaroop had made the statement to a police officer while he was in custody.

35. As far as the question of the other gun, which Jagdish Baggar took from Gyanendra and its recovery from Brahm Swaroop is concerned, both the Trial Court and the High Court disbelieved the recovery. However, the High Court took the view that no benefit can be given to the accused persons on the ground that the recovery of the said gun was not worth to be believed. Even in the absence of the proper recovery of the said gun, there was enough evidence to prove beyond reasonable doubt, the guilt of the accused. The High Court took the view that in light of the fact that the eyewitness accounts

and the medical evidence were in harmony with each other and clearly established the guilt of Brahm Swaroop and Jagdish Baggar, the decision of the Trial Court to acquit them could not be in consonance with the evidence available on record and thus, perverse. Thus, no fault can be found with the findings so recorded by the High Court in reversing their acquittal.

36. We also do not find any force in the submissions made on behalf of the appellants that there could be no recovery of weapons on 3.6.2000 when the statement of Jagdish Baggar (A.6) was recorded firstly on 7.6.2000 in the District Jail, for the reason that Shri N.K. Sharma, Sub-Inspector (PW.7) has stated that Balwant (A.2) and Brahm Swaroop (A.5) were arrested on 3.6.2000 and they were having the gun with them. Balwant (A.2) himself brought one Rifle out of gathered hay and therefore, the statement of N.K. Sharma (PW.7) cannot be brushed aside as he has referred to the butt of the gun which was broken and the chap of which had fallen down.

37. We have, ourselves appreciated the evidence and reached conclusions similar to the High Court:

(i) If the evidence of the eye-witnesses is trustworthy and believed by the court, the question of motive becomes totally irrelevant.

(ii) Merely because the witnesses were close relatives to the deceased, that cannot be a ground to discard their evidence.

(iii) Prosecution examined an injured witness. His presence on the spot cannot be doubted and his deposition is to be given due weightage.

(iv) In the facts and circumstances of the case there was no conflict between the direct evidence and medical evidence. Even if deceased were having some minor abrasions and contusions for the reason that they might

have reacted to the assault and tried to save themselves, cannot create a doubt in the prosecution case about the presence of the witnesses.

(v) The eye witnesses have been cross-examined thoroughly, but nothing useful to the accused could be elicited from them. The testimony of the eye witnesses is credible and worthy of confidence.

(vi) The acquittal of Brahm Swaroop (A.5) and Jagdish Baggar (A.6) by the trial court cannot be held to be based on cogent reasons. The High court has rightly reversed their acquittals for offences under sections 302/34 and 307/34 IPC, but has rightly upheld their acquittal under Section 25 of the Arms Act.

38. In view of the above, we do not find any cogent reasons to interfere with the impugned judgment and order of the High Court. The appeals lack merit and, are accordingly, dismissed.

K.K.T. Appeals dismissed.

MAHARASHTRA LAND DEVELOPMENT CORPORATION AND ORS.

v.

STATE OF MAHARASHTRA AND ANR.

(Civil Appeal Nos. 2147-48 of 2004)

NOVEMBER 11, 2010

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

Forests – Maharashtra Private Forests (Acquisition) Act, 1975 – ss.2 (c-i), 2(f), 3, 4, 5, 6 to 19 and 21 – "Forest" and "private forest" – Vesting in the State – State Government attempted to acquire the land in question as a "private forest" amidst the efforts of the Maharashtra Land Development Corporation to continue its quarrying operations in the area – Dispute as to whether on the appointed day, i.e., 30.08.1975 under the Maharashtra Private (Acquisition) Forest Act, 1975 the appellant's land of 53 acres was a "private forest" or not – Held: The provisions of the Act present no apparent conflict with the overarching objective of vesting 'private forests' with the State in the Government's efforts to protect them – The definition of a 'forest' as enunciated in s.2 (c-i) (ii) is an inclusive definition and therefore, it would not be appropriate to give it a restrictive meaning – In light of the legislative scheme of the Act, and its provisions, it is clear that the portion of land, measuring 53 acres vested with the respondent-State as a 'private forest' – That the area fell within a part designated as 'forest' on the 30th of August, 1975 is beyond dispute and is supported by the evidence on record – Therefore, by virtue of s.2 (c-i) (ii), the portion in dispute will also be designated as a 'private forest' u/s.2(f) – The respondent-State was only acting in accordance with the principles envisaged in the Act – This action cannot in any way said to be disproportionate or irrational solely because

it divests the appellant-Corporation of the land – The circumstances of this case, especially in so far as it relates to the quarrying operations conducted by the appellant-Corporation in the said area, merit that the State protects the interests of the general public by acquiring the land as a private forest.

Interpretation of Statutes – Preamble to the Act – Held: Is the guiding light to its interpretation.

Administrative Law – Principle of proportionality – Held: The Wednesbury principle of reasonableness has given way to the doctrine of proportionality – Unless the impugned administrative action is advantageous and in public interest such an action cannot be upheld – Any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred – The test of proportionality is concerned with the way in which the decision-maker has ordered his priorities, i.e., the attribution of relative importance to the factors in the case – Thus, it is not so much the correctness of the decision that is called into question, but the method to reach the same.

Ecology/Environment – Preservation of the eco-system is an immutable duty under the Constitution – A fine balance must be struck between environmental protection and development.

The instant appeal was placed in the context of the State Government's attempt to acquire the land in question as a "private forest", amidst the efforts of the Maharashtra Land Development Corporation to continue its quarrying operations in the area.

The question involved in the instant appeal was as to whether on the appointed day, i.e., 30.08.1975 under

the Maharashtra Private (Acquisition) Forest Act, 1975 the appellant's land of 53 acres was a "private forest" or not.

Dismissing the appeal, the Court

HELD:1. The instant case is one that must seek to attain a fine balance between the process of development on the one hand, and the ecological imperative of preserving the environment on the other. This Court has for long been an outspoken critic of attempts to degrade the environment, and a vocal supporter of sustainable development. A developing country like ours cannot afford to ignore the growing needs of teeming millions, but this development shall have to resonate with the preservation of the environment. Preservation of the eco-system is an immutable duty under the Constitution – a fine balance must be struck between environmental protection and development. Many regions in India are biodiversity 'hotspots', known to host a staggering variety of flora and fauna. However, they are under the constant threat of environmental degradation and rapid depletion of natural resources, due to various factors, including the desire to earn quick money. Consequently, a major challenge in this backdrop is to arrive at a successful model of sustainable development – one that aims to preserve the rich ecosystem, while addressing the economic needs of the people in the region. [Paras 27 and 28] [56-F-H; 57-A-D]

T.V. Godavarman Thirumulpad v. Union of India **(1997) 2 SCC 267 and** *Glanrock Estates v. State of Tamil Nadu* **[Decision of Supreme Court in Writ Petition (Civil) Nos. 242 of 1988 and 408 of 2003] – referred to.**

2.1. The issue of whether the land in question was a 'forest' on the appointed day, has to be seen in the context of whether the entire land that encompassed the

disputed area was a 'forest' on the said date. In this regard the legislative scheme of the Act is required to be seen. [Para 36] [63-C-D]

2.2. The definition of a 'forest' as enunciated in Section 2 (c-i) (ii) of the Maharashtra Private Forest (Acquisition) Act, 1975 specifically includes "*land which is part of a forest or lies within it or was part of a forest or was lying within a forest* ***on the 30th day of August, 1975***"**. It is already established that subsequent to proceedings initiated under the Bombay Salsette Estate Abolition Act, 1951, the entire land bearing Survey No. 345-A was held to be a "forest" vide an order dated 24th December, 1964. A bare reading of the provision also indicates that the definition of 'forest' is an inclusive definition and therefore, it could have a wider connotation and it would not be appropriate to give it a restrictive meaning. Every word and phrase of the Act is to be understood in its context and must be given significance so that they are not rendered redundant. The appellant has steadfastly maintained that the interpretation of the provisions cannot mean land which was a forest in the past (i.e. before 30th August, 1975) to be a 'forest' according to the Act. This argument might have had some force had the time period in question related to many decades or even a century before. The aforementioned proceedings were concluded in proximity to the appointed day in question, and the character of land cannot be said to have changed over such a relatively short period of time. It is beyond doubt that the land which encompassed the said portion of 53 acres belonging to the appellant-Corporation was a 'forest' on the appointed day. [Para 34] [61-G-H; 62-A-E]**

2.3. The appellant submitted that although the word 'Forest' was added in the Record of Right after such

proceedings, it was later dropped when the matter went up in appeal to the Commissioner. Even if this were to be considered, it is to be noted that the preponderance of evidence seems to indicate the land in Survey No. 345 was considered as 'forest'. This is amply supported by documentary evidence, including the mortgage deed of 1900, and the revenue records of the past 50 years. Moreover, the conveyance deed dated 29.3.1975 which was executed by the Court Receiver to the appellant, clearly describes the land as "piece or parcel of forest land with structures". This is further buttressed by the mutation entries till 1969-70 which described the land as a forest. Even the mutation entries from 1970-71, have only changed the recording to 'huts, quarry and grass' which does not in any way dispute the nature of the land. That apart in the enquiry conducted under sub-Section(2) of Section 37 of the Bombay Land Revenue Code, it was admitted by the Company through whom the appellant had derived title that the land was forest land. Therefore, there is overwhelming documentary evidence and also contemporaneous evidence on record to prove and establish that the land, in question, even in recent times was considered as forest land and also retained its character as such. [Para 35] [62-F-H; 63-A-C]

2.4. The Preamble to the Act, which is the guiding light to its interpretation, also expresses similar concerns as to the depletion of forest cover in the State. In this light, it is important to construe the provisions of the Act in tune with the purpose of its enactment. Such a rule of interpretation has been supported by the decisions of this Court in a catena of cases. [Para 37] [64-B-C]

2.5. The purpose of the statute and the intention of the legislature in enacting the same must be of paramount consideration while interpreting its provisions. In this instance, moreover, the provisions of

the Act present no apparent conflict with the overarching objective of vesting 'private forests' with the State in the Government's efforts to protect them. Further, it is important to note that the said area was being used for quarrying operations by the appellant-Corporation. That the said portion in the area of Survey 345-A measuring 209 acres is claimed to be rocky and devoid of growth certainly does not change the character of the forest land. It cannot be disputed that within forest areas, there exists water bodies swamp land, grass land etc. The very existence of such land within the forest area would and could not change the nature and character of the forest land and the same would still continue to be treated as forest land. In many instances across the country, mining and quarrying operations, while regulated, do take place in forest land, and they can very well be considered as forest produce. However, the harmful effects of the ecological imbalance that may result as a consequence of quarrying operations in a forest zone is also to be considered. [Para 38] [65-F-H; 66-A-B]

2.6. In light of the legislative scheme of the Act, and its provisions, it is clear that the said portion of the land, measuring 53 acres will vest with the respondent-State as a 'private forest'. That the area fell within a part designated as 'forest' on the 30th of August, 1975 is beyond dispute and is supported by the evidence on record. Therefore, by virtue of Section 2 (c-i) (ii) of the Act, the portion in dispute will also be designated as a 'private forest' under Section 2(f) of the Act, and the authorities are directed to maintain it as such. [Para 39] [66-C-D]

Union of India v. Ranbaxy Laboratories Ltd. **(2008) 7 SCC 502;** *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors.* **(1987) 1 SCC 424;** *Chief Justice of Andhra Pradesh and Others v. L. V. A. Dixitulu and Others* **(1979) 2 SCC 34 – referred to.**

3.1. The appellant-Corporation further alleged that the State's decision to consider the disputed land as automatically vested with the Government was irrational and disproportionate. However, the common yardstick to determine whether the act on the part of the Government violates established principles of administrative law has been the Wednesbury principle of unreasonableness, employed both by English and Indian Courts. The Wednesbury principle of reasonableness has given way to the doctrine of proportionality. [Paras 41, 42 and 43] [67-B-E; 68-B]

3.2. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. Thus implying that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. The principle of proportionality therefore implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question. Unless the impugned administrative action is advantageous and in public interest such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred. This principle has found favour in recent times with this Court, and a number of decisions reflect the shift towards the doctrine of proportionality. [Paras 44 and 45] [68-F-H; 69-A-B]

3.3. The test of proportionality is concerned with the way in which the decision-maker has ordered his priorities, i.e., the attribution of relative importance to the factors in the case. Thus, it is not so much the correctness of the decision that is called into question, but the *method* to reach the same. [Para 50] [70-D-E]

3.4. In the instant case, it is seen that the decision of the Government has been guided by the provisions in the Act, which seek to conserve and protect private forests in the State of Maharashtra that have been facing severe depletion and exploitation. Therefore, the Act, which provides for the vesting of private forests with the Government, does so in the general interests of the public in tune with principles of environmental protection and sustainable development. The respondent-State was only acting in accordance with the principles envisaged in the Act. This action cannot in any way be said to be disproportionate or irrational solely because it divests the appellant-Corporation of the land within Survey 345-A. The circumstances of this case, especially in so far as it relates to the quarrying operations conducted by the appellant-Corporation in the said area, merit that the State protects the interests of the general public by acquiring the land as a private forest. [Para 51] [70-F-H; 71-A]

Bhagat Ram v. State of Himachal Pradesh **(1983) 2 SCC 442;** *Ex-Naik Sardar Singh v. Union of India and Ors.* **(1991) 3 SCC 213;** *Coimbatore District Central Coop. Bank v. Employees Assn.* **(2007) 4 SCC 669;** *Charanjit Lamba v. Commanding Officer, Southern Command and Ors.* **AIR 2010 SC 2462 – referred to.**

Associated Provincial Picture Houses Limited v. Wednesbury Corporation **(1947) 2 All ER 680;** *Council of Civil Services Unions v. Minister for the Civil Services* **[1985] AC 374 – referred to.**

Case Law Reference:

(1997) 2 SCC 267	**referred to**	**Paras 23, 25**
(2008) 7 SCC 502	**referred to**	**Para 37**
(1987) 1 SCC 424	**referred to**	**Para 37**
(1979) 2 SCC 34	**referred to**	**Para 37**
(1947) 2 All ER 680	**referred to**	**Para 42**
[1985] AC 374	**referred to**	**Para 43**
(1983) 2 SCC 442	**referred to**	**Para 46**
(1991) 3 SCC 213	**referred to**	**Para 47**
(2007) 4 SCC 669	**referred to**	**Para 48**
AIR 2010 SC 2462	**referred to**	**Para 49**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2147-2148 of 2004.

From the Judgment & Order dated 8.10.2003 of the High Court of Judicature at Bombay in Writ Petition No. 1052 of 1998.

P.P. Rao, Jay Savla, M.P. Savla, Meenakshi Ogra, Shilpi Choudhary, M. Qamaruddin, Ambar Qamaruddin, M. Qamaruddin, Apeksha Sharan, Purshotam S.T. Utsav, Sidhu, Fitza Moonis for the Appellant.

Shekhar Naphade, Madhavi Diwan, Sanjay Kharde and Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Since the issues

raised and argued in these matters are inter-connected, we propose to dispose both of them by this Order. Civil Appeal No. 2147 is filed by the Maharashtra Land Development Corporation against the State of Maharashtra seeking to challenge the judgment and order of the Bombay High Court dated October 8, 2003 in Writ Petition No. 1052 of 1998. Civil Appeal No. 2148 is filed by K.N. Shaikh against the State of Maharashtra seeking to challenge the judgment and order of the Bombay High Court dated October 8, 2003 in Writ Petition No. 1383 of 2002.

2. At the first stage we will deal with Civil Appeal No. 2147, and after pronouncing the judgment herein we shall deal with Civil Appeal No. 2148.

Civil Appeal No. 2147 of 2004

3. By the judgment in Writ Petition No. 1052 of 1998, the High Court reversed the order and concurrent findings recorded by the Sub-Divisional Officer on 23rd April, 1985 and the Maharashtra Revenue Tribunal on 21st February, 1998 wherein it was held that the land in question is neither "forest" nor "private forest" as referred to in the Maharashtra Private Forests (Acquisition) Act, 1975 (hereinafter referred to as "the Act").

4. The gamut of events that led to the passing of the impugned judgment and order of the High Court may be elaborated here. The land in question was part of an original Survey No. 345 in village Dahisar, Maharashtra, measuring about 650 acres. At all relevant times, it was shown as "forest land" in the Revenue records. In or about 1947, out of 650 acres, around 365 acres was acquired for the purpose of creating a National Park at Borivli. Original Survey No. 345 was subsequently divided into three survey numbers, being Survey Nos. 345-A, 345-B and 345-C. The land which was acquired was Survey No. 345-B. From the remaining land, land admeasuring about 75 acres was given Survey No. 345-C and

the land in question admeasuring about 209 acres was given Survey No. 345-A.

5. It is the case of the State of Maharashtra that village Dahisar was Ex-Khot village. The whole land of Survey No. 345 of village Dahisar was originally owned by ex-khot of the area by name Haji Ali Kasam Agboatwala, who expired in the year 1945. Administration Suit No. 3415 of 1957 was filed in the High Court of Judicature at Bombay and the Court Receiver, High Court of Bombay was appointed as the Court Receiver for administration and management of the estate belonging to Agboatwala. In 1962, in pursuance of an order passed by the High Court, the suit land was sold which was purchased by one M/s. Veekaylal Investment Company ("Company" for short) from the Court Receiver. According to the case of the State, even at that juncture the suit land was "forest land". In 1963-64, proceedings were initiated under the Bombay Salsette Estate Abolition Act, 1951, and vide an order dated 24th December, 1964, the entire land bearing Survey No. 345-A was held "forest" and vested in the State under Section 4 of the said Act.

6. On 27th August, 1975, a notice was issued by the State Government to the Company under sub-Section (3) of Section 35 of the Indian Forest Act, 1927 calling upon the Company, the owner of the land, to show cause as to why notification under sub-Section (1) of Section 35 of the Act should not be issued for regulating and/or prohibiting the non-forest activities on the land. The said notice was issued in respect of total area of land bearing Survey No. 345-A admeasuring 209 acres.

7. On 30th August, 1975, the Maharashtra Private Forests (Acquisition) Act, 1975 came into force under which allegedly land bearing Survey No. 345-A stood acquired and vested in the State Government on the appointed day i.e. August 30, 1975. Accordingly, on October 8, 1975, the Sub-Divisional Officer, Bombay Sub-urban District, in exercise of power under Section 5 of the Act, issued notice to the company to hand over possession of the entire land of Survey No. 345-A admeasuring

209 acres. The company filed a reply to the said notice contending that the land bearing Survey No. 345-A was not "forest", much less a "private forest". The company also called upon the Collector to hear and decide the question as to whether or not the land was "forest" or "private forest" and whether it vested in the State Government under the Act. An inquiry was conducted under Section 6 of the Act by the Sub-Divisional Officer, Bombay Suburban District, wherein notices were issued to the company, being the owner of the land as well as to the Court Receiver. Subsequently, by an order dated 12th November, 1975, the Sub-Divisional Officer held the land to be "private forest" and also held that the land stood acquired and vested in the State of Maharashtra. The company was, therefore, called upon to hand over possession of the land within 10 days to the Collector of Bombay.

8. The company challenged the said order passed by the Sub-Divisional Officer by filling an appeal before the Maharashtra Revenue Tribunal and the Maharashtra Revenue Tribunal vide its order dated 20th March, 1976 dismissed the appeal, upholding and confirming the order passed by Sub-Divisional Officer and observing that the land in question was "forest" within the meaning of Section 2(c-i) of the Act of 1975. It was also held to be "private forest" falling under Section 2(f) of the Act and as such, stood acquired and vested in the State of Maharashtra. The said order was never challenged in further proceedings by the company and became final, conclusive and binding on the parties.

9. It may be stated that when the question of handing over actual and physical possession of land bearing Survey No. 345-A came up, it was revealed that out of 209 acres of land of Survey No. 345-A, land admeasuring about 53 acres was in possession of the Maharashtra Land Development Corporation (the appellant herein), and 50 acres was in possession of K.N. Shaikh (appellant in Civil Appeal No. 2148 of 2004). The Company, in the circumstances, handed over to the

Respondent-State, possession of land admeasuring about 106 acres of land out of 209 acres of Survey No. 345-A.

10. The appellant-Corporation herein objected to handing over possession of the land which was with it. It filed Miscellaneous Petition No. 512 of 1976 in the Bombay High Court challenging the notice issued by Sub-Divisional Officer. It also challenged an order dated November 12, 1975 passed by Sub-Divisional Officer, holding the land to be "forest" as also judgment and order dated March 20, 1976 passed by Revenue Tribunal confirming the order passed by Sub-Divisional Officer. The orders were not challenged by the aggrieved party and they had become final. The appellant-Corporation herein challenged the above decisions, contending that they were *inter alia* in violation of principles of natural justice. The said Miscellaneous Petition No. 512 of 1976, however, came to be settled on the basis of consent terms arrived at between the parties on 19th April, 1984. The consent terms, inter alia, provided that fresh inquiry will be conducted under Section 6 of the Act regarding vesting of the property admeasuring 53 acres in possession of the appellant-Corporation. It was also ordered that in case the authority comes to the conclusion that the land in possession of appellant-Corporation is a "forest" and "private forest" and that it stood acquired and vested in the Government of Maharashtra, the appellant-Corporation would hand over possession of the land to the Sub-Divisional Officer.

11. In pursuance of the consent terms arrived at between the parties, the Sub-Divisional Officer conducted fresh inquiry under Section 6 of the Act, after issuing necessary notice to the appellant-Corporation herein. After hearing the appellant-Corporation, the Sub-Divisional Officer, by an order dated 23rd April, 1985, held that land admeasuring 53 acres out of Survey No. 345-A in possession of the appellant-Corporation was neither a forest nor "private forest" and as such did not stand acquired and vested in the Government of Maharashtra in accordance with the provisions of the Act.

12. The Respondent State challenged the said order passed by the Sub-Divisional Officer by filing an appeal before the Maharashtra Revenue Tribunal. The Maharashtra Revenue Tribunal, vide its judgment and order dated 29th September, 1986, allowed the appeal, set aside the order passed by the Sub-Divisional Officer and declared that the land admeasuring 53 acres in possession of respondent No. 1 as 'forest" and "private forest" as defined in the Act. The Tribunal also held that in accordance with the provisions of the Act, the land stood acquired and vested in the State of Maharashtra.

13. Aggrieved with the order passed by Maharashtra Revenue Tribunal dated 29th September, 1986, the appellant-Corporation filed Writ Petition No. 4726 of 1986 in the Bombay High Court. A Division Bench of the Bombay High Court vide its judgment and order dated 13/17th March, 1992 confirmed the order passed by Maharashtra Revenue Tribunal, holding that the land in possession of respondent No. 1 was "forest" and "private forest", and as such, stood acquired and vested in the State of Maharashtra.

14. The appellant-Corporation challenged the order passed by the Maharashtra Revenue Tribunal and confirmed by a Division Bench of the Bombay High Court by carrying the matter to this Court. This Court, by an order dated 27th August, 1992, allowed the appeal, set aside the order passed by this Court as well as by Maharashtra Revenue Tribunal and remanded the matter to the Tribunal, directing it to dispose of the appeal afresh by affording to both the parties an opportunity of adducing additional evidence.

15. After remand, the matter was placed before the Maharashtra Revenue Tribunal. It was re-heard and vide its judgment and order dated 4th December, 1992, the Tribunal held that the entire land bearing Survey No. 345-A admeasuring 209 acres was neither "forest" nor "private forest" and did not stand acquired and vested in the State of Maharashtra.

16. The Department of Forest, being aggrieved by the above decision of Maharashtra Revenue Tribunal, filed Writ Petition No. 2023 of 1994 in the Bombay High Court and the High Court vide its judgment and order dated 11/15/16/17th April, 1996 allowed the petition and quashed and set aside the order passed by Maharashtra Revenue Tribunal concluding that the entire land bearing Survey No. 345-A, admeasuring 209 acres was "forest" and "private forest" which stood vested in the Government of Maharashtra under the provisions of the Act of 1975.

17. The judgment and order of the Bombay High Court was again challenged by the appellant-Corporation, approaching this Court by way of Special Leave Petition No. 14259 of 1996 and this Court vide its order dated 24th September, 1996, again set aside the order of the High Court and remanded the matter to the Maharashtra Revenue Tribunal by granting liberty to the parties to lead further evidence before the Tribunal and by directing the Tribunal to reach a decision having regard to the material on record as also which might be brought on record by the parties.

18. The Maharashtra Revenue Tribunal, in pursuance of the direction issued by the Apex Court, considered the question in the light of the rival contentions and the evidence before it and by an order dated 21st February, 1998, and once again held that the land in question cannot be treated as "forest" or "private forest" under the Act of 1975, and hence no action could be taken under the said Act. The appeal filed by the Respondents came to be dismissed. It is that order passed by the Maharashtra Revenue Tribunal on 21st February, 1998 which was challenged by the respondent in Writ Petition No. 1052 of 1998 before the Bombay High Court.

19. The Bombay High Court, however, allowed the petition (Writ Petition No. 1052 of 1998] and decided in favour of the State of Maharashtra, Respondent herein. In deciding the matter, the Bombay High Court held:

"81. The Tribunal then stated:

"In this view of the admitted position, we cannot altogether refrain ourselves from finding some substance in the submission of respondent No. 1 to the effect that in the absence of any fresh evidence from the appellant, there is no fresh material to disturb the finding of the Maharashtra Revenue Tribunal as given in its last judgment of 4th December, 1992."

With respect, the above approach of the Maharashtra Revenue Tribunal is not in consonance with law and cannot be approved. It is not open to the Tribunal to proceed on the basis that since "there is no fresh material to disturb the finding" of the MRT as given in its judgment dated 4th December, 1992, the said finding called for no interference. Once a petition was filed against the said judgment in the High Court and the High Court set aside that judgment and the Supreme Court allowed the appeal directing the Tribunal to consider and decide the matter afresh, in the eye of law, it cannot be said that there were "findings" by the Tribunal in its earlier judgment and in absence of "fresh evidence", those findings need not be disturbed. To us, therefore, it is clear that this is a jurisdictional error committed by the Maharashtra Revenue Tribunal and the order is indeed vulnerable.

…104. On various grounds discussed by us in earlier part of the judgment, the Maharashtra Revenue Tribunal has committed an error of law apparent on the face of the record by holding that the land bearing Survey No. 345-A of village Dahisar was neither "forest" nor "private forest" and by taking such view, it exceeded jurisdiction and hence, the said decision deserves to be quashed by this Court by exercising powers under Articles 226 and 227 of the Constitution and accordingly, the said decision is quashed and set aside.

105. For the aforesaid reasons, in our opinion, the petition (Writ Petition No. 1052 of 1998) deserves to be allowed and is accordingly allowed. The order passed by the Maharashtra Revenue Tribunal on 21st February, 1998 in Appeal No. Forest-3 of 1997 is quashed and set aside and the land bearing Survey No. 345-A situate at Dahisar is held to be "private forest" under the provisions of the Maharashtra Private Forests (Acquisition) Act, 1975 and deemed to have vested in the State Government. Rule is accordingly made absolute. In the facts and circumstances, however, there shall be no order to costs."

Aggrieved by the decision of the High Court, the appellant-Corporation has approached this Court by way of appeal.

20. In this appeal, we heard the learned counsel appearing for both parties. Mr. Ashok Desai, Senior Advocate and Mr. Jay Savla, appearing on behalf of the appellant-Corporation, submitted that the findings of the Sub-Divisional Officer in concluding that the appellant-Corporation's land was not a 'private forest' on the appointed day, i.e. 30.08.1975, would be final, subject to the decision of the Tribunal. Such a conclusion, according to the counsel for the appellant-Corporation, stemmed from the language of Section 6 of the Act. Emphasis was also placed by the counsel on the fact that the Sub-Divisional Officer, while deciding the matters, considered the fact that the land was dropped from acquisition in earlier land acquisition proceedings and it was not found suitable for the development of a National Park.

21. According to the counsel for the appellant-Corporation, the Indian Forest Act, 1927 clearly differentiates between "Government Forest" and "Privately Owned Forest". While it was admitted that the Government can regulate or prohibit certain activities in such land, ownership would continue to vest with the private party. It was the counsel's submission that there is therefore, no automatic vesting of a privately owned forest, i.e. "private forest'" with the Government. Learned counsel also took

us through the reasons behind the decision of Maharashtra Revenue Tribunal to buttress his arguments. Adjudication as to the nature of land whether it is "forest" or "private forest", according to Counsel for the appellant-Corporation, had to be done in accordance with the provisions of 1975 Act.

22. It was submitted that the respondent-State had two opportunities in separate rounds of litigation to produce evidence, documentary or otherwise, and despite such opportunities, no evidence was adduced. Counsel for the appellant-Corporation stated that twice the matter had reached upto the highest Court of the country and that on both the occasions, the Supreme Court allowed the appeal filed by the appellant-Corporation, remanded the matter to the Maharashtra Revenue Tribunal and granted liberty to the parties to adduce additional evidence. It was the contention that additional evidence had not been led by the respondent herein but further materials had been produced on record by the first respondent and that if on the basis of such materials, the Tribunal had decided the matter in favour of the appellant-Corporation, counsel contended, the State [respondent herein] had no right to make grievance against such order.

23. As regards the Bombay High Court's reliance on the decision of this Court in *T.V. Godavarman Thirumulpad v. Union of India,* reported at (1997) 2 SCC 267, it was pleaded by the counsel for the appellant-Corporation that "forest land" as considered by this Court in the light of the Forest Conservation Act, 1980, must be understood according to its literal, dictionary meaning, and must not be understood to include any area recorded as forest in the Government records irrespective of ownership. Moreover, it was also contended that the provisions of the Forest Conservation Act, 1980 do not deal with the acquisition or vesting of 'privately owned land' or 'forest' as the case may be. Lastly, it was also contended by the counsel for the appellant-Corporation that the notice purportedly issued under Section 35(3) of the Indian Forest Act, 1927

declaring the land to be a 'private forest' was never produced in previous stages of litigation, and no opportunity to dispute the particulars of the notice was ever provided to the appellant-Corporation.

24. On behalf of the respondent-State, it was submitted that in the proceedings initiated under Section 37 of the Bombay Land Revenue Code, and in the enquiry held in respect of the applicability of the Bombay Salsette Estate Abolition Act, 1951, it was found that the land in Survey No. 345 is a forest land. Before the Mamlatdar, evidence was adduced by the predecessor-in-interest of the appellant-Corporation, M/s. Veekaylal Investment Company, to the effect that Survey No. 345 was a 'jungle'. It was contended by the learned counsel appearing for the respondent-State that the Company at the time took the stand that the land in question is a jungle, and not a waste land, with a view to prevent its vesting in the State Government under Section 4 of the Bombay Salsette Estate Abolition Act, 1951. It was urged before this Court that the appellant-Corporation, now as the successor-in-interest of M/s. Veekaylal Investment Company is adopting a diametrical opposite stand that the said land is not a forest land and hence is not permissible.

25. Counsel for the Respondent-State also contended that Survey No. 345-A in its entirety is part of Sanjay Gandhi National Park Division. In view of the interim orders passed by the Bombay High Court from time to time, and in particular, of the orders dated 7th May 1997 and 17th July 1999 which applied to the said land, according to counsel for the State Government, the land over which the State Government claimed ownership was "forest" and "private forest" and vested in the State Government. It was also submitted that irrelevant and extraneous factors have been kept in mind by the Tribunal for coming to the conclusion that the land was not forest/private forest. Counsel contended that the Maharashtra Revenue Tribunal did not take into account and consider in their proper

perspective, the relevant provisions of the Indian Forest Act, 1927, Maharashtra Private Forest (Acquisition) Act, 1975 as well as other Acts and various decisions of the Supreme Court, including *T.V. Godavarman Thirumulpad v. Union of India,* reported at (1997) 2 SCC 267.

26. It was also the submission of the respondent-State that the provisions of the Maharashtra Private Forest (Acquisition) Act, 1975 must be given an expansive interpretation in view of the fact that the Act was introduced to ameliorate grave concerns over the fact that private forests in Maharashtra had been severely depleted due to unregulated, unrestricted and excessive exploitation. A bare reading of the Act, it was contended, would make it clear that the definition of "forest" under Section 2 (c-i) (ii) includes land which was part of a forest in addition to land which is presently part of one, and even for lands which could be treated as forests in the future. Moreover, the State submitted, the definition of 'private forests' in Section 2 (f) of the Act is not only confined to any 'forest' which is not the property of the Government, but also includes, *inter alia* ,any 'land' in respect of which a notice has been issued under Section 35(3) of the Indian Forest Act. As long as it was established that the land was subject to such a notice, the learned counsel contended, it was enough to vest the land in the State Government without any enquiry.

27. This case is placed in the context of the State Government's attempt to acquire the land in question as a "private forest", amidst the efforts of the Maharashtra Land Development Corporation to continue its quarrying operations in the area. Therefore, this case is one that must seek to attain a fine balance between the process of development on the one hand, and the ecological imperative of preserving the environment on the other. This Court has for long been an outspoken critic of attempts to degrade the environment, and a vocal supporter of sustainable development.

28. Since Independence, India has travelled a long way on

the path of progress and industrialization to achieve a better quality of life. A developing country like ours cannot afford to ignore the growing needs of teeming millions, but this development shall have to resonate with the preservation of the environment. Mahatma Gandhi once said that earth provides enough to satisfy every man's need but not every man's greed. It is the greed of the mankind which has brought environment degradation and pollution. Preservation of the eco-system is an immutable duty under the Constitution – a fine balance must be struck between environmental protection and development. Many regions in India are biodiversity 'hotspots', known to host a staggering variety of flora and fauna. However, they are under the constant threat of environmental degradation and rapid depletion of natural resources, due to various factors, including the desire to earn quick money. Consequently, a major challenge in this backdrop is to arrive at a successful model of sustainable development – one that aims to preserve the rich ecosystem, while addressing the economic needs of the people in the region.

29. In as recently as September 2010, this Court has observed in *Glanrock Estates v. State of Tamil Nadu* [Writ Petition (Civil) Nos. 242 of 1988 and 408 of 2003] that :

> "8. [….] [F]orests in India [are] an important part of the environment. They constitute [a] national asset. In various judgments of this Court delivered by the Forest Bench of this Court in the case of *T.N. Godavarman v. Union of India* (Writ Petition No. 202 of 1995), it has been held that "inter-generational equity" is part of Article 21 of the Constitution. What is inter-generational equity? The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated. The doctrine of sustainable development also forms part of Article 21 of the

> Constitution. The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21. The important point to be noted is that in this case we are concerned with vesting of forests in the State. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of over- arching principle."

30. However, it is pertinent to note here that the primary issue involved in this case is as to whether on the appointed day, i.e., 30.08.1975 under the Maharashtra Private (Acquisition) Forest Act, 1975 the Appellant's land of 53 acres was a "private forest" or not. In this regard, we have perused the relevant sections of the Act, and the same may be produced herein. The Preamble of the Act reads thus:

> "An Act to acquire private forests in the State and to provide for certain other matters.
>
> WHEREAS the forest land in the State is inadequate:
>
> And WHEREAS the private forest in the State is generally in highly degraded and over-exploited state and is adversely affecting agriculture and agricultural population;
>
> AND WHEREAS it is, therefore, expedient to acquire private forests in the State of Maharashtra generally for conserving their material resources and protecting them from destruction or over-exploitation by their owners and for promoting systematic and scientific development and management of such forests for the purpose of attaining and maintaining ecological balance in the public interest […]
>
> AND WHEREAS it is also expedient to provide that in the case of owners of private forests (other than those whose lands were used for extracting minor minerals such as quarries) whose total holdings of lands became less than twelve hectares on the appointed day on account of

acquisition of their forest lands under this Act, or whose total holdings of lands was already less than twelve hectares on the day immediately preceding the appointed day, the whole or the appropriate portion of their forest lands so acquired shall be restored to, and revested in, them, so that their total holdings of lands may be twelve hectares or else, as the case may be, and they may be able to continue to earn their livelihood from such lands; and to provide for certain other purposes hereinafter appearing."

The State Act defines "forest" in section 2(c-i) thus:

"Forest" means a tract of land covered with trees (whether standing, felled, found or otherwise), shrubs, bushes, or woody vegetation, whether of natural growth or planted by human agency and existing or being maintained with or without human effort, or such tract of land on which such growth is likely to have an effect on the supply of timber, fuel, forest produce, or grazing facilities, or on climate, stream flow, protection of land from erosion, or other such matters and includes-

(i) land covered with stumps of trees of forest:

(ii) land which is part of a forest or lies within it or was part of a forest or was lying within a forest on the 30th day of August, 1975:

(iii) such pasture land, water-lodged or cultivable or non-cultivable land, lying within or linked to a forest, as may be declared to be forest by the State Government:

(iv) forest land held to let for purpose of agriculture or for any purposes ancillary thereto:

(v) all the forest produce therein, whether standing, felled, found or otherwise;"

It also defines "private forest" in Clause (f) of section 2 which reads as under:-

"Private forest" means any forest which is not the property of Government and includes;

(i) any land declared before the appointed day to be a forest under section 34-A of the Forest Act;

(ii) any forest in respect of which any notification issued under sub-section (1) of section 35 of the Forest Act, is in force immediately before the appointed day;

(iii) any land in respect of which a notice has been issued under sub-section (3) of section 35 of the Forest Act, but excluding an area not exceeding two hectares in extent as the Collector may specify in this behalf;

(iv) land in respect of which a notification has been issued under section 38 of the Forest Act;

(v) in a case where the State Government and any other person are jointly interested in the forest, the interest of such person in such forest;

(vi) sites of dwelling houses constructed in such forest which are considered to be necessary for the convenient enjoyment or use of the forest and lands appurtenant thereto."

31. Section 3 of the Act mandates that all private forests will vest in the State Government. Section 4 enumerates steps to be taken by the Government on acquisition of private forests. Section 5 enables the State Government to take over possession of private forests. Sections 6 to 19 deal with settlement of disputes, determination of amount to be paid to the owners of private forests, deduction of amount of encumbrances and extinguishment of rights of other persons, appeals, revisions etc. Section 21 empowers the State

Government to declare certain lands as private forests. It also provides that on publication of the notification by the State Government regarding declaration of any land as private forests, certain consequences would ensue.

32. In the context of this legislative scheme, the primary argument of the appellant-Corporation has been that the State's contention to give an expansive interpretation to the term 'forest' as defined in Clause (c-i) of section 2 of the Act is erroneous. The State has submitted that 'forest' would include even land which was a forest in past irrespective of whether on the appointed day, i.e, 30.8.1975, the same was not a forest. According to the appellant, accepting such an interpretation would tantamount to land which was a forest even 50 or 100 years ago, to stand vested and acquired on the appointed day, resulting in an absurdity. To buttress this argument, it has been the endeavour of the appellant to prove that the said portion of the land was not a forest on the appointed day.

33. The appellant-Corporation has pointed out to us the conclusions reached by both the Authorities in their orders dated 23.4.1985 and 21.2.1998. These orders relied on the fact that the portion of the said land was under quarrying operations, and that it was too rocky and devoid of tree growth. Moreover, land acquisition proceedings initiated vide order dated 15.9.1973 were withdrawn on the recommendation of the Forest Department. All these findings were put forth by the appellant-Corporation to contend that the land was not a forest as per the provisions of the Act.

34. Despite these averments, we are unable to agree with the contention of the appellant-Corporation. The definition of a 'forest' as enunciated in Section 2 (c-i) (ii) of the Act specifically includes "*land which is part of a forest or lies within it or was part of a forest or was lying within a forest on the 30th day of August, 1975*". It is already established that subsequent to proceedings initiated under the Bombay Salsette Estate

Abolition Act, 1951, the entire land bearing Survey No. 345-A was held to be a "forest" vide an order dated 24th December, 1964. A bare reading of the provision also indicates that the definition of 'forest' is an inclusive definition and therefore, it could have a wider connotation and it would not be appropriate to give it a restrictive meaning. Every word and phrase of the Act is to be understood in its context and must be given significance so that they are not rendered redundant. The appellant has steadfastly maintained that the interpretation of the provisions cannot mean land which was a forest in the past (i.e. before 30th August, 1975) to be a 'forest' according to the Act. This argument might have had some force had the time period in question related to many decades or even a century before. The aforementioned proceedings were concluded in proximity to the appointed day in question, and the character of land cannot be said to have changed over such a relatively short period of time. It is beyond doubt that the land which encompassed the said portion of 53 acres belonging to the appellant-Corporation was a 'forest' on the appointed day. In our considered opinion, the facts on record seem to overwhelmingly support such a conclusion.

35. The appellant has submitted that although the word 'Forest' was added in the Record of Right after such proceedings, it was later dropped when the matter went up in appeal to the Commissioner. Even if this were to be considered, it is to be noted that the preponderance of evidence seems to indicate the land in Survey No. 345 was considered as 'forest'. This is amply supported by documentary evidence, including the mortgage deed of 1900, and the revenue records of the past 50 years. Moreover, the conveyance deed dated 29.3.1975 which was executed by the Court Receiver to the appellant, clearly describes the land as "piece or parcel of forest land with structures". This is further buttressed by the mutation entries till 1969-70 which described the land as a forest. Even the mutation entries from 1970-71, have only changed the recording to 'huts, quarry and grass'

which does not in any way dispute the nature of the land. That apart in the enquiry conducted under sub-Section(2) of Section 37 of the Bombay Land Revenue Code, it was admitted by the Company through whom the appellant had derived title that the land was forest land. Therefore, there is overwhelming documentary evidence and also contemporaneous evidence on record to prove and establish that the land, in question, even in recent times was considered as forest land and also retained its character as such.

36. Therefore, the issue of whether the land in question was a 'forest' on the appointed day, has to be seen in the context of whether the entire land that encompassed the disputed area was a 'forest' on the said date. In order to seek the reasons behind such an analysis, we need only look into the legislative scheme of the Act, which has been elaborated hereinabove. The Statement of Objects and Reasons, which supplement and aid in the interpretation of the provisions, state:

> "The total forest area in the State [of Maharashtra] is approximately 21 per cent of the total area. This is less that the national average and is also substantially less that the 33 1/3 per cent recommended by the National Forest Policy
>
> Out of the total area under Forests, a considerable area is private forests. While no detailed survey has been made, a Committee appointed a decade ago estimated the same as approximately 8,985 sq.kms. These forests are in a very bad state of regression. On the one hand, they have been severely depleted due to unregulated, unrestricted and excessive exploitation, and on the other hand, there has been a lack of fresh plantation and investment in these areas. Of late, there has been an excessive spurt of indiscriminate fellings and these valuable forests are fast disappearing. As owners of such forests have failed to reboise these areas, large areas have been rendered barren and uncultivable and more and more areas are

> increasingly being brought to the same state…"

37. The Preamble to the Act, which is the guiding light to its interpretation, also expresses similar concerns as to the depletion of forest cover in the State. In this light, it is important to construe the provisions of the Act in tune with the purpose of its enactment. Such a rule of interpretation has been supported by the decisions of this Court in a catena of cases. In *Union of India v. Ranbaxy Laboratories Ltd.,* reported at (2008) 7 SCC 502, this Court observed that all statutes have to be considered in light of the object and purport of the Act. In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors.,* reported at (1987) 1 SCC 424, this Court held that:

> "Interpretation [of statutory provisions] must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation, Statutes have to be construed so that every word has a place and everything is in its place."

In *Chief Justice of Andhra Pradesh and Others v. L. V. A.*

Dixitulu and Others, reported at (1979) 2 SCC 34, a Constitutional Bench of this Court observed:

> "The primary principle of interpretation is that a constitutional or statutory provision should be construed 'according to the intent of they that made it' (Code). Normally, such intent is gathered from the language of the provision. If the language of the phraseology employed by the legislation is precise and plain and thus by itself, proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean, or evocative or can reasonably bear meaning more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved and the consequences that may flow from the adoption of one in preference to the other possible interpretation."

38. Therefore it is clear that the purpose of the statute and the intention of the legislature in enacting the same must be of paramount consideration while interpreting its provisions. In this instance, moreover, the provisions of the Act present no apparent conflict with the overarching objective of vesting 'private forests' with the State in the Government's efforts to protect them. Further, it is important to note that the said area was being used for quarrying operations by the appellant-Corporation. That the said portion in the area of Survey 345-A measuring 209 acres is claimed to be rocky and devoid of growth certainly does not change the character of the forest land. It cannot be disputed that within forest areas, there exists

water bodies swamp land, grass land etc. The very existence of such land within the forest area would and could not change the nature and character of the forest land and the same would still continue to be treated as forest land. In many instances across the country, mining and quarrying operations, while regulated, do take place in forest land, and they can very well be considered as forest produce. However, the harmful effects of the ecological imbalance that may result as a consequence of quarrying operations in a forest zone is also to be considered.

39. Thus, in light of the legislative scheme of the Act, and the provisions discussed herein, we are of the considered opinion that the said portion of the land, measuring 53 acres will vest with the respondent-State as a 'private forest'. That the area fell within a part designated as 'forest' on the 30th of August, 1975 is beyond dispute and is supported by the evidence on record. Therefore, by virtue of Section 2 (c-i) (ii) of the Act, the portion in dispute will also be designated as a 'private forest' under Section 2(f) of the Act, and the authorities are directed to maintain it as such.

40. It may also be cursorily mentioned here that both parties have made submissions with regard to the requirement of issuance of notice as per Section 35(3) of the Act. Neither the issuance and service of the notice, nor its publication in the Government Gazette could be challenged as both the exercises have been done in the present case. The High Court in its impugned order has extensively dealt with the same and has recorded a finding that notice was issued to the registered owner and served. These conclusions have not been specifically challenged by the appellant. It is proved and also recorded that the notice under Section 35(3) of Forest Act was issued to the owner on 8.8.1975 and was served on the recorded owner. Since the notice was issued and served on the recorded owner, the same was sufficient compliance. In order to fortify our conclusions we also rely on the judgment of this Court in *Chintamani Gajaman Velkar Vs. State of*

Maharashtra & Ors. reported in (2003) 3 SCC 143, wherein this Court held that irrespective of whether the notice was served on the land owner before the appointed date or not, issuance of notice before that day would itself be sufficient for vesting the land in the State.

41. The appellant-Corporation has also alleged that the State's decision to consider the disputed land as automatically vested with the Government was irrational and disproportionate. In this regard, it was the argument of the learned counsel for the appellant that while it may be possible for the Government to regulate and prohibit certain activities in 'forest' lands, the ownership would continue to vest with the private owners, and there cannot be any automatic vesting of the same. Thus it was argued that taking away the ownership of the land was wholly disproportionate in nature.

42. Being called upon to review this administrative action, we have examined as to whether the same amounts to irrational or disproportionate. The common yardstick to determine whether the act on the part of the Government violates established principles of administrative law has been the Wednesbury principle of unreasonableness, employed both by English and Indian Courts. The Wednesbury principle was enunciated by Lord Greene MR in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* reported at (1947) 2 All ER 680. To quote the learned Judge on the principle enunciated:

> *"What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; the authority must disregard those irrelevant collateral matters.*"

43. However, the Wednesbury principle of reasonableness has given way to the doctrine of proportionality. Through his decision in the celebrated case of *Council of Civil Services Unions v. Minister for the Civil Services* reported at [1985] AC 374, Lord Diplock widened the grounds of judicial review. He mainly referred to three grounds upon which administrative action is subject to control by judicial review. The first ground being "illegality", the second "irrationality" and the third 'procedural impropriety'. He also mentioned that by further development on a case to case basis, in due course, there may be other grounds for challenge. He particularly emphasized the principles of proportionality. Thus, in a way, Lord Diplock replaced the language of 'reasonableness' with that of 'proportionality' when he said:

> "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'…It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…."

44. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. Thus implying that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. The principle of proportionality therefore implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question. Unless the impugned administrative action is

advantageous and in public interest such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred.

45. This principle has found favour in recent times with this Court, and a number of decisions reflect the shift towards the doctrine of proportionality.

46. In *Bhagat Ram v. State of Himachal Pradesh* reported at (1983) 2 SCC 442, this Court held that if the penalty imposed is disproportionate to the gravity of the misconduct, it would violate Article 14 of the Constitution.

47. In *Ex-Naik Sardar Singh v. Union of India* and Ors reported at (1991) 3 SCC 213 where instead of one bottle of brandy that was authorized, the delinquent was found carrying four bottles of brandy while going home on leave. He was sentenced to three months rigorous imprisonment and dismissal from service which was found by this Court to be disproportionate to the gravity of the offence proved against him.

48. In *Coimbatore District Central Coop. Bank v. Employees Assn.* reported at (2007) 4 SCC 669 this Court stated that the doctrine of proportionality has not only arrived in our legal system but is here to stay. With the increasing presence and visibility of administrative law and the need to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by reference to which the action of such authorities can be judged. If any action taken by an authority is contrary to law, improper, irrational or otherwise unreasonable, a court competent to do so can interfere with the same while exercising its power of judicial review.

49. In *Charanjit Lamba vs. Commanding Officer, Southern Command and Ors,* reported at AIR 2010 SC 2462, it was held that

> **"**The constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straitjacket formula. It must be considered keeping in view the doctrine of flexibility. Before an action is struck down, the court must be satisfied that a case has been made out for exercise of power of judicial review. We are not unmindful of the development of the law that from the doctrine of Wednesbury unreasonableness, the court is leaning towards the doctrine of proportionality...."

50. The test of proportionality is therefore concerned with the way in which the decision-maker has ordered his priorities, i.e., the attribution of relative importance to the factors in the case. Thus, it is not so much the correctness of the decision that is called into question, but the *method* to reach the same. In this context, we are to see if the decision of the respondent-State in considering the disputed property to be automatically vested with the Government is commensurate with public interests, in a way that affects individual rights in a minimal way.

51. The decision of the Government, as we have elucidated earlier, has been guided by the provisions in the Act, which seek to conserve and protect private forests in the State of Maharashtra that have been facing severe depletion and exploitation. Therefore, the Act, which provides for the vesting of private forests with the Government, does so in the general interests of the public in tune with principles of environmental protection and sustainable development, to which we have alluded at the outset. In our opinion, the respondent-State was only acting in accordance with the principles envisaged in the Act. This action cannot in any way said to be disproportionate or irrational solely because it divests the appellant-Corporation

of the land within Survey 345-A. The circumstances of this case, especially in so far as it relates to the quarrying operations conducted by the appellant-Corporation in the said area, merit that the State protects the interests of the general public by acquiring the land as a private forest.

52. Therefore, after giving thoughtful consideration to the issues, we find that the appellant has failed to make out any case before us for interference with the orders passed by the High Court. Hence, in the light of the aforesaid issues, principles and precedents in question, we are of the considered opinion that the appeal is without merit and deserves to be dismissed.

Civil Appeal No. 2148 of 2004

53. Civil Appeal No. 2148 is filed by K.N. Shaikh [appellant herein] against the State of Maharashtra seeking to challenge the judgment and order of the Bombay High Court dated October 8, 2003 in Writ Petition No. 1383 of 2002. The said Writ Petition was preferred against the decision of the Maharashtra Revenue Tribunal upholding the order of the Sub-Divisional Officer declaring that the survey No. 345-A constitutes a private forest in terms of Section 2(f) of the Maharashtra Private Forest Act, 1975 and that it stood vested in the State Government in terms of Section 3(1) thereof. The Bombay High Court, while dismissing Writ Petition No. 1383 of 2002, held:

> "So far as Writ Petition No. 1383 of 2002 is concerned, the Maharashtra Revenue Tribunal considered the matter again after the review petition was allowed by this Court and dismissed the appeal filed by the petitioner appellant. We see no infirmity in the reasons recorded and conclusions reached by the Tribunal. In our opinion, the said decision requires no interference. The petition, therefore, deserves to be dismissed and is accordingly dismissed."

54. Before this Court, Counsel for the appellant herein has

contended that the Bombay High Court failed to consider the additional submissions put forth by the appellant, and proceeded to dismiss the appeal in a common judgment. However, upon hearing the learned counsel and on perusal of the submissions, we find that the appellant herein has placed similar, if not identical, arguments to that of the Maharashtra Land Development Corporation.

55. Counsel for the appellant herein has primarily contended that the meaning of 'forest' must be understood in its ordinary sense, and that it would be inconceivable to think of forest land without trees and shrubbery. Consequently, it was submitted, the rocky area devoid of growth cannot be considered a 'forest' and must instead be understood as a wasteland that cannot vest with the State Government. For reasons elaborated in the previous appeal, we are unable to agree with the learned counsel for the appellant. The land in question remains, in essence, a forest and the mere purported presence of a rocky area therein cannot change its character.

56. Moreover, it is pertinent to observe that the appellant has based his claim on the basis of possession of land without any deed of conveyance or sale deed to support the same. Moreover, such a claim is not based on any interest on the land, but on the fact that the appellant used to perform quarrying operations on the same. Therefore, the Maharashtra Revenue Tribunal while holding that the land in question cannot be treated as "forest" or "private forest" under the Act of 1975, still chose to dismiss the claim of the appellant herein. In appeal, the High Court was also inclined to do the same. Consequently, it is clear that the appellant stands on the same, if not weaker, footing as the Corporation. In the light of the reasons that we have enunciated in Civil Appeal No. 2147 of 2004, which are entirely applicable to the case at hand, we find that the appeal is without merit and deserves to be dismissed.

B.B.B. Appeal dismissed.

M/S. TECHNOGLOBE

v.

STATE OF TAMIL NADU & ORS.

(Civil Appeal No. 1809 of 2003)

NOVEMBER 16, 2010

[D.K. JAIN, DR. MUKUNDAKAM SHARMA AND R.M. LODHA, JJ.]

Tamil Nadu General Sales Tax Act, 1959 – ss. 3 and 17A – Deferment of sales tax by Government Notification for a period of five years – On purchase for a particular project – Revenue denying the tax concession for two assessment years – Taxation Tribunal as well as the High Court upholding the order of Revenue – On appeal, held: The tax incentives were given by the Government Notification – State Government was competent to issue the Notification – Since the authorities below did not examine the scope and implication of the Notification, matter remanded to the Tribunal to examine all the aspects of levy of tax – G.O.M. No. 169 Information and Tourism Department, dated 27th June, 1994.

Practice and Procedure – New plea, based on evidence – Raising of, for the first time before Supreme Court – Held: Ordinarily, such plea is not entertainable – However, if the plea is based on a public document, the same can be taken into consideration.

Respondent No. 2-Corporation, a nodal agency for administering and implementing a 'Film City Project', awarded the contract to the appellant. The Corporation issued various purchase orders to the appellant, accompanied by Certificates of Sale, certifying that the sales tax for the equipments purchased for the Film City Project was exempted by the State Government.

The Commercial Tax Officer (CTO) denied the exemption to the appellant and subjected the entire sales turnover to sales tax under Tamil Nadu General Sales Tax Act, 1959 creating an additional tax demand and also imposed penalty.

The appellant approached the Taxation Special Tribunal seeking direction to the Corporation to pay the arrears of sales tax, surcharge and penalty levied on the appellant. The Tribunal rejected the petition. The writ petition filed against the order of the Tribunal was dismissed by the High Court. Therefore, the instant appeal was filed.

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

HELD: 1. Under certain circumstances, the State Government has the power to issue Notification for deferment of payment of the whole or any part of the tax payable in respect of any period. The State Government in exercise of its jurisdiction u/s. 17-A of the Tamil Nadu General Sales Tax Act, 1959 was competent to issue G.O.M. No. 169 Information and Tourism Department dated 27th June, 1994. The Notification defers payment of sales tax by the proposed 'Film City Project' for a period of five years. The State Government had acceded to the request of the 'Film City' for granting it various concessions, incentives etc. with the concurrence of different departments, which included the Department of Commercial Taxes as well. [Paras 15 and 16] [82-B; 81-C]

2. All the authorities below, particularly the Tribunal, have proceeded on the premise that no Notification u/s. 17 of the Act, which clothes the State Government with the power to notify exemptions and reductions of tax in

respect of any tax payable under the Act, had been issued. The Notification dated 27th June, 1994, contemplates deferment of sales tax for a period of 5 years wherever sales tax levy is applicable on the purchases for the film city project. *Prima facie*, there is force in the stand of the appellant that the Notification would cover the sales made by them to the Corporation in the years 1994-95 and 1995-96 which fall in the stipulated period of five years. [Para 19] [83-D; 84-B]

3. Ordinarily the Supreme Court would be loathe to examine contentions of facts based on evidence, advanced for the first time before the Supreme Court without there being any adjudication by the High Court on the same. However, in the instant case, the Notification dated 27th June, 1994 being a public document, produced by one of the contesting respondents, it would be travesty of justice if the said document is not taken into consideration for determining the issue, which admittedly surrounded the same Notification. [Para 19] [84-C-D]

Sardar Govindrao Mahadik and Anr. vs. Devi Sahai and Ors. **(1982) 1 SCC 237 – relied on.**

4. Since none of the authorities below had examined the scope and implication of the Notification dated 27th June, 1994, the case is remanded back to the Tribunal, to examine all the aspects of levy of sales tax on the subject sales, in the said two years, keeping in view the scope and ambit of the said Notification as also the fact that the period for which the payment of sales tax was deferred has also expired. [Para 20] [84-E-F]

American Remedies Pvt. Ltd. and Anr. vs. Government of AndhraPradesh and Anr. **(1999) 113 STC 400 (SC) , relied on.**

5. Under Section 3 of the Act, the liability to pay sales tax in accordance with the provisions of the Act is cast on the dealer, irrespective of the fact whether he has collected it from the consumer or not. Therefore, the plea of the appellant that they had not charged and collected any sales tax from the Corporation is of no consequence. [Para 18] [83-B]

Case Law Reference:

(1999) 113 STC 400 (SC)	**relied on.**	**Para 13**
(1982) 1 SCC 237	**relied on.**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1809 of 2003.

From the Judgment & Order dated 1.8.2000 of the High Court of Judicature at Madras in Writ Petition No. 12798 of 2000.

Rajiv Mehta, Biswanath Agrawalla for the Appellant.

TLV Iyer, T. Harish Kumar, Prasanth P., V. Vasudevan, R. Nedumaran, C.K.R. Lenin Sekar for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge, in this civil appeal, is to the judgment and order dated 1st August 2000, delivered by the High Court of Judicature at Madras in W.P. No. 12798 of 2000, whereby the High Court has affirmed the levy of sales tax on the appellant on sale of goods made by it to respondent No.2 herein, in the assessment years 1994-95 and 1995-96.

2. Briefly stated, the facts necessary for the disposal of this appeal, are as follows :

In the year 1992, respondent No. 1, the State of Tamil Nadu

sanctioned a "film city" project, for which respondent No. 2 viz. the Tamil Nadu Film Development Corporation, (for short "the Corporation") a public sector undertaking, was designated as the nodal agency, responsible for administering and implementing the said project. Pursuant thereto, a tender was floated by the Corporation for supply of various equipments for the said film city project. After a successful bid, the appellant was awarded the contract. In furtherance thereof, on 28th June, 1994, the Corporation issued various purchase orders to the appellant, accompanied by Certificates of sale which, *inter-alia,* stated:

> "This is to certify that the Sales Tax for the equipments purchased for the Film City Project at Madras has been exempted by the Tamil Nadu Government."

3. Vide assessment order dated 31st January 1996, the Commercial Tax Officer (for short "CTO") exempted the sales made by the appellant to the Corporation in the assessment year 1994-95 from the levy of sales tax.

4. However, in relation to the assessment year 1995-96, the CTO, vide his order dated 26th June 1997, rejected the appellant's claim of exemption on similar sales made by them to the Corporation, holding that:

> "There is no exemption granted in the G.O. cited as stated by the dealers for claiming exemption to the sales turnover made to the Film Development Corporation. Hence the objection-filed by the dealers are not accepted."

5. Accordingly, the CTO included the entire sales turnover made by the appellant to the Corporation in the taxable turnover for the said year and subjected the same to sales tax under Tamil Nadu General Sales Tax Act, 1959 (for short "the Act"), thereby creating an additional tax demand of Rs. 26,57,388/-. In addition the CTO also imposed a penalty of Rs. 39,86,082/- under Section 12(5)(b)(v) of the Act.

6. Additionally, vide order dated 29th August 1997, the CTO revised the assessment under the Act in respect of the year 1994-95, thereby disallowing the exemption on the goods sold by the appellant to the Corporation, which resulted in additional demand of tax of Rs. 29,75,983/-. A penalty of Rs. 44,60,901/- was imposed together with a penalty of Rs. 3,127/- under Section 12(3) read with Section 24(3) of the Act was also levied.

7. Faced with the threat of recovery of the aforestated tax demands, the appellant issued a legal notice to the three respondents herein on 1st February 1999, requesting, inter alia, the Corporation to furnish the Government Order granting sales tax exemption, as mentioned in their purchase orders and, in the alternative to pay the sales tax, penalty and surcharge levied on the appellant by the CTO. However, there was no response to the said notice from any of the respondents.

8. On 1st December 1999, the CTO served a legal notice on the appellant, stating that since the arrears of sales tax had not been paid, the house property of the proprietress was being attached, and would be brought to public auction.

9. The appellant, thereafter, approached the Tamil Nadu Taxation Special Tribunal (for short "the Tribunal") praying that the Corporation be directed to pay the arrears of sales tax, surcharge and penalty levied on them. The Tribunal, vide its order dated 6th July 2000, rejected the petition of the appellant, observing that:

> "As the petitioner themselves are not able to mention that there is any Government order available granting exemption it appears that there is no such exemption granted by the Government. Under those circumstances there is no question of exemption."

10. Being aggrieved by the said order, the appellant preferred a writ petition before the High Court. As afore-

mentioned, the High Court has rejected the writ petition of the appellant, inter alia, holding that:

> "On consideration, we find that admittedly, no notification under Section 17 of the Tamil Nadu General Sales Tax Act has been issued. Therefore, in the absence of any such notification issued, the petitioner-firm being an assessee is liable to pay the sales tax and it cannot take advantage of the alleged certificate issued by the 2nd respondent."

11. Hence the present appeal.

12. Mr. Rajiv Mehta, learned counsel appearing on behalf of the appellant, while assailing the impugned judgment, strenuously contended that in view of G.O.M. No. 169 dated 27th June 1994, issued by the Government of Tamil Nadu, the appellant cannot be made liable for payment of Tax under the Act in respect of sales to the Corporation. Learned counsel contended that if at all sales tax is leviable under the Act, it is the Corporation which is liable to pay the same as in the purchase order issued by them to the appellant it was clearly stated that "Film City project has been exempted from the payment of Sales Tax by issuing a separate G.O. (copy will be sent separately). The particulars to that effect is enclosed with this purchase order." Relying on the said representation which had been made by a public sector undertaking of the State Government, the supplies were made by the appellant without charging any sales tax. It was also urged that in light of Section 26(1) of the Act, the CTO was competent to recover sales tax from the Corporation, notwithstanding the fact that it is a public sector undertaking.

13. *Per contra,* Mr. TLV Iyer, learned senior counsel appearing for the respondents contended that G.O.M. No. 169 Information and Tourism Department, dated 27th June, 1994 was not issued by the Commercial Taxes Department, and therefore, the dealer-appellant cannot claim exemption on the basis of the said G.O.M. Learned counsel contended that under

the Act, it is the dealer who is liable to pay the sales tax, and if there is any contract or understanding between the dealer and the purchaser regarding payment of tax dues, the Commercial Taxes Department is not bound by it. If the appellant, so desires, it may recover the amount so paid by them from the Corporation. Commending us to the decision of this Court in *American Remedies Pvt. Ltd. & Anr. Vs. Government of Andhra Pradesh & Anr.*,[1] learned counsel contended that it is a settled proposition of law that the dealer is liable to pay sales tax, and it is immaterial whether or not, he has collected the same from the consumer. Learned counsel, however, submitted that the Commercial Taxes Department will have no objection if this Court, in exercise of its jurisdiction under Article 142 of the Constitution, is inclined to pass an order, directing the Corporation to discharge the sales tax liability under the Act on the purchases made from the appellant during the years 1994-95 and 1995-96.

14. Before we advert to the rival submissions, it would be expedient to extract relevant portions of G.O.M. No. 169 Information and Tourism Department dated 27th June 1994, filed before us by learned Counsel for the Corporation. The G.O.M. issued under the order of the Governor of Tamil Nadu, declares the "Film City Project" as a Tourism project and grants certain "incentives, concessions and subsidies for Tourism promotion projects and activities." It reads:

> "3. The Government after careful consideration of the proposal submitted by Special Officer, Film City, declare the 'Film City Project' as 'tourism project' for purpose of extending various concessions, incentives and subsidies as applicable to other industries. The Government also direct that the following concessions, incentives and subsidies shall be made available to Film City Project :-
>
> ……

1. [1999] 113 STC 400 (SC).

iii) Deferral of sales Tax for a period of 5 years wherever Sales Tax levy is applicable.

……

6. This order issues with the concurrence of Industries Commerical Taxes and Religious Endowments, Energy and Finance Departments vide their U.O. Nos. 12959A/MIG2/94-1 dt.2.5.94, 26/Secy/Per/94-1 dt.3.5.94, 4554/A2/94-1 dt.9.5.94 and 2677/FS/P/94 dt. 2.6.94."

(Emphasis supplied by us)

15. It is manifest that the said G.O.M. defers payment of sales tax by the proposed "Film City Project" for a period of five years. It is also plain that the Government of Tamil Nadu had acceded to the request of the "Film City" for granting it various concessions, incentives etc. with the concurrence of different departments, which included the Department of Commercial Taxes as well.

16. At this juncture itself, it will be useful to refer to Section 17-A of the Act, which empowers the State Government to notify deferred payment of tax for new industries etc. The Section reads as under:

"17-A. Power of Government to notify deferred payment of tax for new industries, etc: (1) The Government may, in such circumstances and subject to such conditions as may be prescribed, by notification issued whether prospectively or retrospectively, defer the payment by any new industrial unit or sick unit or sick textile mill of the whole or any part of the tax payable in respect of any period:

Provided that such retrospective effect shall not be earlier than the 9th May, 1988.

(1-A) The Government may, by general or special order, authorize the Territorial Assistant Commissioner to exercise such of their powers specified in sub-section (1).

(2) Notwithstanding anything contained in this Act, the deferred payment of tax under sub-section (1) or sub-section (1-A) shall not attract interest under sub-section (3) of section 24 provided the conditions laid down for payment of the tax deferred are satisfied."

Thus, it is clear that under certain circumstances the State Government has the power to issue notification for deferment of payment of the whole or any part of the tax payable in respect of any period. It bears repetition that the State Government in exercise of its jurisdiction under Section 17-A of the Act was competent to issue G.O.M. No.169 dated 27th June, 1994. It is also evident from the notification that it was issued with the "concurrence" of Commercial Taxes and Finance Departments, besides others.

17. *Section 3 of the Act provides for the levy of sales tax on sales or purchase of goods by a dealer. The relevant part thereof reads as under:*

"3. *Levy of taxes on sales or purchases of goods***.-**

(1)(a)(i) Every dealer, other than the dealer, casual trader or agent of a non-resident dealer referred to in clause (ii), whose total turnover for a year exceeds three lakhs of rupees ; and

(ii) every dealer in bullion, gold, silver and platinum jewellery including articles thereof and worn-out or beaten jewellery and precious stones and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, shall pay tax for each year in accordance with the provisions of this Act ;

(1)(b) Notwithstanding anything contained in clause (a), every dealer (other than a dealer in bullion, gold, silver, platinum jewellery including articles thereof and worn-out or beaten jewellery and precious stones and a casual trader or agent of a non-resident dealer) whose total turnover for a year exceeds three lakhs of rupees but does

not exceed ten lakhs of rupees shall not be liable to pay tax on the first three lakhs of rupees of his total turnover, provided that no amount by way of tax or purporting to be by way of tax has been collected by him under this Act in respect of that first three lakhs of rupees."

18. It is abundantly clear that under Section 3 of the Act, the liability to pay sales tax in accordance with the provisions of the Act is cast on the dealer, irrespective of the fact whether he has collected it from the consumer or not. Therefore, the plea of the appellant that they had not charged and collected any sales tax from the Corporation is of no consequence. However, the issue for consideration in the present case relates to the effect of the deferral scheme envisaged in G.O.M. No. 169 on the liability of the appellant to pay sales tax on the sales made by them to the Corporation for the assessment years 1994-95 and 1995-96.

19. It is evident from the afore-extracted orders that all the authorities below, particularly the Tribunal, have proceeded on the premise that no notification under Section 17 of the Act, which clothes the State Government with the power to notify exemptions and reductions of tax in respect of any tax payable under the Act, had been issued. Therefore, according to the Tribunal, in the absence of such a notification, the appellant could not take advantage of the Certificate allegedly issued by the Corporation, certifying that sales tax on the equipment purchased for the film city project had been exempted by the Tamil Nadu Government and avoid payment of sales tax on the sales made to them in the years 1994 and 1995. It is quite intriguing as to why, in response to the legal notice issued by the appellant to the three respondents, the Corporation, in particular, did not furnish a copy of the said notification to them or produce it before the Tribunal where it was represented by a Government pleader. At the same time, it is equally surprising as to why the appellant did not make any effort to produce a copy of the notification, a public document when they were visited with huge sales tax demands and were threatened with

auction of their immovable property. Be that as it may, we are of the opinion that notification dated 27th June, 1994, placed on record by the respondents has a significant bearing on the aforestated issue before us. As noticed above, the notification contemplates deferment of sales tax for a period of 5 years wherever sales tax levy is applicable on the purchases for the film city project. *Prima facie*, there is some force in the stand of the appellant that the notification would cover the sales made by them to the Corporation in the years 1994-95 and 1995-96 which fall in the stipulated period of five years. We are conscious that ordinarily this Court would be loathe to examine contentions of facts based on evidence, advanced for the first time before this Court without there being any adjudication by the High Court on the same. (See: *Sardar Govindrao Mahadik & Anr. Vs. Devi Sahai & Ors.*[2]). However, in the present case, the said notification being a public document, produced by one of the contesting respondents, it would be travesty of justice if the said document is not taken into consideration for determining the issue, which admittedly surrounded the same notification.

20. In light of the aforestated factual scenario, we are of the opinion that since none of the authorities below had examined the scope and implication of the said notification, it would be expedient and just to remand the case back to the Tribunal, to examine all the aspects of levy of sales tax on the subject sales, in the said two years, keeping in view the scope and ambit of the said notification as also the fact that the period for which the payment of sales tax was deferred has also expired.

21. For the foregoing reasons, the appeal is allowed; the impugned judgment is set aside and the matter is remitted back to the Tribunal for fresh consideration, particularly in light of the notification dated 27th June, 1994. The parties are left to bear their respective costs.

K.K.T. Appeal allowed.

2. (1982) 1 SCC 237.

DLF UNIVERSAL LTD. AND ANR.
v.
DIRECTOR, T & C. PLANNING HARYANA AND ORS.
(Civil Appeal No. 550 of 2003)

NOVEMBER 19, 2010

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

Haryana Development and Regulation of Urban Areas Act, 1975:

Scheme of the Act – Held: The Act intends to regulate the use of land in order to prevent ill planned and haphazard urbanization in or around towns in the State of Haryana – Urban development.

ss.2(i), 5; r.11B r.w. r.26(2) of Haryana Development and Regulation of Urban Areas Rules, 1976 – Extension fee and maintenance fee – Power of Director (Town and Country Planning) to prohibit the colonizer/owner of the land to collect the extension fee and the maintenance fee from plot/flat holders – Held: There is nothing in the Act, Rules and Regulations prohibiting the colonizer/owner of the land to collect additional amount on account of non-completion of the construction by the purchaser within the period stipulated in the agreement – The licence granted by the Director do not prohibit incorporation of such a clause in the agreement to be entered between the owners and the purchasers – The Act also does not suggest that the owner is required to provide the maintenance services free of cost – The Director has no authority under the Act to issue directions to the owners/ colonizers to incur maintenance expenses, by deeming the same to be part of the internal development works covered by s.2(i).

Transfer fee – Allottee's right to nominate another person as purchaser of property whether can be denied by colonizer – Held: There is no provision whatsoever in the Stamp Act or Registration Act imposing any restriction on the assignment or transfer of rights under a sale/purchase agreement by the purchaser to a third party, before the execution of any conveyance deed in respect of any immovable property – The conveyance deed executed by the owner is the one which is executed either in favour of the allottee or his nominee as the case may be on which a proper stamp duty and registration fee is required to be paid – Director (Town and Country Planning) has no power under the Act or the Rules to issue direction prohibiting such nomination of another person thereby substituting the allottee.

Jurisdiction of the Director (Town and Country Planning) to meddle with the terms of agreements entered into by and between the owner and the purchasers of flat/plots – Held: There is no provision in the Act or the Rules empowering the Director to sit in judgment on the perceived fairness of any clauses incorporated in the agreement entered by the parties.

Sale price of plots/flats – Determination of – Held: The sale price charged by the owner from the buyers for the sale of the plots/flats is a market driven sale price and is not based on any particular figure of cost – The provisions of the Act or the Rules in no manner impose any price control directly or indirectly in respect of plots/flats sold by the colonizer/owner – The question as to whether the cost of the plot includes the maintenance charges has to be decided on a proper interpretation of the terms and conditions of the agreement.

Functions and duties of Director of Town and Country Planning – Held: The Director plays vital role and is authorized to issue appropriate directions from time to time concerning the execution of layout and development works in the colony and every such direction issued is required to

be complied with by the licencee – He is is not authorized to interfere with agreements voluntarily entered into by and between the owner/colonizer and the purchasers of plots/flats – The agreed terms and conditions by and between the parties do not require the approval or ratification by the Director nor is the Director authorized to issue any direction to amend, modify or alter any of the clauses in the agreement entered into by and between the parties.

Profit – Limit of 15% profit – The question as to whether the owner made any profit over and above 15% would arise for consideration only after the grant of final completion certificate in respect of the entire colony/development – In case, it is found that the owners had exceeded the said 15% limit on the profit, it is always open to the authorities to take appropriate action in accordance with law.

Deeds and documents: Contract – Interpretation of – Held: A contract is to be interpreted according to its purpose – Every contract expresses the autonomy of the contractual parties' private will – The court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed – It is not the intent of a single party; it is the joint intent of both parties which is to be discovered from the entirety of the contract and the circumstances surrounding its formation – Purposive construction.

Contract: Public law remedy – Held: The court in a public law remedy cannot undertake the task of resolving disputes arising out of a contract for such disputes as they essentially lie in the private law domain.

The appellants were granted licence under the provisions of Haryana Development and Regulation of Urban Areas Act, 1975 and the rules framed thereunder for setting up the residential colonies. They entered into the required agreements with the Governor of Haryana

through the respondent-authority and commenced setting up colonies by dividing the lands into plots. The plots were sold to various buyers. The plot buyers were required to make construction on such plots to be used for the purpose for which the layout was approved. The appellants also allotted flats to various persons and entered into the agreements on the conditions and covenants mutually agreed between them. In respect of certain areas even completion certificate was granted as early as in the year 1991-92.

The respondent, without any notice to the appellants, issued the impugned memo whereby he directed the appellants to delete the provision in the agreements which were entered into between the appellants and the plot/flat owners relating to the extension fee and maintenance fee; and stop the charging of the extension fee and the maintenance fee from the plot/flat holders and refund the amount so recovered to the Government immediately; to stop allowing the transfer of plots after obtaining full payment for the same and to ensure immediate registration of conveyance deed on receipt of full payments of the plot/flats. Aggrieved, the appellants filed the writ petitions before the High Court. The High Court upheld the validity of impugned memo and dismissed the writ petitions. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals with certain observations, the Court

HELD:

1. Scheme of the Act : The Haryana Development and Regulation of Urban Areas Act, 1975 intends to regulate the use of land in order to prevent ill planned and haphazard urbanization in or around towns in the State

of Haryana. The Act applies to all urban areas in the State of Haryana. [Para 8] [101-A-B]

2.1. Interpretation of Contract: It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualize. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract is so formed. It is not the intent of a single party; it is the joint intent of both parties which is to be discovered from the entirety of the contract and the circumstances surrounding its formation. In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly. A party who claims otherwise, violates the principle of good faith. [Para 11] [115-G-H; 116-A-F]

Anson's Law of Contract, "a basic principle of the Common Law of Contract; Purposive Interpretation in Law by Aharon Barak **2005 Princeton University Press – referred to.**

2.2. The validity of impugned memo is required to be decided with reference to the scheme of the Act, Rules and the Regulations framed thereunder. The agreement with the Governor required to be entered by owners of land intending to set up a colony is structured and regulated by Rule 11 of the Haryana Development and Regulation of Urban Areas Rules, 1976. The agreement by and between the owners/colonizers, agreed terms and conditions and covenant therein are purely under private

law domain. The terms and conditions of the agreement and the obligations of the owner of land and covenants thereof are prescribed by Statutory Rules. The contract between the owner of land and its buyers, unlike the agreement entered by the owner of the land with the government, is not required to be in any statutory form. It is a contract between the two willing contracting parties whereunder the terms and conditions are mutually agreed upon. The covenants decide the mutual obligations between the owner of the land and the buyers thereof. [Paras 9, 10, 31] [115-D-G; 125-F-G]

3.1. Extension Fee: The agreement entered into by the owners and purchasers *inter-alia* provided that the purchaser shall, after approval of his building plans from the competent authority, "be bound to commence construction of the house on the plot not later than three years from the date the sale deed is executed in his favour" and in case the purchaser fails to commence construction within the stipulated period, the seller shall be entitled to resume the plot, refund the amount paid by the purchaser and to resell the plot to somebody else. However, the seller in its sole discretion may extend the said period of construction "provided the purchaser pays additional charges to the owner." It was mutually agreed that a provision to this effect may have to be incorporated in the sale deed and the purchaser "shall be bound by the same." This clause enabled the owner to charge additional amount for the non-completion of the construction by the purchaser within the period stipulated in the agreement. There is nothing in the Act, the Rules and Regulations prohibiting the owner of the land to collect such charges from the buyer. The said provision for payment of "extension fee" has been provided for in the agreement, according to the appellants, only in the interest of speedy development of each colony, and also in order to prevent purchase

of plots by speculators who may keep the plot vacant without making any construction with the only object to earn profit by selling the same at a future date and such an act may prove detrimental to other purchasers as such acts obstruct the all round development of the area which is pre-eminently/ predominantly in the public interest. [Para 13] [116-H; 117-A-F]

3.2. The Act does not confer any authority or jurisdiction upon the Director to meddle with the terms of agreement entered into by and between the owners and the purchasers of the plots/flats. The Director's functions and duties are well structured by the Act and the Rules. There is no provision in the Act or the Rules empowering the Director to sit in judgment on the perceived fairness of any clauses incorporated in the agreement entered by the parties. The terms and conditions in the licence granted by the Director do not prohibit incorporation of such a clause in the agreement to be entered between the owners and the purchasers. Nor there is any clause in the agreement entered by the owner with the Governor through the Director empowering the Director to sit in appeal over the agreement entered by the owners with the purchasers of the plots. There is no explanation forthcoming as to the source of power under which the Director could have issued the impugned directions directing the owner to delete such clauses from the agreement entered with the purchasers. [Paras 14, 15] [117-G-H; 118-A]

3.3. Section 5 of the Act and Rule 11B r.w. Rule 26 do not in any manner restrain or prohibit the colonizer/ owner to insist buyers of the plots to complete construction in time bound manner and charge extra amounts as may be agreed between the parties for failure to do so. These provisions do not empower the Director to issue the impugned directions prohibiting the

owners to collect the extension fee for the delayed construction of buildings by the purchasers of the plots. The dispute, if any, between the parties to the agreement, may have to be resolved in a properly constituted proceeding in private law domain. [Para 17] [119-B-F]

4. Transfer Fee: The prevailing practice of permitting transfer of plots before registration of conveyance deed to the allottee is not contrary to the provisions of the Act or the Rules. Section 17(1)(b) of the Registration Act requires that where the Conveyance Deed has been prepared for effecting the transfer of a plot or other immovable property, such deed should be registered within a period of 4 months after its execution. It does not, however, contain any provision whatsoever requiring that a Conveyance Deed should be executed within any period of time after the execution of sale agreement between the buyer and the seller. There is no provision whatsoever in the Stamp Act or Registration Act imposing any restriction on the assignment or transfer of rights under a sale/purchase agreement by the purchaser to a third party, before the execution of any conveyance deed in respect of any immovable property. The parties in the agreement had agreed for the substitution of the name of allottees at the sole discretion of the owner. The conveyance deed executed by the owner is the one which is executed either in favour of the allottee or his nominee as the case may be on which a proper stamp duty and registration fee is required to be paid. In any event the Director has no power under the Act or the Rules to issue any such direction altogether prohibiting such nomination of another person thereby substituting the allottee. [Para 19] [120-A-F]

5.1. Maintenance Fee: The Act, no doubt, imposes certain obligations upon the colonizers/owners and

specifies certain items of expenses to be borne by them. Section 3(3)(a)(ii) of the Act requires the colonizer/owner to pay proportionate development charges if the external development works as defined under Section 2(g) of the Act are to be carried out by the Government or any other local authority. Similarly Section 3(3)(a)(iv) requires the owner to construct at his own cost the schools, hospitals, community centres and other community buildings on the lands set apart for the said purposes. Further, Section 5 of the Act read with Rule 11(1)(b) imposes obligation and requires the owner to meet the cost of internal development works as defined in Section 2(i) of the Act. It is no doubt true that Section 3(3)(a)(iii) imposes responsibility for the maintenance and upkeep of all roads, open spaces, public parks and public health services for a period of five years from the date of issue of the completion certificate unless earlier relieved of this responsibility and thereupon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the authority, as the case may be. A bare reading of the provisions does not suggest that the owner is required to provide the said maintenance services free of cost. On the other hand, the latter part of Section 3(3)(a)(iii) provides that on the expiry of the said period of five years the owner is required to transfer all such roads, open spaces etc. free of cost to the government or the local authority, as the case may be. [Paras 21- 22] [121-C-H]

5.2. There is no dispute whatsoever that any maintenance fee or charges are being collected by the owners/colonizers in respect of any of the internal development works mentioned in Section 2 (i). The appellants are rendering the following additional services, which are not in any manner whatsoever covered by Section 3(3)(a)(iii) or any provisions of the Act or the

Rules. a) Round the clock security b) Electricity consumption of street lights, which shall include replacement of bulbs, tubes etc., maintenance of electrical system and its upgradation. c) Repairing and strengthening of boundary walls and fencing. d) Conservancy and general upkeep, which shall include sweeping of roads, door to door garbage collection and its disposal, clearing of unwanted growth of plants in vacant plots, repair/replacement/painting of signages, guide maps and gates etc. e) Upgradation of Roads/ parks. f) Establishment/administrative charges for rendering the aforesaid services, which shall include salaries of staff, rent of the building, telephone, printing, stationery, electricity, computer expenses etc. incurred in running complaint centre in DLF City. The maintenance fee/charges levied and collected are clearly not in respect of any of the internal development works defined under clause (i) to (v) of Section 2 (i). Clause (i) to (v) of Section 2 (i) refers to "Works" which are erected within the colony as an integral part of the internal development of the colony. The residuary clause (vi) of Section 2 (i) also refers to "work" which means and implies activities akin to that of which constitute an 'internal development of the colony'. Providing services of the kind for which the maintenance charges/fee are collected, are in no manner in respect of a "work" of "internal development" which is required to be carried out within the licenced area. The expression "work" in Section (i) (vi) cannot be interpreted in isolation ignoring the clauses (i) to (v) in Section 2 (i). Such a construction is impermissible in law. It is, therefore, clear that the Director has no authority or power under the Act to issue any directions directing the owners/colonizers to incur maintenance expenses, by deeming the same to be part of the internal development works covered by Section 2(i). The maintenance of services specifies in Section 3(3)(a)(iii) cannot be

considered to be part of the internal development works as defined by Section 2 (i). Though this plea has not been taken by the Director in the High Court nor any such point is urged on his behalf in these appeals, the material available on record suggested that the Director has never considered the maintenance expenses to be part of internal development works as specified in Section 2 (i). Section 3(3)(a) of the Act mandates the colonizer/owner to furnish a bank guarantee equal to 25% of the estimated cost of the development works. It is an admitted case that the Director has not taken into consideration the said maintenance expenses for the purpose of computing the amount of the bank guarantee, which is 25% of the total cost of the internal development works. [Paras 24-27] [122-F-H; 123-H; 124-A-E]

6.1. There is no price fixation formula devised under the provisions of the Act, Rules and Regulations framed thereunder. The Statutory Authorities have no role to play in the fixation of price and costs of land and rate at which the plots/flats are to be sold. The price charged by the owner for the plot is fixed and covered by clauses (1) and (2) of plot sale agreement entered into by and between the parties. The agreed sale price of the plot includes external development charges. The payment of maintenance charges by the plot buyer is provided for in clause (14) of the said agreement. The Act, Rules and the Regulations framed thereunder do not provide for any approval or ratification of the agreements so entered into by and between the owners/colonizers. The Director of the Country and Town Planning is not required to put his seal of approval on the agreements so entered. The Director is not authorized or empowered to review or evaluate the terms of contract and resolve the disputes, if any, between the owners/colonizers and the purchasers of plots/flats. [Paras 29] [124-G-H; 125-A-C]

6.2. The sale price charged by the owner from the buyers for the sale of the plots/flats is a market driven sale price and is not based on any particular figure of cost. The provisions of the Act or the Rules in no manner impose any price control directly or indirectly in respect of plots/flats sold by the colonizer/owner. The sale and purchase of the plots/flats is between a willing vendor and a willing vendee. The Director is not empowered to meddle with the transactions and put any restriction on the rights of the owner/colonizer in the matter of sale and purchase of plots/flats. [Para 30] [125-D-E]

7. The Director plays a vital role and is authorised to issue appropriate directions from time to time concerning the execution of layout and development works in the colony and every such directions issued are required to be complied with by the licensee. The Director is not authorized to interfere with agreements voluntarily entered into by and between the owner/colonizer and the purchasers of plots/flats. The agreed terms and conditions by and between the parties do not require the approval or ratification by the Director nor is the Director authorized to issue any direction to amend, modify or alter any of the clauses in the agreement entered into by and between the parties. It is thus clear that there is no provision in the Act, Rules or in the licence that empowers the Director to fix the sale price of the plots or the cost of flats. The impugned directions issued by the Director are beyond the limits provided by the empowering Act. The directions so issued by the Director suffer from lack of power. Any order which is *ultra vires* or outside jurisdiction is void in law, i.e. deprived of its legal effect. An order which is not within the powers given by the empowering Act, it has no legal leg to stand on. Order which is *ultra vires* is a nullity, utterly without existence or effect in law. Thus while Act and Rules may impose many restrictions on profit percentages etc. time

limit on construction and handing over of such construction, such power does not encompass within itself the right to exercise power in manner that inhibits terms and contracts and freedom granted therein. [Paras 35, 36, 37, 40] [127-C-H; 128-H; 129-A]

Khargram Panchayat Samiti and another v. State of W.B. and others **(1987) 3 SCC 82;** *D.L.F. Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana and others* **(2003) 5 SCC 622 – relied on.**

8. Limit of 15% Profit: The question as to whether appellants made any profit over and above 15% would arise for consideration only after the grant of final completion certificate in respect of the entire colony/ development. The application for grant of final completion certificate remained pending with the authorities since long time. The complete accounts are to be finalized to determine whether the 15% limit on the profit has been exceeded and whether the colonizers/owners made profits over and above that. Further steps may have to be taken in accordance with law only thereafter. It would be appropriate to direct the authorities to decide the application so filed by the developers/colonizers for grant of final completion certificate as expeditiously as possible preferably within six months. In case if it is found that the owners had exceeded the said 15% limit on the profit, it shall always be open to the authorities to take appropriate action in accordance with law. For the said reasons, the impugned memo of the Director is not sustainable and the same is set aside. But this order shall not preclude owners of plots/flats to avail such remedies as may be available to them in law and raise any dispute that had arisen or may arise and for the enforcement of contractual terms and conditions in which event the matters have to be decided on its own merits uninfluenced by the observation, if any, made in the order

of the High Court and in this order. The question as to whether the cost of the plot includes the maintenance charges may have to be decided on a proper interpretation of the terms and conditions of the agreement. The court in a public law remedy cannot undertake the task of resolving disputes arising out of a contract for such disputes as they essentially lie in the private law domain. [Paras 41, 42] [129-B-H]

Case Law Reference:

(1987) 3 SCC 82	**relied on**	**Para 38**
(2003) 5 SCC 622	**relied on**	**Para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 550 of 2003.

From the Judgment & Order dated 31.5.2001 of the High Court of Punjab & Haryana at Chandigarh in W.P. No. 6704 of 1999.

WITH

C.A.Nos. 551, 1611 of 2003.

Contmt. Pet. (C) Nos. 215 of 2005 in C.A. No. 550 of 2003.

Contmt. Pet. (C) Nos. 106 of 2006 in C.A. No. 550 of 2003.

S. Ganesh, Harish Malhotra, Uday U. Lalit, Pravin Bahadur, Kanika Gomber, Rajeshwari Shukla, Mallika Joshi, Rajan Narain, Rohina, Nath, Priyadeep, Umesh Kumar Khaitan, Chanchal Kumar Ganguli, M.K. Michael, Sudarsh Menon, Jitender Choudhary, Shila Chohan, Rajesh Singh, Kamal Mohan Gupta, C.S. Ashri, Sanjeev Anand, Manoj Swarup, Vinay Kumar Garg, Madhu Tewatia, Sidhi Arora for the appearing parties.

The Judgment of the Court was delivered by

B.SUDERSHAN REDDY, J. 1. These appeals are directed against the orders of Punjab and Haryana High Court dismissing the Writ Petitions filed by the appellants herein challenging the impugned order dated 05.05.1999 passed by the Director, Town and Country Planning, Chandigarh, Haryana. The High Court upheld the validity of the impugned memo and accordingly dismissed the Writ Petitions. The same is challenged in these appeals on various grounds.

2. We have heard the learned senior counsel Shri Harish Salve, Shri S. Ganesh, Shri Harish Malhotra and the learned counsel Shri Rajiv Vermani for the appellants and Shri U.U. Lalit, learned senior counsel for the respondents. We have also heard the learned counsel appearing on behalf of the interveners-applicants.

3. The central question that arises for our consideration in this group of appeals is whether the Director, Town and Country Planning, is empowered to pass the impugned order? Whether the impugned order is ultra vires?

4. By the impugned memo the Director had purported to give the following directions:

(a) the provision in the agreement between the appellant and the plot/flat buyers regarding extension fee and maintenance fee should be deleted from the agreement as the same is not permissible under the law;

(b) further directed to stop charging of extension fee and maintenance fee from the plot/flat holders henceforth and the charges recovered on account of both from the plot/flat holders "may be refunded to the Government immediately."

(c) stop allowing the transfer of plots after obtaining full payment for the same and to ensure immediate registration of Conveyance Deed "where the full payments of the plot/flats have been received."

5. In order to consider the question as to the validity of the impugned memo few relevant facts may have to be noticed.

BACKGROUND FACTS :

6. The appellants were granted licence under the provisions of Haryana Development and Regulation of Urban Areas Act, 1975 (for short 'the Act') and the Rules framed thereunder, i.e. Haryana Development and Regulation of Urban Area Rules, 1976 (for short 'the Rules') for setting up residential colonies. The appellants entered into required agreements with the Governor of Haryana acting through Director Town and Country Planning, Haryana. The appellants acting under the licence so granted and the agreements commenced setting up colonies by dividing the land into plots. The plots were sold to various buyers. The plot buyers are required to make construction on such plots to be used for the purpose for which the lay out was approved. The appellants have also allotted flats to various persons and have entered into agreements. Mutual rights and obligations between the appellants and the plot/flat buyers is structured by the agreements voluntarily entered into by them and all terms and conditions, covenants were mutually agreed by and between the parties. In respect of certain areas even completion certificates were granted as early as in the year 1991-92. The Director all of a sudden without any notice whatsoever to any of the appellants issued the impugned directions which were challenged on various grounds in the High Court.

7. In order to consider the central question as to whether the impugned order is void and unenforceable, it is just and necessary to notice the relevant provisions of the Act.

SCHEME OF THE ACT :

8. The Act intends to regulate the use of land in order to prevent ill planned and haphazard urbanization in or around towns in the State of Haryana. The Act applies to all urban areas in the State of Haryana. We shall notice the relevant provisions of the Act and the Rules which are as under :

" Section 2. Definitions

(a) .....

(aa) .....

(b) .....

(c) "colony" means an area of land divided or proposed to be divided into plots or flats for residential, commercial, industrial, cyber city or cyber park purposes or for the construction of flats in the form of group housing or for the construction of integrated commercial complexes, but an area of land divided or proposed to be divided—

(i) for the purpose of agriculture ; or

(ii) as a result of family partition, inheritance, succession or partition of joint holding not with the motive of earning profit ; or

(iii) in furtherance of any scheme sanction under any other law; or

(iv) by the owner of a factory for setting up of a housing colony for the labourers or the employees working in the factory; provided there is no profit motive ; or

(v) when it does not exceed one thousand square metres or such less area as may be decided from time to time in an urban area to be notified by

Government for the purposes of this sub-clause. shall not be a colony ,

(d) "colonizer" means an individual, company or association or body of individuals, whether incorporated or not, owning land for converting it into a colony and to whom a licence has been granted under this Act ;

(dd) "cyber city" means self contained intelligent city with high quality of infrastructure, attractive surrounding and high speed communication access to be developed for nucleating the Information Technology concept germination of medium and large software companies and Information Technology enabled services, wherein no manufaturing units shall be permitted ;

(ddd) "cyber park" means an area developed exclusively for locating software development activities and Information Technology Enabled Services, wherein no manufacturing of any kind (including assembling activities) shall be permitted ;

(e) "development works" means internal and external development works ;

(f) .....

(g) "external development works" include water supply, sewerage, drains, necessary provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal, slaughter houses, colleges, hospitals, stadium/sports complex, fire stations, grid sub-stations etc. and any other work which the Director may specify to be executed in the periphery of or outside colony/area for the benefit of the colony/area;

(gg) "flat" means a part of any property, intended to be used for residential purposes, including one or more rooms with enclosed spaces located on one or more floors, with direct exit to a public street or road or to a common area leading to such streets or road and includes any garage or room whether or not adjacent to the building in which such flat is located provided by the coloniser/owner of such property for use by the owner of such flat for parking any vehicle or for residence of any person employed in such flat, as the case may be ;

(h) …….

(i) "internal development works" mean—

(i) metalling of roads and paving of footpaths;

(ii) turfing and plantation with trees of open spaces;

(iii) street lighting ;

(iv) adequate and wholesome water-supply ;

(v) sewers and drains both for storm and sullage water and necessary provision for their treatment and disposal ; and

(vi) any other work that the Director may think necessary in the interest of proper development of a colony ;

(j) …….

(k) "owner" includes a person in whose favour a lease of land in an urban area for a period of not less than ninety nine years has been granted ;

(l) ……

(m) "plot/flat holder" means a person in whose favour a plot/flat in a colony has been transferred or agreed to be transferred by the coloniser ;

(n) . ……

(o) ……

Section 3 Application for licence :

(1) Any owner desiring to convert his land into a colony shall, unless exempted under section 9, make an application to the Director, for the grant of a licence to develop a colony in the prescribed from and pay for it such fee and conversion charges as may be prescribed. The application shall be accompanied by an income-tax clearance certificate :

Provided that if the conversion charges have already been paid under the provisions of the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (41 of 1963), no such charges shall be payable under this section.]

(2) On receipt of the application under sub-section (1), the Director shall, among other things, enquire into the following matters, namely :—

(a) title to the land ;

(b) extent and situation of the land ;

(c) capacity to develop a colony ;

(d) the layout of a colony ;

(e) plan regarding the development works to be executed in a colony ; and

(f) conformity of the development schemes of the colony land to those of the neighbouring areas

(3) After the enquiry under sub-section (2), the Director, by an order in writing, shall—

(a) grant a licence in the prescribed form, after the applicant has furnished to the Director a bank guarantee equal to twenty-five per centum of the estimated cost of development works in case of area of land divided or proposed to be divided into plots or flats for residential, commercial or industrial purposes and a bank guarantee equal to thirty-seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park purposes as certified by the Director and has undertaken—

(i) to enter into an agreement in the prescribed form for carrying out and completion of development works in accordance with the licence granted ;

(ii) to pay proportionate development charges in the external development works as defined in clause(g) of section 2 are to be carried out by the government or any other local authority. The proportion in which and the time within which, such payment is to be made shall be determined by the Director ;

(iii) the responsibility for the maintenance and upkeep of all roads, open spaces, public parks and public health services for a period of five years from the date of issue of the completion certificate unless earlier relieved of this responsibility and thereupon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be ;

(iv) to construct at his own cost, or get constructed by any other institution or individual at its cost, schools, hospitals, community centres and other community buildings on the lands set apart for this purpose, or to transfer to the Government at any time, if so desired by the Government, free of cost the land set apart for schools, hospitals, community centres and community buildings, in which case the Government shall be at liberty to transfer such land to any person or institutions including a local authority on such terms and conditions as it may deem fit ;

(v) to permit the Director or any other officer authorized by him to inspect the execution of the layout and the development works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted :

(4) The licence so granted shall be for a period of 2 years and will be renewable from time to time for a period of one year, on payment of prescribed fee.

Provided that the Director, having regard to the amenities which exist or are proposed to be provided in the locality, is of the opinion that it is not necessary or possible to provide one or more such amenities, may exempt the licencee from providing such amenities either wholly or in part ;

(b) refuse to grant a licence, by means of a speaking order, after affording the applicant an opportunity of being heard.

[Provided that in the licensed colony permitted as a special project by the Government, the licence

shall be valid for a maximum period of five years and shall be renewable for a period as decided by the Government.]

(5) A separate licence shall be required for each colony.

3-A . Establishment of Fund

(1) Any colonizer whom a licence has been given under this Act shall deposit as service charges a sum [at such rate as may be prescribed by the Government from time to time, per square metre of the gross area and of the covered area of all the floors in case of flats proposed to be developed by him into a colony] in two equal instalments. The first instalment shall be deposited within 60 days from the date of the grant of the licence and the second instalment to be deposited within six months from the date of grant of the licence.

(2) The Haryana Urban Development Authority local authorities, firms, undertakings of Government and other authorities involved in land development shall also be liable to deposit the service charges and shall be deemed to be colonizers for this purpose only. The date of first inviting applications for sale of plots in any colony by it shall be deemed to be the date of granting of licence under this Act for the purpose of deposit of service charges.

(3) The service charges shall be deposited by the colonizer with such officer or person as may be appointed by the Government in this behalf.

(4) The colonizer shall in turn be entitled to pass on the service charges paid by him to the plot holder.

(5) The amount of service charges if not paid within the

prescribed period shall be recoverable as arrears of land revenue.

(6) The amount of service charges so deposited by the colonizer shall constitute a fund called the Haryana Urban Development Fund (hereinafter referred to as the Fund) which shall vest in the State Government.

(7) The Fund shall be administered by such officers of the State Government as may be appointed by it for this purpose.

(8) The amount of service charges deposited by the colonizers and grants from the Government or the local authority shall be credited to the Fund.

(9) The Fund shall be utilized by the State Government for the benefit of the urban development and for creation and improvement of urban infrastructure in the State of Haryana. The Fund may also be utilized to meet the cost of administering the Fund.

(10) The Government shall publish annually in the Official Gazette the report of the activities financed from the fund and the statement of accounts.

Section 3 ……..

Section 4……..

Section 5. Cost of Development Works

(1) The colonizer shall deposit thirty per centum of the amount realised, from time to time, by him, from the plot-holders within a period of ten days of its realisation in a separate account to be maintained in a scheduled bank. This amount shall only be utilised by him towards meeting the cost of internal

development works in the colony. After the internal development works of the colony have been completed to the satisfaction of the Director, the coloniser shall be at liberty to withdraw the balance amount. The remaining seventy per centum of the said amount shall be deemed to have been retained by the coloniser, inter alia, to meet the cost of land and external development works.

(2) The colonizer shall maintain accounts of the amount kept in the scheduled bank, in such manner as may be prescribed :

Provided that where the licence under section 3 is granted for setting up a colony for cyber city or cyber park purposes, the provisions of sub-sections (1) and (2) shall not be applicable.

———————————————————————————

Rule 2. Definitions

(a) ……

(b) "amenity" includes roads, water supply, street lighting, drainage, sewerage, public parks, schools, play grounds, hospitals, community centers and other community buildings , horticulture, land scaping and any other public utility service;

Rule 3……..

Rule 4 ……..

Rule 5. Development works to be provided in colony [Section 3(3)]—

The designs and specifications of the development works to be provided in a colony shall include—

(a) metalling of roads and paving of footpaths;

(b) turfing and plantation of trees in open spaces;

(c) street lighting;

(d) adequate and wholesome water supply;

(e) sewers and drains both for storm and sullage water and necessary provision for their treatment and disposal; and

(f) any other works that the Director may think necessary in the interest of proper development of the colony.

11. Conditions required to be fulfilled by applicant

[Section 3 (3)]—

(1) the applicant shall—

(a) furnish to the Director a bank guarantee equal to twenty five percent of the estimated cost of the development works as certified by the Director and enter into an agreement in form LC-IV for carrying out and completion of development works in accordance with the licence finally granted;

(b) undertake to deposit fifty percent of the amount to be realized by him from the plot-holders, from time to time, within ten days of its realization in a separate account to be maintained in a scheduled bank and this amount shall only be utilized towards meeting the cost of internal development works in the colony;

(c) undertake to pay proportionate development charges if the main lines of roads, drainage, sewerage, water supply and electricity are to be laid out and constructed by the Government or any other local authority. The proportion in which and the time

within which such payment is to be made shall be determined by the Director;

(d) undertake responsibility for the maintenance and upkeep of all roads, open spaces, public parks and public health services for a period of five years from the date of issue of the completion certificate under rule 16 unless earlier relieved of this responsibility and there upon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be;

(e) undertake to construct at his own cost or get constructed by any other institution or individual at its cost, schools, hospitals, community centers and other community buildings on the land set apart for this purpose, or undertake to transfer to the government at any time, if so desired by the Government free of cost, the land set apart for schools, hospitals, community centers and community buildings, in which case the Government shall be at liberty to transfer such land to any person or institution including a local authority on such terms and conditions as it may deem fit; and

(f) undertake to permit the Director or any other officer authorized by him to inspect the execution of the layout and the development works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted.

(2) If the Director, having regard to the amenities which exist or are proposed to be provided in the locality, decides that it is not necessary or possible to provide such amenity or amenities, the applicant

will be informed thereof and clauses (c), (d) and (e) of sub-rule (1) shall be deemed to have been modified to that extent.

12. Grant of licence [Section 3 (3) and (4)]—

(1) After the applicant has fulfilled all the conditions laid down in rule 11 to the satisfaction of the Director , the Director shall grant the licence in form LC-V.

(2) The licence granted under sub-rule (1) shall be valid for a period of two years from the date of its grant during which period all development works in the colony shall be completed and certificate of completion obtained from the Director as provided in rule 16.

16. Completion certificate/Part Completion Certificate [Section 24]—

(1) After the colony has been laid out according to approved layout plans and development works have been executed according to the approved designs and specifications the colonizer shall make an application to the Director in form LC-VIII.

(2) After such (scrutiny), as may be necessary, the Director may issue a completion certificate/part completion certificate in form LC-IX or refuse to issue such certificate stating the reasons for such refusal;

Provided that the colonizer shall be afforded an opportunity of being heard before such refusal.

18. Cancellation of licence [Section 8(1)]—

(1) If the Director determines at any time that the execution of the layout plans and the construction

or other works is not proceeding according to the licence granted under rule 12 or is below specification or is in violation of the provisions of these rules or of any law or rules for the time being in force, he shall by notice in form LC-X require the colonizer to remove the various defects within the time specified in the notice.

(2) If the colonizer fails to comply with the requirements detailed in the notice issued under sub-rule (1), the Director shall issue him a further notice in form LC-XI to afford him an opportunity to show cause within a period of one month why the licence granted should not be cancelled.

(3) After hearing the colonizer and considering such representation as he may make the Director may either cancel the licence or grant him further time for complying with the requirements of the notice issued under sub-rule (1). If, however, the colonizer does not comply with the said requirements within such extended period, the Director shall cancel the licence and thereafter, within one month, shall cause a proclamation made in the locality about the cancellation of the licence by beat of drum within thirty days of cancellation of licence.

(4) On cancellation of the licence, no further work shall be undertaken or carried out by the colonizer,

[(5) Deleted.]

20. Release of Bank guarantee [Section 24]—

After the layout and development works or part thereof in respect of the colony or part thereof have been completed and a completion certificate in respect thereof issued, the Director may, on an application in this behalf from the

colonizer, release bank guarantee or part thereof as the case may be;

Provided that if the completion of the colony is taken in parts only , the part of the bank guarantee corresponding to the part to the colony completed shall be released;

Provided further that the bank guarantee equivalent to 1/15th amount thereof shall be kept unreleased to ensure upkeep and maintenance of the colony or part thereof, as the case may be, for a period of five years from the date of issue of the completion certificate under rule 16 or earlier, in case the colonizer is relieved of the responsibilities in this behalf.

21……

22……

23……

24……

25……

26. maintenance and submission of accounts [Section 5 and 6]—

(1) The colonizer shall—

(i) issue regular receipts to the plot holders in respect of the money received by him and maintain counterfoils of the receipts so issued;

(ii) maintain separate ledger account of each plot-holder;

(iii) maintain a register containing authenticated copies of each of the agreements entered into between him and each of the plot holders; and

(iv) maintain accounts books showing details of expenses incurred by him on various development works in the colony.

(2) The colonizer shall within a period of three months after the close of every financial year, submit to the director through registered post with acknowledgement due a statement of accounts indicating the amount realized from each plot-holders, the expenditure incurred on internal and external development works separately of the colony with details thereof together with the amount due from each plot holder indicating their postal address. This statement should be duly audited, certified and signed by a chartered accountant.

9. The validity of the impugned memo is required to be decided with reference to the scheme of the Act, Rules and the Regulations framed thereunder.

10. The agreement with the Governor required to be entered by owners of land intending to set up a colony is structured and regulated by Rule 11 of the Rules. The terms and conditions of the agreement and the obligations of the owner of land and covenants thereof are prescribed by Statutory Rules. The contract between the owner of land and its buyers, unlike the agreement entered by the owner of the land with the government, is not required to be in any statutory form. It is a contract between the two willing contracting parties whereunder the terms and conditions are mutually agreed upon. The covenants decide the mutual obligations between the owner of the land and the buyers thereof.

Interpretation of Contract:

11. It is settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed

to actualize. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, "a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept….Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large." The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency…. In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly. A party who claims otherwise, violates the principle of good faith. [See Purposive Interpretation in Law by Aharon Barak : 2005 Princeton University Press].

Extension Fee:

12. Whether the Director is empowered to issue any direction, directing the appellants not to collect the extension fee with further direction to delete the relevant clauses from the agreement?

13. The agreement entered into by the owners and purchasers inter-alia provides that the purchaser shall, after approval of his building plans from the competent authority, "be

bound to commence construction of the house on the plot not later than three years from the date the sale deed is executed in his favour….in case the purchaser fails to commence construction within the stipulated period, the seller shall be entitled to resume the plot, refund the amount paid by the purchaser and to resell the plot to somebody else provided that the seller in its sole discretion may extend the aforesaid period of construction "provided the purchaser pays additional charges to the owner." It was mutually agreed that a provision to this effect may have to be incorporated in the sale deed and the purchaser "shall be bound by the same." This clause enables the owner to charge additional amount for the non completion of the construction by the purchaser within the period stipulated in the agreement. There is nothing in the Act, the Rules and Regulations prohibiting the owner of the land to collect such charges from the buyer. The said provision for payment of "extension fee" has been provided for in the agreement, according to the appellants, only in the interest of speedy development of each colony, and also in order to prevent purchase of plots by speculators who may keep the plot vacant without making any construction with the only object to earn profit by selling the same at a future date and such an act may prove detrimental to other purchasers as such acts obstruct the all round development of the area which is pre-eminently/ predominantly in the public interest. It is not necessary for us to express any firm opinion with regard to the plea so taken by the appellants in this proceeding. It may altogether be a different matter if the purchasers raise objection as regards the very covenants incorporated into the agreement entered into by and between the parties in a properly constituted proceedings on such grounds as may be available to them in law.

14. The question that arises for our consideration is whether the Director was justified in issuing directions asking the licensee/owner to virtually amend the clauses/covenants in the agreement? Whether the statute confers any authority or

jurisdiction upon the Director to meddle with the terms of agreement entered into by and between the owners and the purchasers of plots/flats?

15. The Director's functions and duties are well structured by the Act and the Rules. There is no provision in the Act or the Rules empowering the Director to sit in judgment on the perceived fairness of any clauses incorporated in the agreement entered by the parties. The terms and conditions in the licence granted by the Director do not prohibit incorporation of such a clause in the agreement to be entered between the owners and the purchasers. Nor there is any clause in the agreement entered by the owner with the Governor through the Director empowering the Director to sit in appeal over the agreement entered by the owners with the purchasers of the plots. There is no explanation forthcoming as to the source of power under which the Director could have issued the impugned directions directing the owner to delete such clauses from the agreement entered with the purchasers.

16. Whether Section 5 of the Act and Rule 11B read with Rule 26(2) of the Rules in any manner prohibit collection of additional charges characterized as 'extension fee' by the owner/colonizer?

17. Section 5 of the Act merely requires the colonizer to deposit 30% of the amount realised, from time to time, from the plot holders in a separate account to be maintained in a scheduled bank and the said amount is to be utilised by him only for meeting the cost of internal development works in the colony. After the completion of the internal development works to the satisfaction of the Director, the colonizer is entitled to withdraw the balance amount. The remaining 70% of the said amount shall be deemed to have been retained by the colonizer to meet the cost of the land and the external development works. There is no doubt that accounts are required to be maintained by the colonizer in the prescribed manner.

Rule 11(b) merely reiterates as to what has been provided for in Section 5 of the Act.

Rule 26 obligates the colonizer to issue regular receipts to the plot holders in respect of the money received by him and maintain counterfoils of the receipts so issued; maintain separate ledger of each plot holder, maintain a Register containing authenticated copies of each of the agreements entered into between him and each of the plot holders; and maintain account books showing details of expenses incurred on various developmental works in the colony. We fail to appreciate as to how and in what manner these provisions restrain or prohibit the colonizer/owner to insist buyers of the plots to complete construction in time bound manner and charge extra amounts as may be agreed between the parties for failure to do so. It shall always be open for the Director to insist the colonizer/owner to submit a statement of accounts indicating the amount realized from each plot holders, the expenditure incurred on internal and external development works. We do not find anything in these provisions empowering the Director to issue the impugned directions prohibiting the owners to collect the extension fee for the delayed construction of buildings by the purchasers of the plots. We are essentially dealing with the question as to the authority of the Director and as to whether he is empowered to pass such an order and not with regard to the question as to whether the clauses dealing with this aspect of the matter suffer from any infirmity. The dispute, if any, between the parties to the agreement, may have to be resolved in a properly constituted proceeding in private law domain.

Transfer Fee:

18. Whether the owner/colonizer in law after obtaining full payments from the allottees is prohibited from transferring the plots to the nominees of the allottees? Whether the allottees' right to nominate another person as purchaser of the property can be denied by the colonizer?

19. The prevailing practice of permitting transfer of plots before registration of conveyance deed to the allottee is not contrary to the provisions of the Act or the Rules. The only justification sought to be given by the respondent in this regard is that the State would like a separate set of stamp duty paid to it in respect of each transaction, even though there is no conveyance deed executed as yet in respect of the land in question. This argument is wholly devoid of any merit. Section 17 (1)(b) of the Registration Act requires that where the Conveyance Deed has been prepared for effecting the transfer of a plot or other immovable property, such deed should be registered within a period of 4 months after its execution. It does not, however, contain any provision whatsoever requiring that a Conveyance Deed should be executed within any period of time after the execution of sale agreement between the buyer and the seller. Nor there is any provision whatsoever in the Stamp Act or Registration Act imposing any restriction on the assignment or transfer of rights under a sale/purchase agreement by the purchaser to a third party, before the execution of any conveyance deed in respect of any immovable property. The parties in the agreement had agreed for the substitution of the name of allottees at the sole discretion of the owner. The conveyance deed executed by the owner is the one which is executed either in favour of the allottee or his nominee as the case may be on which a proper stamp duty and registration fee is required to be paid. In any event the Director has no power under the Act or the Rules to issue any such direction altogether prohibiting such nomination of another person thereby substituting the allottee.

MAINTENANCE FEE:

20. The crucial question that arises for our consideration is whether the Director of Country and Town Planning is empowered to issue any directions, directing the appellants to stop charging maintenance fee from the plot/flat holders and also "delete the relevant clauses from the agreement" and

refund the amounts so far collected to the Government immediately. Whether the Act imposes any obligation upon the colonizers or owners to incur maintenance charges out of their own resources? Whether the colonizers/owners are prohibited from recovering the amounts spent towards the maintenance charges from the plots/flats buyers? Whether the clause incorporated in the sale agreement enabling the owners to collect the maintenance charges is void?

21. The Act no doubt imposes certain obligations upon the colonizers/owners and specifies certain items of expenses to be borne by them. Section 3(3)(a)(ii) of the Act requires the colonizer/owner to pay proportionate development charges if the external development works as defined under Section 2 (g) of the Act are to be carried out by the Government or any other local authority. Similarly Section 3 (3) (a) (iv) requires the owner to construct at his own cost schools, hospitals, community centres and other community buildings on the lands set apart for the said purposes. Further Section 5 of the Act read with Rule 11 (1) (b) imposes obligation and requires the owner to meet the cost of internal development works as defined in Section 2 (i) of the Act.

22. It is no doubt true that Section 3 (3) (a) (iii) imposes responsibility for the maintenance and upkeep of all roads, open spaces, public parks and public health services for a period of five years from the date of issue of the completion certificate unless earlier relieved of this responsibility and thereupon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the authority, as the case may be. That a bare reading of the provisions does not suggest that the owner is required to provide the said maintenance services free of cost. On the other hand, the latter part of Section 3 (3) (a) (iii) provides that on the expiry of the said period of five years the owner is required to transfer all such roads, open spaces etc. free of cost to the government or the local authority, as the case may be.

23. The learned senior counsel for the respondents relying on Section 2 (i) (vi) contended that maintenance expenses are covered by the said provisions and, therefore, they are required to be borne by the owner/colonizer. Let us test the submission so made by the learned senior counsel. The question that requires to be considered whether providing services of the kind by the owner/colonizer for which maintenance charges are imposed is a "work" of "internal development" which has to be carried out within the colony. Section 2 (i) defines "Internal Development Works" as under:

(a) metalling of roads and paving of footpaths;

(b) turfing and plantation of trees in open spaces;

(c) street lighting;

(d) adequate and wholesome water supply;

(e) sewers and drains both for storm and sullage water and necessary provision for their treatment and disposal; and

(f) any other works that the Director may think necessary in the interest of proper development of the colony.

24. There is no dispute whatsoever that any maintenance fee or charges are being collected by the owners/colonizers in respect of any of the internal development works mentioned in Section 2 (i). It is not disputed that the appellants are rendering the following additional services, which are not in any manner whatsoever covered by Section 3 (3) (a) (iii) or any provisions of the Act or the Rules.

(a) Round the clock security

(b) Electricity consumption of street lights, which shall include replacement of bulbs, tubes etc., maintenance of

electrical system and its upgradation.

(c) Reparing and strengthening of boundary walls and fencing.

(d) Conservancy and general upkeep, which shall include sweeping of roads, door to door garbage collection and its disposal, clearing of unwanted growth of plants in vacant plots, repair/replacement/painting of signages, guide maps and gates etc.

(e) Upgradation of Roads/parks.

(f) Establishment/administrative charges for rendering the aforesaid services, which shall include salaries of staff, rent of the building, telephone, printing, stationery, electricity, computer expenses etc. incurred in running complaint centre in DLF City.

25. In our considered opinion the maintenance fee/charges levied and collected are clearly not in respect of any of the internal development works defined under clause (i) to (v) of Section 2 (i). Perhaps, the learned senior counsel conscious of the difficulty to bring it under Section 2 (i) (i) to (v) urged that maintenance expenses can be considered to be covered by Section 2 (i) (vi), which refers to "any other work that the Director may think necessary in the interest of proper development of a colony". We find no merit in the submission. Clause (i) to (v) of Section 2 (i) refers to "Works" which are erected within the colony as an integral part of the internal development of the colony. The residuary clause (vi) of Section 2 (i) also refers to "work" which means and implies activities akin to that of which constitute an 'internal development of the colony'. We have already noticed that providing services of the kind for which the maintenance charges/fee are collected, are in no manner in respect of a "work" of "internal development" which is required to be carried out within the licenced area. The expression "work" in Section (i) (vi) cannot be interpreted in

isolation ignoring the clauses (i) to (v) in Section 2 (i). Such a construction is impermissible in law.

26. It is, therefore, clear that Director has no authority or power under the Act to issue any directions directing the owners/colonizers to incur maintenance expenses, by deeming the same to be part of the internal development works covered by Section 2 (i). It is needless to reiterate that the maintenance of services specifies in Section 3 (3) (a) (iii) cannot be considered to be part of the internal development works as defined by Section 2 (i).

27. Be it noted that this plea has not been taken by the Director in the High Court nor any such point is urged on his behalf in these appeals before us. On the other hand the material available on record suggests that the Director has never considered the maintenance expenses to be part of internal development works as specified in Section 2 (i). Section 3 (3) (a) of the Act mandates the colonizer/owner to furnish a bank guarantee equal to 25% of the estimated cost of the development works. It is an admitted case that the Director has not taken into consideration the said maintenance expenses for the purpose of computing the amount of the bank guarantee, which is 25% of the total cost of the internal development works.

28. Whether the amount of maintenance service charges was already included in the sale price of the plots/flats?

29. There is no price fixation formula devised under the provisions of the Act, Rules and Regulations framed thereunder. The Statutory Authorities have no role to play in the fixation of price and costs of land and rate at which the plots/flats are to be sold. The price charged by the owner for the plot is fixed and covered by clauses (1) and (2) of plot sale agreement entered into by and between the parties. The agreed sale price of the plot includes external development charges. The payment of maintenance charges by the plot buyer

is provided for in clause (14) of the said agreement. The sale price charged by the owner from the plot buyers includes maintenance of service charges at the most could be a bonafide contention between the owners/colonizers and the purchasers of plots/flats. The Act, Rules and the Regulations framed thereunder do not provide for any approval or ratification of the agreements so entered into by and between the owners/colonizers. The Director of the Country and Town Planning is not required to put his seal of approval on the agreements so entered. The Director is not authorized or empowered to review or evaluate the terms of contract and resolve the disputes, if any, between the owners/colonizers and the purchasers of plots/flats.

30. The sale price charged by the owner from the buyers for the sale of the plots/flats is a market driven sale price and is not based on any particular figure of cost. The provisions of the Act or the Rules in no manner impose any price control directly or indirectly in respect of plots/flats sold by the colonizer/ owner. The sale and purchase of the plots/flats is between a willing vendor and a willing vendee. The Director is not empowered to meddle with the transactions and put any restriction on the rights of the owner/colonizer in the matter of sale and purchase of plots/flats.

31. Now what remains for our consideration is whether a direction could have been issued by the Director to delete the clause or relevant clauses from the agreements mutually entered by and between the parties. The agreement by and between the owners/colonizers, agreed terms and conditions and covenant therein are purely under private law domain.

32. Let us now examine what are the functions and duties of the Director and the power conferred upon him under the provisions of the Act and Rules. Section 3(1) of the Act provides that any owner of land desirous of setting up a colony shall make an application in writing to the Director in the prescribed Form LC-I alongwith the required particulars

mentioned therein which are not required to be noticed in detail. Section 3 (3) (a) provides that after making a proper enquiry under sub-section (2), the Director, by an order in writing, shall grant a licence in the prescribed form, after the application is furnished to the Director, a bank guarantee equal to 25 per centum of the estimated cost of development works in case of area of land divided or proposed to be divided into the plots or flats for residential, commercial or industrial purpose and a bank guarantee equal to thirty-seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park. The owner is required to enter into an agreement in the prescribed form for carrying out and for the completion of development works in accordance with the licence granted. Section 3(3)(a)(v) permits the Director or any other officer authorized by him to inspect the execution of the layout and the development works in the colony and to carry out all the directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted. It is thus clear that the Director is entitled to inspect the execution of the lay out and internal and external development works in the colony and to issue appropriate directions which he may consider necessary and proper for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted. This is to be read along with the condition of licence which requires "that the colony is laid out to conform to the approved layout plans and development works are executed according to the designs and specifications shown in the approved plan accompanying the licence." The Director thus is empowered to issue appropriate directions in order to ensure strict compliance of the terms and conditions of licence subject to which the colony is to be set up by the owner or colonizer. Rule 5 provides that the designs and specifications of the development works to be provided in a colony which is nothing but reproduction of Section 2 (i) which we have noticed in the preceding paragraphs.

33. Section 8 speaks about cancellation of licence by the Director if the colonizer contravenes any of the conditions of the licence or the provisions of the Act or the Rules made thereunder; provided that before such cancellation the colonizer shall be given an opportunity of being heard.

34. It further provides for the consequences that may flow after the cancellation of the licence.

35. From a fair analysis of these provisions, it becomes clear that the Director's functions and duties and as well as power is completely structured by the statute and the Rules. He undoubtedly plays a vital role and is authorised to issue appropriate directions from time to time concerning the execution of layout and development works in the colony and every such directions issued are required to be complied with by the licensee.

36. In our considered opinion the Director is not authorized to interfere with agreements voluntarily entered into by and between the owner/colonizer and the purchasers of plots/flats. The agreed terms and conditions by and between the parties do not require the approval or ratification by the Director nor is the Director authorized to issue any direction to amend, modify or alter any of the clauses in the agreement entered into by and between the parties.

37. It is thus clear that there is no provision in the Act, Rules or in the licence that empowers the Director to fix the sale price of the plots or the cost of flats. The impugned directions issued by the Director are beyond the limits provided by the empowering Act. The directions so issued by the Director suffer from lack of power. It needs no restatement that any order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of its legal effect. An order which is not within the powers given by the empowering Act, it has no legal leg to stand on. Order which is ultra vires is a nullity, utterly without existence or effect in law.

38. In *Khargram Panchayat Samiti and another vs. State of W.B. and others* [(1987) 3 SCC 82] upon which reliance has been placed by the leaned senior counsel for the second respondent in no manner supports the impugned directions issued by the Director. The only issue which arose was, whether, in the absence of any specific statutory provision, the authority conferred with a statutory power to issue licence for holding "hats" or "fairs" also possessed any incidental powers to fix the date on which the 'hat' or 'fair' would take place. It was held that such power to fix the date was necessarily incidental to the power of the grant of the licence, in the absence of any provision in the statute. In the very nature of things this court came to the conclusion that it is impossible to separate the power to grant a licence to hold the "fairs" from that of the fixation of the date thereof, because the two are inseparably and intrinsically interconnected. The provisions of the 1975 Act and the Rules enumerates in detail the powers of Director and arms him with jurisdiction to issue appropriate directions from time to time for ensuring due compliance in the execution of the layout and the development works in accordance with the licence granted. The impugned directions issued result in far-reaching consequences and they cannot be considered to be incidental or ancillary to the power conferred under the Act and Rules. The submission made in this regard is totally devoid of merit.

39. In *D.L.F. Qutab Enclave Complex Educational Charitable Trust vs. State of Haryana and others* [(2003) 5 SCC 622], it is held by this court :

> "38. A regulatory Act must be construed having regard to the purpose it seeks to achieve. The State as a statutory authority cannot ask for something which is not contemplated under the Act."

40. Thus while Act and Rules may impose many restrictions on profit percentages etc. time limit on construction and handing over of such construction, such power does not

encompass within itself the right to exercise power in manner that inhibits terms and contracts and freedom granted therein.

LIMIT OF 15% PROFIT :

41. The question as to whether appellants made any profit over and above 15% would arise for consideration only after the grant of final completion certificate in respect of the entire colony/development. The application for grant of final completion certificate remained pending with the authorities since long time. The complete accounts are to be finalized to determine whether the 15% limit on the profit has been exceeded and whether the colonizers/owners made profits over and above that. Further steps may have to be taken in accordance with law only thereafter. It would be appropriate to direct the authorities to decide the application so filed by the developers/ colonizers for grant of final completion certificate as expeditiously as possible preferably within six months. In case if it is found that the owners had exceeded the said 15% limit on the profit, it shall always be open to the authorities to take appropriate action in accordance with law.

42. For the aforesaid reasons, we find it difficult to sustain the impugned memo of the Director and the same is set aside. But this order of ours shall not preclude owners of plots/flats to avail such remedies as may be available to them in law and raise any dispute that had arisen or may arise and for the enforcement of contractual terms and conditions in which event the matters have to be decided on its own merits uninfluenced by the observation, if any, made in the order of the High Court of Punjab and Haryana and in this order. The question as to whether the cost of the plot includes the maintenance charges may have to be decided on a proper interpretation of the terms and conditions of the agreement. The court in a public law remedy cannot undertake the task of resolving disputes arising out of a contract for such disputes as they essentially lie in the private law domain.

43. In the circumstances, we find it very difficult to sustain the view taken by the High Court for upholding the impugned memo issued by the Director, Town and Country Planning. The judgment of the High court is, accordingly, set aside. The appeals are, accordingly, allowed subject to the observations made hereinabove.

44. All interlocutory applications and contempt cases are, accordingly, disposed of in terms of this order.

D.G. Appeals allowed.

SARUP SINGH AND ANR.
v.
UNION OF INDIA AND ANR.
(Civil Appeal No. 3568 of 2005)

NOVEMBER 25, 2010

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

Land Acquisition Act, 1894:

ss.23(1A), 23(2) and 34 – Whether the benefit of enhancement in the rate of solatium and interest as introduced by the Amendment Act of 68 of 1984 could be given to such of the claimants whose cases for payment of compensation were finalized prior to coming into force of the aforesaid Amendment Act of 1984 – Held: For entitlement to enhanced rates under the Amendment, the award of the Land Acquisition Officer/Collector or of the Reference Court must have been made between 30-4-1982 and 24-9-1984, i.e., the dates of introduction of the Land Acquisition Amendment Bill, 1982 in the House of the People and that of commencement of operation of the Land Acquisition (Amendment) Act, 1984 respectively – In the instant appeals, the award of the Collector and that of the reference court in their case was passed prior to 30.04.1982 – Therefore, the said amendment brought in by the Act of 1984 to the concerned provisions could not have been made applicable to the proceeding of the present cases.

Judgment given by High Court enhancing the quantum of compensation by giving benefit of enhanced solatium from 15% to 30% and interest from 6% to 9% per annum in view of the Amendment Act of 68 of 1984 – Whether, on facts, the judgment could be negated by the Executing Court – Held: Though the Executing court cannot go behind the decree and

grant interest not granted in the decree, but, if a decree is found to be nullity, the same could be challenged and interfered with at any subsequent stage, say, at the execution stage or even in a collateral proceeding – In the instant appeals, the judgment passed by the High Court before the amendment Act of 68 of 1984 became final and binding as no appeal was brought to this Court thereafter – However, consequent to the Amendment in the Land Acquisition Act, the appellants filed civil miscellaneous applications for the grant of 30 per cent solatium and 9 per cent interest for first year and 15 per cent interest thereafter, which was allowed by the High Court – Such a judgment and decree which has become final and binding could not have been reopened by the High Court on the basis of revision applications filed under ss.151 and 152 of CPC – The orders passed by the High Court granting enhanced solatium and interest as amended by Act 68 of 1984 is without jurisdiction and a nullity – If a particular Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction and the same is non-est and void ab initio – The defect of jurisdiction strikes at the very root and authority of the Court to pass decree which cannot be cured by consent or waiver of the parties – The validity of any such decree or order could be challenged at any stage – Code of Civil Procedure, 1908 – ss.151 and 152.

The questions which arose for consideration in the instant appeals were 1) whether the benefit of enhancement in the rate of solatium and interest as introduced by the Amendment Act of 68 of 1984 could be given to such of the claimants whose cases for payment of compensation were finalized prior to coming into force of the aforesaid Amendment Act of 1984; and 2) whether the judgment and order given by the High Court enhancing the quantum of compensation by giving benefit of enhanced solatium from 15% to 30% and

interest from 6% to 9% per annum in view of the Amendment Act of 68 of 1984 could be negated by the Executing Court and whether the Executing Court could go behind the judgment and decree passed by the High Court.

Dismissing the appeals, the Court

HELD: 1.1. The Land Acquisition Act, 1894 came to be amended by virtue of the Amendment Act of 68 of 1984. The said amendment became effective from 24.09.1984. By the aforesaid Amendment Act of 68 of 1984, amendments were brought into the provisions of Section 23, in that provisions of Sub-Section 23 (1A) and Sub-Section 23(2) were inserted and added. Similarly, an amendment was brought into the provisions of Section 34 by way of Amendment Act of 68 of 1984, which deals with the quantum of compensation of interest to be paid to the claimants. In the said section interest became payable on amendment at 9 per cent per annum for the period of first one year from the date on which possession was taken, and thereafter, at the rate of 15 per cent per annum on expiry of the period of one year on the amount of compensation. The aforesaid amendment was made effective by the amending Act of 68 of 1984 from 24.09.1984. [Paras 12, 13] [142-A-B; G-H; 143-A]

1.2. The provisions in Sub-Sections 30 (1) & 30(2) of the Act of 68 of 1984 regarding application of the provisions of the aforesaid amendment to proceedings pending on or after 30.04.1982 came to be considered in various decisions of this Court. In *Raghubir Singh* case*, this Court was called upon to determine as to which awards, references and/or appeals would be entitled to avail of the enhanced rates of interest by virtue of the Amendment of 1984. In adjudicating the matter, this Court clearly held that the award made by the Collector under

Section 11 of the Act made between 30-4-1982 and 24-9-1984, i.e., the dates of introduction of the Land Acquisition Amendment Bill, 1982 in the House of the People and that of commencement of operation of the Land Acquisition (Amendment) Act, 1984 respectively, will be entitled to the enhanced rates under the Amendment. This Court also held that an award made by the Principal Civil Court of Original Jurisdiction under Section 23 of the parent Act on a reference made to it by the Collector under Section 19 of the Act between the aforesaid dates would also be entitled to the same, even though it be upon reference from an award made before 30-4-1982. This decision of the Court, passed by a Bench of 5 Judges, squarely applies to the appeals in this case, and makes it amply clear that the award of the Land Acquisition Officer/Collector or of the Reference Court must have been made between the aforesaid stipulated period, i.e., between 30.4.1982 and 24.9.1984. [Paras 14, 15 and 16] [143-B; 144-B-E; 147-F-G]

1.3. The applicability of the Amendment Act to a proceeding of the aforesaid nature was made clear by the Act of 1984 by enacting the provision of Section 30(2). In all the instant appeals, the award of the Collector and that of the reference court in their case was passed prior to 30.04.1982. Therefore, the said amendment brought in by the Act of 1984 to the concerned provisions could not have been made applicable to the proceeding of the present cases. Hence, the judgment and order passed by the High Court giving the benefit provided by the Amendment Act of 68 of 1984, viz., Section 23(1A) and 23(2) and the amended provision of Section 34 of the Act, cannot be made applicable in the cases of the appellants-landholders. [Para 17] [146-G-H; 147-A-B]

Union of India & Anr. v. Raghubir Singh ***(Dead) by Lrs. Etc.*** **(1989) 2 SCC 754 – followed.**

2.1. Though the Executing court cannot go behind the decree and grant interest not granted in the decree, but, if a decree is found to be nullity, the same could be challenged and interfered with at any subsequent stage, say, at the execution stage or even in a collateral proceeding. This is in view of the fact that if a particular Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction and the same is *non-est* and void *ab initio***. The defect of jurisdiction strikes at the very root and authority of the Court to pass decree which cannot be cured by consent or waiver of the parties. The validity of any such decree or order could be challenged at any stage. [Paras 18, 19 and 20] [147-C-F]**

2.2. In the instant appeals, the judgment and order passed by the High Court before the amendment Act of 68 of 1984 became final and binding as no appeal was brought to this Court thereafter. However, consequent to the Amendment in the Land Acquisition Act, the appellants had filed civil miscellaneous applications for the grant of 30 per cent solatium and 9 per cent interest for first year and 15 per cent interest thereafter, which was allowed by the High Court. Such a judgment and decree which has become final and binding could not have been reopened by the High Court on the basis of revision applications filed under Section 151 and 152 of CPC. [Paras 24 and 29] [149-D-E; 154-H; 155-A-B]

2.3. The orders passed by the High Court granting enhanced solatium and interest as amended by Act 68 of 1984 is without jurisdiction and a nullity. [Paras 30 and 31] [155-C-D]

State of Punjab & Others v. Krishan Dayal Sharma **AIR 1990 SC 2177;** *Union of India v. Sube Ram & Others* **(1997) 9 SCC 69;** *Amrit Bhikaji Kale & Others v. Kashinath*

Janardhan Trade & Anothers **(1983) 3 SCC 437;** *Balvant N. Viswamitra & Others v. Yadav Sadashiv Mule (Dead) Through Lrs. & Others* **(2004) 8 SCC 706;** *Chiranjilal Shrilal Goenka (deceased) Through Lrs. v. Jasjit Singh & Others* **(1993) 2 SCC 507;** *Union of India v. Swaran Singh & Others* **(1996) 5 SCC 501;** *Union of India v. Rangila Ram (dead) by Lrs.* **(1995) 5 SCC 585;** *Dwaraka Das v. State of M.P. & Another* **(1999) 3 SCC 500;** *State of Haryana & Others v. Ram Kumar Mann* **(1997) 3 SCC 321;** *State of Bihar & Others v. Kameshwar Prasad Singh & Another* **(2000) 9 SCC 94** ***Secy.,*** *Jaipur Development Authority v. Daulat Mal Jain* **1996 (7) SCALE 135 – referred to.**

Case Law Reference:

(1989) 2 SCC 754	**followed**	**Para 15**
AIR 1990 SC 2177	**referred to**	**Para 18**
(1997) 9 SCC 69	**referred to**	**Para 20**
(1983) 3 SCC 437	**referred to**	**Para 21**
(2004) 8 SCC 706	**referred to**	**Para 22**
(1993) 2 SCC 507	**referred to**	**Para 23**
(1996) 5 SCC 501	**referred to**	**Para 24**
(1995) 5 SCC 585	**referred to**	**Para 25**
(1999) 3 SCC 500	**referred to**	**Para 26**
(1997) 3 SCC 321	**referred to**	**Para 26**
(2000) 9 SCC 94	**referred to**	**Para 28**
1996 (7) SCALE 135	**referred to**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3568 of 2005.

From the Judgment & Order dated 24.09.2002 of the High Court of Punjab & Haryana at Chandigarh in Civil Revision No. 5481 of 2001.

WITH

C.A. Nos. 3566 & 3567 of 2005.

Nanita Sharma, Shalini, Vivek Sharma, K.R. Gupta, R.C. Gubrela, Suresh Kumar Sharma, Shishpal L., Balbir Singh Gupta for the Appellants.

Mohan Parasaran, ASG, S. Wasim A. Qadri, M. Ullah, Anil Katiyar, Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. As the facts and issues involved are similar and interconnected, we propose to dispose of all the appeals by this common judgment and order. However, we may record the facts of each of the cases separately and deal with the issues at one place as they are interconnected.

Civil Appeal No. 3568 of 2005

2. This appeal arises out of the acquisition of land of Sarup Singh, the appellant herein, by issuing a notification under Section 4 of the Land Acquisition Act, 1894 [hereinafter referred to as "the Act"] on 09.10.1974. Possession of the land was taken on 03.12.1974 and the award was passed on 11.06.1975. As against the award passed by the Special Land Acquisition Collector, Bhatinda Cantonment, a reference case was filed which was decided by the Reference Court on 31.07.1979. Finally, the matter came to be decided by the High Court of Punjab & Haryana. The High Court by an order dated 08.12.1982, determined the market value of the land and the appellants herein were also granted solatium at 15 per cent and also interest at 6 per cent per annum. The aforesaid

judgment and order passed by the High Court became final and binding as no appeal was brought to this Court thereafter.

3. Subsequently, however, the decree holders-appellants filed Civil Miscellaneous Applications No. 1296 of 1985 under Sections 151 and 152 of Code of Civil Procedure, 1908 [for short "C.P.C."] praying for solatium and interest at the enhanced rate as provided for by the amendment in the Act (by way of Act 68 of 1984) which was given effect from 24.09.1984. The High Court allowed the said Miscellaneous Petition by order dated 17.02.1986 by passing an order enhancing the payment of solatium from 15 per cent to 30 per cent and interest from 6 per cent to 9 per cent per annum for the first year after acquisition and 15 per cent per annum thereafter till the date of actual payment of the enhanced amount of compensation.

4. On the basis of the aforesaid order dated 17.02.1986, the appellants filed an execution application before the Additional District Judge, Bhatinda. The execution application was dismissed by the Additional District Judge, Bhatinda by an order dated 30.08.2001 holding that the appellants herein are not entitled to enhanced rate of solatium and interest as the award of the Collector and that of the reference court in their case was passed prior to 30.04.1982. The Additional District Judge further held that the order passed by the High Court under Sections 151 and 152 of C.P.C. was without jurisdiction and as such a nullity.

5. Being aggrieved by the said order, the appellants herein filed a miscellaneous petition before the High Court which was registered as Civil Revision No. 5481 of 2001 and by the impugned order dated 24.09.2002, the same was dismissed upholding the order passed by the Additional District Judge, Bhatinda as against which the present appeal was filed.

Civil Appeal No. 3566 of 2005

6. This appeal arises out of the same notification dated

09.10.1974, as that of Civil Appeal No. 3568 of 2005, issued by the respondents under Section 4 of the Act proposing to acquire land belonging to one Chuhar Singh. Chuhar Singh died subsequently and therefore his sons, viz., Hardev Singh, Balwant Singh and Gurbachan Singh preferred claim on the basis of which the Special Land Acquisition Collector, Bhatinda Cantonment gave his award on 11.06.1975. As the appellants sought for reference, a reference case was registered in which the Additional District Judge passed a judgment and order dated 31.07.1979. The matter was taken to the High Court which was initially registered as RFA No. 10687 of 1980 and was decided on 30.07.1981. After which a Letters patent Appeal No. 128 of 1982 was filed which was decided on 18.12.1985 and the said was partly allowed and the respondents were directed to pay solatium at the rate of 30 per cent of the market value of the acquired land as determined by the court and also interest at the rate of 9 per cent for the first year from the date of their possession by the Land Acquisition Collector and at the rate of 15 per cent thereafter till the date of actual payment of enhanced amount of compensation.

7. The appellants herein filed an execution application for realization of the balance amount in pursuance to the order of the High Court in LPA No. 128 of 1982 dated 18.12.1985 which was rejected by the Additional District Judge, Bhatinda by his order dated 30.08.2001 and the aforesaid execution applications of the appellants were dismissed by holding that they were not entitled to enhanced rate of solatium and interest as the award of the Collector and that of the reference court were prior to 30.04.1982. Additional District Judge, Bhatinda further held that the aforesaid order passed by the High Court is nullity in the eyes of law as the benefit of the order of the High Court dated 18.12.1985 cannot be given to the appellants in view of various decisions rendered by the Supreme Court.

8. Being aggrieved by the aforesaid judgment and order

passed by the Additional District Judge, Bhatinda the appellants filed Civil Revision which was registered as Civil Revision No. 6171 of 2001. The aforesaid matter was also heard along with the Civil Revision No. 5481 of 2001 filed by Sarup Singh and Gurdip Singh which was disposed of by the impugned judgment and order which is under challenge in Civil Appeal Nos. 3568 and 3566 of 2005.

Civil Appeal No. 3567 of 2005

9. In this case, the lands of the appellants were acquired by Bhatinda Cantonment in the year 1976 and Special Land Acquisition Collector of Bhatinda Cantonment gave his award on 18.06.1979. On an application being filed by the appellants for reference the same was referred to Additional District Judge, Bhatinda and it was decided on 31.7.1980. Being aggrieved by the said decision of the Additional District Judge, Bhatinda appellants filed FRA No. 412 of 1981 before the High Court which was decided on 27.07.1983. Still aggrieved, appellants filed Special Leave Petition No. 6701-23 of 1984 in this Court culminating in Civil Appeal Nos. 4132-65 of 1986. This Court on 1.9.1986 decided the aforesaid appeals alongwith the Civil Appeal Nos. 5142-65 of 1986 and enhanced the compensation holding that the ends of justice require that compensation shall be awarded to the appellants at the rate of Rs. 17/- per sq. yard upto the depth of 500 meter of the acquired and at the rate of Rs. 10/- per sq. yard beyond the depth of 500 meters. This Court also held that consequential payments would also be made on the basis of the aforesaid rate of compensation. Appellants then filed their first execution application before the Additional District Judge for getting said enhanced amount which was accordingly ordered vide order dated 9.3.1998 but with regard to benefits of amended Sections, viz., 23(2) and 28 of the Act, it rejected the prayer of the appellants holding that since the award of the Collector was given on 18.6.1979 and award of the Court was given on 31.7.1980, appellants are not entitled to the said benefits.

Respondents then filed revision before the High Court but the same was dismissed. Respondents then filed appeals before this Court and vide order dated 12.7.99, the matter was directed to be filed before the High Court.

10. All the above-mentioned three appeals were listed for hearing and we heard the learned counsel appearing for the parties who have ably taken us through all the relevant documents on record and also placed before us the various decisions which may have a bearing on the issues raised in the present appeals.

11. On the basis of the arguments advanced before us the following issues arise for our consideration: -

(a) Whether the benefit of enhancement in the rate of solatium and interest as introduced by the Amendment Act of 68 of 1984 could be given to such of the claimants whose cases for payment of compensation were finalized prior to coming into force of the aforesaid Amendment Act of 98 of 1984?

AND

(b) Whether the judgment and order given by the High Court enhancing the quantum of compensation by giving benefit of enhanced solatium from 15 per cent to 30 per cent and interest from 6 per cent to 9 per cent per annum in view of the Amendment Act of 68 of 1984 could be negated by the Court of Additional District Judge, Bhatinda while acting as an Executing Court and whether the Executing Court of Additional District Judge, Bhatinda could go behind the judgment and decree passed by the High Court?

12. In order to answer the aforesaid two issues which arise for our consideration, we need to point out that the Land

Acquisition Act, 1894 came to be amended by virtue of the Amendment Act 68 of 1984. The said amendment became effective from 24.09.1984. By the aforesaid Amendment Act of 68 of 1984, amendments were brought in to the provisions of Section 23, in that provisions of Sub-Section 23 1(A) and Sub-Section 23 (2) were inserted and added, which read as follows: -

"Section 23 - Matters to be considered in determining compensation […]

[…] [(1A) In addition to the market value of the land above provided, the Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market-value for the period commencing on and from the date of the publication of the notification under section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

Explanation.-In computing the period referred to in this sub-section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any court shall be excluded.

(2) In addition to the market-value of the land as above provided, the court shall in every case award a sum of [thirty per centum on such market-value, in consideration of the compulsory nature of the acquisition.]"

13. Similarly, an amendment was brought in to the provisions of Section 34 by way of Amendment Act of 68 of 1984, which deals with the quantum of compensation of interest to be paid to the claimants. In the said section interest became payable on amendment at 9 per cent per annum for the period of first one year from the date on which possession was taken, and thereafter, at the rate of 15 per cent per annum on expiry

of the period of one year on the amount of compensation. The aforesaid amendment was made effective by the amending Act of 68 of 1984 from 24.09.1984.

14. We may also refer to the provisions in Sub-Sections 30 (1) & 30 (2) of the Act of 68 of 1984 regarding application of the provisions of the aforesaid amendment to proceedings pending on or after 30.04.1982 which read as follows: -

"30. Transitional Provisions –

(1) The Provisions of sub-section (1A) of Section 23 of the principal Act, as inserted by clause (a) of Section 15 of this Act, shall apply, and shall be deemed to have applied, also to, and in relation to:

(a) every proceeding for the acquisition of any land under the principal Act pending on the 30th day of April, 1982 [the date of introduction of the Land Acquisition (Amendment) Bill, 1982, in the House of the People], in which no award has been made by the Collector before that date.

(b) every proceeding for the acquisition of any land under the principal Act commenced after that date, whether or not an award has been made by the Collector before the date of commencement of this Act.

(2) The provisions of sub-section (2) of Section 23 and Section 28 of the principal Act, as amended by clause (b) of Section 15 and Section 18 of this Act respectively, shall apply, and shall be deemed to have applied, also to, and in relation to, any award made by the Collector or Court or to any order passed by the High Court or Supreme Court in appeal against any such award under the provisions of the principal Act after the 30th day of April, 1982 [the date of introduction of the Land Acquisition (Amendment) Bill, 1982, in the House of the People] and before the commencement of this Act.."

15. The aforesaid amended provisions and their application came to be considered in various decisions of this Court. Reference in this connection can be made to the decision of *Union of India & Anr. v. Raghubir Singh (Dead) by Lrs. Etc.* reported in (1989) 2 SCC 754. This Court in the aforesaid case was called upon to determine as to which awards, references and/or appeals would be entitled to avail of the enhanced rates of interest by virtue of the Amendment of 1984. In adjudicating the matter, this Court clearly held that the award made by the Collector under Section 11 of the Act made between 30-4-1982 and 24-9-1984, i.e., the dates of introduction of the Land Acquisition Amendment Bill, 1982 in the House of the People and that of commencement of operation of the Land Acquisition (Amendment) Act, 1984 respectively, will be entitled to the enhanced rates under the Amendment. This Court also held that an award made by the Principal Civil Court of Original Jurisdiction under Section 23 of the parent Act on a reference made to it by the Collector under Section 19 of the Act between the aforesaid dates would also be entitled to the same, even though it be upon reference from an award made before 30-4-1982,. in which this Court held as follows: -

"31. In construing Section 30(2), it is just as well to be clear that the award made by the Collector referred to here is the award made by the Collector under Section 11 of the parent Act, and the award made by the Court is the award made by the Principal Civil Court of Original Jurisdiction under Section 23 of the parent Act on a reference made to it by the Collector under Section 19 of the parent Act. There can be no doubt that the benefit of the enhanced solatium is intended by Section 30(2) in respect of an award made by the Collector between 30-4-1982 and 24-9-1984. Likewise the benefit of the enhanced solatium is extended by Section 30(2) to the case of an award made by the Court between 30-4-1982 and 24-9-1984, even

though it be upon reference from an award made before 30-4-1982.

On the question of appeals to the High Court or Supreme Court, however, this Court adopted a different stand. It held:-

> 32. The question is: What is the meaning of the words "or to any order passed by the High Court or Supreme Court on appeal against any such award?" Are they limited, as contended by the appellants, to appeals against an award of the Collector or the Court made between 30-4-1982 and 24-9-1984, or do they include also, as contended by the respondents, appeals disposed of between 30-4-1982 and September 24,1984 even though arising out of awards of the Collector or the Court made before 30-4-1982. We are of opinion that the interpretation placed by the appellants should be preferred over that suggested by the respondents. The submission on behalf of the respondents is that the words 'any such award' mean the award made by the Collector or Court, and carry no greater limiting sense; and that in this context, upon the language of Section 30(2), the order in appeal is an appellate order made between 30-4-1982 and 24-9-1984 — in which case the related award of the Collector or of the Court may have been made before 30-4-1982. To our mind, the words 'any such award' cannot bear the broad meaning suggested by learned counsel for the respondents. […] The words 'any such award' are intended to have deeper significance, and in the context in which those words appear in Section 30(2) it is clear that they are intended to refer to awards made by the Collector or Court between 30-4-1982 and 24-9-1984. In other words Section 30(2) of the Amendment Act extends the benefit of the enhanced solatium to cases where the award by the Collector or by the Court is made between 30-4-1982 and 24-9-1984 or to appeals against such awards decided by the High Court and the Supreme Court whether the decisions of the High

> Court or the Supreme Court are rendered before 24-9-1984 or after that date. All that is material is that the award by the Collector or by the Court should have been made between 30-4-1982 and 24-9-1984 […] *[T]o our mind it must necessarily intend that the appeal to the High Court or the Supreme Court, in which the benefit of the enhanced solatium is to be given, must be confined to an appeal against an award of the Collector or of the Court rendered between 30-4-1982 and 24-9-1984.*
>
> […] 34. Learned counsel for the respondents has strenuously relied on the general principle that the appeal is a rehearing of the original matter, but we are not satisfied that he is on good ground in invoking that principle. [...] If the proceeding has terminated with the award of the Collector or of the Court made between the aforesaid two dates, the benefit of Section 30(2) will be applied to such award made between the aforesaid two dates. If the proceeding has passed to the stage of appeal before the High Court or the Supreme Court, it is at that stage when the benefit of Section 30(2) will be applied. *But in every case, the award of the Collector or of the Court must have been made between 30-4-1982 and 24-9-1984.*"

16. This decision of the Court, passed by a Bench of 5 Judges, squarely applies to the appeals in this case, and makes it amply clear that the award of the Land Acquisition Officer/Collector or of the Reference Court must have been made between the aforesaid stipulated period, i.e., between 30.4.1982 and 24.9.1984.

17. The applicability of the Amendment Act to a proceeding of the aforesaid nature was made clear by the Act of 18 of 1984 by enacting the provision of Section 30(2). In all the appeals before us, the award of the Collector and that of the reference court in their case was passed prior to 30.04.1982. Therefore, the said amendment brought in by the

Act of 18 of 1984 to the concerned provisions could not have been made applicable to the proceeding of the present cases. Hence, the judgment and order passed by the High Court giving the benefit provided by under the Amendment Act of 68 of 1984, viz., Section 23(1A) and 23(2) and the amended provision of Section 34 of the Act, cannot be made applicable in the cases of the appellants herein.

18. In so far as the second issue is concerned, it is true that the executing court cannot go behind the decree and grant interest not granted in the decree as submitted by the counsel appearing for the appellants in the light of the decision rendered by this Court in *State of Punjab & Others v. Krishan Dayal Sharma* reported in AIR 1990 SC 2177.

19. But, if a decree is found to be nullity, the same could be challenged and interfered with at any subsequent stage, say, at the execution stage or even in a collateral proceeding. This is in view of the fact that if a particular Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction and the same is *non-est* and void *ab initio*.

20. The aforesaid position is well-settled and not open for any dispute as the defect of jurisdiction strikes at the very root and authority of the Court to pass decree which cannot be cured by consent or waiver of the parties. This Court in several decisions has specifically laid down that validity of any such decree or order could be challenged at any stage. In *Union of India v. Sube Ram & Others* reported in (1997) 9 SCC 69 this court held thus:

> "5. […] here is the case of entertaining the application itself; in other words, the question of jurisdiction of the court. Since the appellate court has no power to amend the decree and grant the enhanced compensation by way of solatium and interest under Section 23(2) and proviso to Section 28 of the Act, as amended by Act 68 of 1984, it is a question of jurisdiction of the court. Since courts have no jurisdiction, it is the settled legal position that it is a nullity and it can be raised at any stage."

21. In yet another case of Amrit Bhikaji Kale & Others v. Kashinath Janardhan Trade & Anothers reported in (1983) 3 SCC 437 this Court has held that when a Tribunal of limited jurisdiction erroneously assumes jurisdiction by ignoring a statutory provision and its consequences in law on the status of parties or by a decision are wholly unwarranted with regard to the jurisdictional fact, its decision is a nullity and its validity can be raised in collateral proceeding.

22. In *Balvant N. Viswamitra & Others v. Yadav Sadashiv Mule (Dead) Through Lrs. & Others* reported in (2004) 8 SCC 706 this Court stated thus:

> "9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. *Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.*"

23. In *Chiranjilal Shrilal Goenka (deceased) Through Lrs. v. Jasjit Singh & Others* reported in (1993) 2 SCC 507 this Court stated thus:

"18. It is settled law that a decree passed by a court without jurisdiction on the subject-matter or on the grounds on which the decree made which goes to the root of its jurisdiction or lacks inherent jurisdiction is a coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party. ……."

24. In the present cases the judgment and order passed by the High Court before the amendment Act of 68 of 1984 became final and binding as no appeal was brought to this Court thereafter. However, consequent to the Amendment in the Land Acquisition Act, the appellants had filed civil miscellaneous applications for the grant of 30 per cent solatium and 9 per cent interest for first year and 15 per cent interest thereafter. This Court has also held in a catena of decisions that a decree once passed and which has become final and binding cannot be sought to be amended by filing petition under Sections 151 and 152, C.P.C. In the case of *Union of India v. Swaran Singh & Others* reported in (1996) 5 SCC 501 this Court held thus:-

"8. The question then is whether the High Court has power to entertain independent applications under Sections 151 and 152 and enhance solatium and interest as amended under Act 68 of 1984. This controversy is no longer res integra. In State of Punjab v. Jagir Singh and also in a catena of decisions following thereafter in Union of India v. Pratap Kaur; State of Maharashtra v. Maharau Srawan Hatkar; State of Punjab v. Babu Singh; Union of India v. Raghubir Singh and K.S. Paripoornan v. State of Kerala, this Court has held that the Reference Court or the High Court has no power or jurisdiction to entertain any

applications under Sections 151 and 152 to correct any decree which has become final or to independently pass an award enhancing the solatium and interest as amended by Act 68 of 1984. Consequently, the award by the High Court granting enhanced solatium at 30% under Section 23(2) and interest at the rate of 9% for one year from the date of taking possession and thereafter at the rate of 15% till date of deposit under Section 28 as amended under Act 68 of 1984 is clearly without jurisdiction and, therefore, a nullity. The order being a nullity, it can be challenged at any stage. Rightly the question was raised in execution. The executing court allowed the petition and dismissed the execution petition. The High Court, therefore, was clearly in error in allowing the revision and setting aside the order of the executing court."

25. In the case of *Union of India v. Rangila Ram (dead) by Lrs.* Reported in (1995) 5 SCC 585 held as follows: -

"4. The point is no longer res integra. This Court has considered the scope of the power of the High Court under Sections 151 and 152, CPC and also under Section 13-A of the Act. This Court has held that once the civil court made an award as per law then in force which became final and that there is no error of law as on that date. Subsequent amendment does not give power to the court to amend the decree under Sections 151 and 152, CPC. This was held in *State of Maharashtra v. Maharau Srawan Hatkar and Union of India v. Pratap Kaur*. In Maharau Srawan Hatkar case this Court held that the civil court lacked inherent jurisdiction and was devoid of the power to entertain an application to award additional benefits under the Amendment Act 68 of 1984. The facts therein were that the award had become final and the Amendment Act 68 of 1984 had come into force on 24-9-1984. The respondents made an application under Sections 151 and 152, CPC to award enhanced solatium and additional

benefits etc. and the civil court allowed and granted the same. In that context, considering the civil court's power under Sections 151 and 152, CPC, this Court laid the above law."

26. In the case of *Dwaraka Das v. State of M.P. & Another* reported in (1999) 3 SCC 500 this Court described the scope of Section 152, C.P.C. thus:

"6. Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. ……"

27. There are number of decisions of this Court wherein it has also been held that a wrong judgment given by the High Court cannot be taken as precedence for perpetrating such wrong. In the case of *State of Haryana & Others v. Ram Kumar Mann* reported in (1997) 3 SCC 321 held as follows: -

"3. The question, therefore, is whether the view taken by the High Court is correct in law. It is seen that the respondent had voluntarily resigned from the service and the resignation was accepted by the Government on 18-5-1982. On and from that date, the relationship of employer and the employee between the respondent and the State ceased and thereafter he had no right, whatsoever, either to claim the post or a right to withdraw his resignation which had already become effective by acceptance on 18-5-1982…The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing mis-appropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Article 14 for reinstatement? The answer is obviously "No".. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right. Under these circumstances, the High Court was clearly wrong in

directing reinstatement of the respondent by a mandamus with all consequential benefits."

28. In the case of *State of Bihar & Others v. Kameshwar Prasad Singh & Another* reported in (2000) 9 SCC 94 this Court held thus: -

"30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner... Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed: (SCC p. 465, para 9)

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

Again in *Secy., Jaipur Development Authority v. Daulat Mal Jain* reported in 1996 (7) SCALE 135 this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding: (SCC pp. 51-52, para 28)

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal

order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

31. In *State of Haryana v. Ram Kumar Mann* this Court observed: (SCC p. 322, para 3)

"The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously 'No'. In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."

29. In the light of the aforesaid settled position of law, when we examine the facts of the present cases it is patently obvious that the reference case and the matter of payment of

compensation to the appellants became final and binding after the award was passed and the judgment was pronounced by the reference court and further by the High Court and thereafter, no appeal having been filed in this Court. Such a judgment and decree which has become final and binding could not have been reopened by the High Court on the basis of revision applications filed under Section 151 and 152 of C.P.C.

30. In view of the two issues that we have discussed and elaborated herein, we are of the considered opinion that the executing court as also the High Court were justified in holding that the orders passed by the High Court granting enhanced solatium and interest as amended by Act 68 of 1984 is without jurisdiction and a nullity.

31. We, therefore, find no merit in these appeals. The orders passed by the executing court and the High Court are found to be legal, valid and justified. We, accordingly, dismiss all these appeals, but, we leave the parties to bear their own costs.

B.B.B. Appeals dismissed.

M/S BAJAJ HINDUSTAN LTD.

v.

SIR SHADI LAL ENTERPRISES LTD. & ANR.

(Civil Appeal No. 5856 of 2005)

NOVEMBER 29, 2010

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Industries (Development and Regulation) Act, 1951:

s.29B – De-licencing of sugar industry – Press Note 12 dated 31.8.1998, followed by a formal Notification on 11.9.1998 issued u/s.29B(1) of the Act, de-licencing the sugar industry, subject to the condition that there would be a minimum of 15 Km. distance between two sugar mills – Validity of – Held: Valid.

s.29B – Power under – Held: Is not tainted by the vice of excessive delegation since the essential legislative policy is specified in the preamble of the Act and is writ large throughout the provisions of the Act.

s.29B – Legislative history of – Discussed.

s.29B – Notification dated 11.9.1998 issued under – Quashing of, by High Court holding that the de-licencing could only be done by the legislature and not by the executive – Held: The executive power of Union of India is co-extensive with the legislative power under Article 73(1) of the Constitution – Therefore, notification u/s.29B was sufficient for this purpose and it was not necessary to amend the Act to de-license the sugar industry – There is nothing in the 1951 Act which required a notification u/s.29B(1) to be approved by Parliament – Whether there should be licensing of an industry or not is for the executive authorities to decide – Constitution of India, 1950 – Article 73(1).

Administrative law:

Judicial review – Administrative decisions – Scope of interference by court – Held: The court cannot sit in judgment over the wisdom of the policy of the legislature or the executive – Court can, however, interfere with administrative decisions when there is clear violation of the statute or a constitutional provision, or there is arbitrariness in the Wednesbury sense – It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest.

Policy decision – Power to withdraw or change – Power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by mala fide exercise of power, or the decision or action taken is in abuse of power – The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law – When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down a new policy.

Economic and fiscal regulatory measures – Judicial review – These are fields where judges should encroach upon very warily as judges are not experts in these matters – Since economic matters are extremely complicated this inevitably entails special treatment for distinct social phenomena – The State must, therefore, be left with wide latitude in devising ways and means of imposing fiscal regulatory measures, and the court should not, unless compelled by the statute or by the Constitution, encroach into this field.

Sugar: Historical background of sugar industry – Industries (Development and Regulation) Act, 1951 – First Schedule.

The Government of India issued Press Note 12 dated

31.8.1998 whereby it de-licenced the sugar industry, subject to the condition that there would be a minimum of 15 Km. distance between two sugar mills. The Press Note was followed by a formal Notification on 11.9.1998 issued under Section 29B(1) of the Industries (Development and Regulation) Act, 1951. The High Court quashed the Press Note and the Notification on the ground that the delicencing could only be done by the legislature and not by the executive. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. The Industries (Development and Regulation) Act, 1951 placed the sugar industry in the First Schedule to the Act, which meant that no sugar industry could be set up without a licence from the Central Government. Since independence, the situation has, however, totally changed in India. Now India has a heavy industrial base and also has several sugar mills. Hence the earlier regulatory laws relating to the sugar industry, including the requirement of a licence, have evidently served their purpose and are no longer required and may in fact be obstructing the growth of industry in India now. The policy of liberalization began in the early 1990s. On 24th July 1991, the Government of India announced its liberalized "Industrial Policy 1991". On 25th July, 1991, the first notification i.e. Notification No.477(E) came to be issued by virtue of which 20 out of the 38 Scheduled industries were taken out of the purview of Section 10, 11, 11A and 13 of the Act. The structure of this notification was that it appended three negative lists (Schedule I, II and III) and the scheduled industries not specified in these three lists were obviously within the scope of the exemption. These lists were changed from time to time during the period 1991-2010 and as things stand at present only a handful of industries now remain in these negative lists. As far as

the sugar industry is concerned, a Parliamentary Committee was appointed which recommended de-licensing of the sugar industry as early as in 1996. Later, pursuant to certain directions of the Allahabad High Court yet another Committee was appointed (the Mahajan Committee), which also supported reform of the licensing system. In August 1998, considering the recommendations of these two reports, the Government of India issued Press Note 12 dated 31.8.1998 and the formal notification on 11.9.1998 under Section 29B(1) of the Act. A perusal of the background in which de-licensing of sugar industry was done shows that it was a well considered step which was done having regard to the stage of development of the industry. [Paras 15 to 17] [169-B-H; 170-A-C]

Ojas Industries P. Ltd. vs. Oudh Sugar Mills Ltd & Ors **(2007) 4 SCC 723 – relied on.**

Ojas Industries P. Ltd. vs. Union of India & Ors **2006 (86) DRJ 593– referred to**

2.1. Section 29B provides that having regard to any of the four specified factors, if the Central Government is of the opinion that it would not be in public interest to apply "all or any" of the provisions of this Act to a scheduled industry, it may by notification in the official gazette exempt (conditionally or otherwise) any industrial undertaking or any class of industrial undertakings, or any scheduled industry or class of scheduled industries. The four specified factors on the basis of which the power may be exercised are as follows: a) the smallness of the number of workers employed; or b) the amount invested in any industrial undertaking; or c) the desirability of encouraging small undertakings generally; or d) the stage of development of any scheduled industry. Sub-section 2 of the Section 29B also confers upon the Central Government an express power of cancellation of

such exemption. Sufficient guidelines have been provided by the legislature for the Government in this connection. The power conferred under Section 29B is not tainted by the vice of excessive delegation because the essential legislative policy is specified in the preamble to the IDR Act and is writ large throughout the provisions of the Act. [Paras 28 and 29, 30] [176-D-H; 177-A]

P. J. Irani vs. State of Madras **(1962) 2 SCR 169;** *Sitaram Bishambar Dayal vs. State of U.P.* **(1972) 4 SCC 485;** *Mahe Beach Trading Co. and Ors. vs. Union Territory of Pondicherry and Ors.* **(1996) 3 SCC 741;** *State of Tamil Nadu vs. K. Sabhanayagam* **(1998) 1 SCC 318;** *Consumer Action Group vs. State of Tamil Nadu* **(2000) 7 SCC 425;** *Kishan Prakash Sharma and Ors. vs. Union of India and Ors.* **(2001) 5 SCC 212 – Relied on**

2.2. The legislative history of Section 29B clearly establishes the legislative intention to confer a wide power of exemption upon the Central Government. Section 28, as was originally enacted, conferred upon the Central Government, in general terms, the power to exempt any scheduled industry or any industrial undertaking from the operation of all or any provisions of this Act. There was no further provision of any parliamentary control (by way of placing the exemption notifications before parliament for its approval or otherwise) contemplated in the said original Section. Amendments were made to the IDR in 1953 when Section 29B was inserted in substitution of Section 28. The amended provision contemplated the grant of exemption on the four factors. In 1956 further amendments were made by way of insertion of Sub-section 2, which confers the power of cancellation of exemptions. [Para 31] [177-F-H; 178-A-B]

Shree Vindhya Paper Mills Case **AIR (1983) Bom 270 – Disapproved.**

3. It is well settled that the executive power of Union of India is co-extensive with the legislative power vide Article 73(1) of the Constitution. Therefore, the notification under Section 29B was sufficient for this purpose and it was not necessary to amend the Act to de-license the sugar industry. There is nothing in the 1951 Act which required a notification under Section 29B(1) to be approved by Parliament. Also, whether it is in the public interest to issue such a notification is ordinarily for the Government to decide, and the court should exercise judicial restraint in this connection. Whether there should be licensing of an industry or not is for the executive authorities to decide. [Paras 32, 34 and 37] [178-G-H; 179-E]

Shri Sitaram Sugar Co. Ltd. vs. Union of India **AIR 1990 SC 1277;** *India Cement Ltd. vs. Union of India* **AIR 1991 SC 724– Relied on.**

New State Ice Co. vs. Liebmann **285 U.S. 262 (1932);** *Secretary of Agriculture vs. Central Roig Refining Co.* **(1949) 338 US 604 (617) – Referred to.**

4.1. The court cannot sit in judgment over the wisdom of the policy of the legislature or the executive. The court can, however, interfere with administrative decisions only within narrow limits e.g. when there is clear violation of the statute or a constitutional provision, or there is arbitrariness in the Wednesbury sense. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest. The court should not ordinarily interfere with policy decisions, unless clearly illegal. Economic and fiscal regulatory measures are fields where Judges should encroach upon very warily as Judges are not experts in these matters. The impugned policy parameters were fixed by experts in the Central Government, and it is not ordinarily open to this

Court to sit in appeal over the decisions of these experts. [Para 22, 42, 43] [173-H; 181-H; 182-A-C]

Balco Employees' Union (Regd.) vs. Union of India and Ors. **2002(2) SCC 333;** *M.P. Oil Extraction vs. State of M.P.* **1997(7) SCC 592;** *Ugar Sugar Works Ltd. vs. Delhi Administration and Ors.* **(2001) 3 SCC 635;** *Bhavesh D. Parish and Ors. vs. Union of India and Anr.* **(2000) 5 SCC 471;** *Netai Bag and Ors. vs. State of West Bengal and Ors.* **(2000) 8 SCC 262;** *P.T.R. Exports (Madras) Pvt. Ltd. vs. Union of India and Ors.* **1996(5) SCC 268 – relied on.**

4.2. The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by *mala fide* exercise of power, or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The Government would take diverse factors for formulating the policy in the overall larger interest of the economy of the country. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down a new policy. Certain matters are by their nature such as best be left to experts in the field. There should be judicial restraint in fiscal and economic regulatory measures. All administrative decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated this inevitably entails special treatment for distinct social phenomena. The State must, therefore, be left with wide latitude in devising ways and means of imposing fiscal regulatory measures, and the court should not, unless compelled by the statute or by the Constitution, encroach into this field. It will make no difference whether the policy

has been framed by the legislature or the executive and in either case there should be judicial restraint. The Court can invalidate an executive policy only when it is clearly violative of some provisions of the Statute or Constitution or is shockingly arbitrary but not otherwise. The impugned Press Note and Notification were validly issued under Section 29B of the Act. Hence the impugned judgment cannot be sustained and it is hereby set aside. [Para 44, 46, 48, 49] [182-C-F; 183-G-H; 184-A-D]

Prag Ice & Oil Mills vs. Union of India **AIR 1978 SC 1296;** *Shri Sitaram Sugar Co. Ltd. vs. Union of India* **(1990) 3 SCC 223;** *Divisional Manager, Aravali Golf Club & Anr. vs. Chander Hass & Anr.* **JT (2008) 3 SC 221 – Relied on**

Case Law Refernce:

2006 (86) DRJ 593	**Referred to**	**Para 20**
(2007) 4 SCC 723	**Referred to**	**Para 20**
2002(2) SCC 333	**Relied on**	**Para 23**
1997(7) SCC 592	**Relied on**	**Para 25**
(2001) 3 SCC 635	**Relied on**	**Para 26**
(2000) 5 SCC 471	**Relied on**	**Para 26**
(2000) 8 SCC 262	**Relied on**	**Para 26**
1996(5) SCC 268	**Relied on**	**Para 27**
(1962) 2 SCR 169	**Relied on**	**Para 30**
(1972) 4 SCC 485	**Relied on**	**Para 30**
(1996) 3 SCC 741	**Relied on**	**Para 30**
(1998) 1 SCC 318	**Relied on**	**Para 30**
(2000) 7 SCC 425	**Relied on**	**Para 30**

(2001) 5 SCC 212	**Relied on**	**Para 30**
AIR (1983) Bom 270	**Disapproved**	**Para 31**
285 U.S. 262 (1932)	**Referred to**	**Para 38**
AIR 1990 SC 1277	**Relied on**	**Para 39**
AIR 1991 SC 724	**Relied on**	**Para 40**
(1949) 338 US 604	**Referred to**	**Para 41**
AIR 1978 SC 1296	**Relied on**	**Para 45**
(1990) 3 SCC 223	**Relied on**	**Para 45**
JT (2008) 3 SC 221	**Relied on**	**Para 50**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5856 of 2005.

From the Judgment & Order dated 24.08.2005 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 36685 of 2004.

WITH

SLP (C) No. 1398 of 2006.

C.A. Nos. 5857 & 5858 of 2005.

K.K. Venugopal, Rajeev Dutta, L. Nageshwar Rao, Sudhir Ch. Agarwal, Syed Shahid Husain Rizavi, Sanjeev K. Singh, Uday Kumar, Roma Ahuja, D.K. Pradhan, Neha Goyal, Noor Afshan Bano, Somanadri Goud, Sameer Parekh, Parijat Sinha, Reshmi Rea Sinha, Anil Kumar Mishra, Vikram Ganguly, Ravi Prakash, Mehrotra Sandeep Singh, Vibhu Tiwari, Manu Agarwal, Ruby Singh Ahuja, Abeer Kumar, Anil Dutt, Sanjeev K. Kapoor, Narender Kmar Verma for the Appellants.

The Judgment of the Court was delivered

SLP © No.1398 of 2006

1. As prayed by learned counsel Mr. Parijat Sinha this petition is dismissed as withdrawn.

Civil Appeal No.5856 of 2005

2. These petitions have been filed against the judgment and order dated 24.8.2005 in Civil Misc. Writ Petition No.36685 of 2004 of the High Court of Judicature at Allahabad

3. By that decision the High Court has quashed the Press Note Number 12 dated 31.8.1998 and Notification SO 808(E) dated 11.9.1998, issued by the Central Government, by which the Sugar Industry was de-licensed under Section 29B of the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as 'the Act'.)

4. As a consequence, the High Court has debarred the respondent number 6 from establishing a sugar industry without obtaining a licence under Section 11 of the Act.

5. The High Court has also cancelled the permission, if any, granted to the respondent number 5 to 6 for purchasing and/or acquiring land for the purposed of establishing new sugar industries without licence.

6. It is submitted by learned counsel for the appellant that the effect of the impugned judgment and order quashing of the Notification dated 11.9.1998 and the Press Note dated 31.8.1998 is that the sugar industry in India has virtually been thrown back into the era of 'License Raj', nullifying the efforts of the Government of India to open up the economy to prospective investors. Also, all the sugar industries established throughout India after 11.9.1998 (as per the available data they are 100 in number) have become illegal. Industrial development, particularly in the sugar producing States, may well come to a grinding halt. An investment of about Rs.4000 crores in the sugar industry in U.P. alone has been jeopardized. The

petitioner herein alone has invested about Rs.600 crores in the sugar industry in the State of U.P. after the said Notification and Press note were issued. Further, the petitioner has committed an investment of an amount of Rs.700 crores in the sugar industry in U.P. It is submitted that lacs of farmers throughout India and particularly in the State of U.P. will suffer as they would be forced to sell their cane at lesser price to the existing sugar mills and those who are not even able to crush their assigned quantity of sugarcane and make timely payment of cane to the farmers, besides rendering thousands of workers directly employed in sugar factories jobless. Also, lacs of families indirectly attached with industries ancillary to the sugar industry will be severely affected as a result.

7. The petitioner acting bonafide and after complying with all the requirements stipulated in the Press Note/Notification, is setting up seven Sugar Factories at various places in U.P. with an aggregate investment of nearly Rs.1300 crores with a capacity of 7000 tonnes crushed per day (TCD) each. The petitioner has already completed and commenced production in one factory at Kinouni, Meerut, which the petitioner had set up in a record seven months period on 5.11.2004 and further three factories are already completed and ready to commence production in September, 2005 including the one which is under challenge in the writ petition in which the impugned judgment has been passed. Further, the petitioner is expecting to complete the commissioning of production in another three factories as fast as possible. The three factories are ready to operate before the on set of the forthcoming crushing season in September, 2005 to enable the farmers to take full economic advantage thereof. The remaining three factories shall commence production in 2006. The petitioner has already spent about Rs.600 crores on the purchase of land, plant and machinery and other miscellaneous expenditure. Further, the construction of buildings of the other three sugar factories and integrated distillery for production of Ethanol etc. is in full swing on which a further sum of Rs.700 crores is committed to be

invested for which the petitioner had also made GDR issue of US$ 110 million and committed in the international market. It is submitted that all the projects of the petitioner would be affected by the impugned judgment.

8. It is submitted that in the State of U.P., the sugar industry is one of the most important industries, with sugarcane being the chief cash crop. Thousands of people have been provided employment in this industry alone. Nearly half of India's sugarcane area is situated in U.P. alone, which constitutes roughly 42% of the total sugarcane production in the country. However, despite adequate availability of sugarcane area, U.P. still lags behind Maharashtra in the production of sugar. Even though the demand of sugar in the country has increased manifold but the sugar industry in U.P. has remained stagnant over a long period of time due to various reasons including sickness of uneconomic and unviable units mainly in the Government and the cooperative sector. Due to low sugarcane crushing capacity, the farmers were forced to sell their cane to less remunerative uses. The petitioner's sugar projects have brought a new hope to the farmers at large.

9. Sugar, is item number 25 of the first Schedule of the Industries (Development and Regulation) Act, 1951. Hence, no one could set up a sugar industry without a licence as per Section 11 of the Act.

10. The Industries (Development and Regulation) Act was passed in 1951. The statements of objects and reasons of the Act states as follows :

> "The object of this Bill is to provide the Central Government with the means of implementing their industrial policy which was announced in their Resolution No.1(3)-44(13) 48, dated 6th April, 1948 and approved by the Central Legislature. The Bill brings under Central control the development and regulation of a number of important industries, the activities of which affect the country as a whole and the development of which must be governed by economic factors of all-India import. The planning of future development on sound and balanced lines is sought to be secured by the licensing of all new undertakings by the Central Government. The Bill confers on Government power to make rules for the registration of existing undertakings, for regulating the production and development of the industries in the Schedule and for consultation with Provincial Governments on these matters."……

11. Section 2 of the Act states as follows :

> "**2. Declaration as to expediency of control by the Union** – It is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule."

12. Section 3(i) of the Act states as follows :

> "(i) "scheduled industry" means any of the industries specified in the First Schedule."

13. Sugar is mentioned in item no.25 of the First Schedule to the Act.

14. The historical background is that up to about 1930 there were practically no sugar industries in India and we had to import all our sugar from foreign countries like West Indies, Jawa, etc. Hence around 1930 the British Government invited some businessmen and requested them to set up sugar industries in India so that we can produce our own sugar. These businessmen told the British Government that they were willing to set up such industries provided they were assured of regular supply of sugarcane. It may be mentioned that sugarcane is the main raw material for manufacture of sugar. If an adequate supply of sugarcane was not available to the sugar mills the mills would have to close down entailing heavy losses to the proprietors. The Government accepted this request and framed

laws for ensuring a regular supply of sugarcane to any sugar mill established in India and made various regulations for the sugar industry.

15. The 1951 Act placed the sugar industry in the First Schedule to the Act, which meant that no sugar industry could be set up without a licence from the Central Government.

16. Since independence the situation has totally changed in India. Now India has a heavy industrial base and also has several sugar mills. Hence the earlier regulatory laws relating to the sugar industry, including the requirement of a licence, have evidently served their purpose and are no longer required and may in fact be obstructing the growth of industry in our country now. Hence the policy of liberalization began in the early 1990s and it appears that it was in pursuance of the liberalization policy that the impugned Press Note and Notification were issued.

17. A perusal of the background in which de-licensing of sugar industry was done shows that it was a well considered step which was done having regard to the stage of development of the industry. This background is:

(a) On 24th July 1991, the Government of India announced its liberalized "Industrial Policy 1991".

(b) On 25th July, 1991, the first notification i.e. Notification No.477(E) came to be issued by virtue of which 20 out of the 38 Scheduled industries were taken out of the purview of Section 10, 11, 11A & 13 of the Act. The structure of this notification was that it appended three negative lists (Schedule I, II and III) and the scheduled industries not specified in these three lists were obviously within the scope of the exemption.

These lists were changed from time to time during the period 1991-2010 and as things stand at present only a handful of industries now remain in these negative lists.

(c) As far as the sugar industry is concerned, a Parliamentary Committee was appointed which recommended de-licensing of the sugar industry as early as in 1996. Later, pursuant to certain directions of the Allahabad High Court yet another Committee was appointed (the Mahajan Committee), which also supported reform of the licensing system. In August 1998, considering the recommendations of these two reports the Government of India issued Press Note 12 dated 31.8.1998 de-licensing the sugar industry, subject to the condition that there would be a minimum of 15 km distance between two sugar mills.

The Press Note was then followed by the formal notification on 11.9.1998, issued under Section 29B(1) of the Act.

18. The Press Note and Notification read as follows :-

"**PRESS NOTE**

Subject : De-licensing of Sugar industry.

1. The Government has further viewed the list of industries under compulsory licensing and has decided to delete sugar industry from the list of industries requiring compulsory licensing under provisions of the Industries (Development and Regulation) Act, 1951. However, in order to avoid unhealthy competition among sugar factories to procure sugarcane, a minimum of 15 KM would continue to be observed between an existing sugar mill and a new mill by exercise of power under Sugarcane (Control) Order, 1966.

2. The entrepreneurs who wish to avail themselves of the de-licensing of sugar industry would be required to file an Industrial Entrepreneurs Memoranda (IEM) with the Secretariat of Industrial Assistance in the

Ministry of Industry as laid down for all de-licensing Industries in terms of the Press Note dated 2nd August, 1991, as amended from time to time.

3. Entrepreneurs who have been issued letter(s) of intent (LOI) for manufacture of sugar need not file an initial IEM. In such cases, the LOI holder shall only file part B of the LOI at the time of commencement of commercial production against the LOI issued by them. It is, however, open to entrepreneurs to file an initial IEM (in lieu of the LOI/Industrial Licence held by them) if they so desire, whenever any variation from the conditions and parameters stipulated in the LOI/Industrial Licence is contemplated."

"**NOTIFICATION**

(266) Ministry of Industry (Department of Industrial Policy and Promotion) Notification No.S.O.808(E) dated September 11, 1998 published in the Gazette of India, Extra, Part II, Section 3 (ii) dated 14th September, 1998 p.2, no.599 (F.No.10(13)/96 I.P.).

In exercise of the powers conferred by sub-section (1) as Section 29-B of the Industries (Development and Regulations) Act, 1951 (65 of 1951), the Central Government hereby makes the following further amendment in the notification of the Government of India in the Ministry of Industry (Department of Industrial Development Number S.O.477(E) dated the 25th July, 1991, namely :-

In Schedule II to the said notification, item 4, relating to Sugar and the entries thereunder shall be omitted."

19. Section 29B(1) of the Act states :

"**29-B. Power to exempt in special cases :**

(1) If the Central Government is of opinion, having regard to the smallness of the number of workers employed or to the amount invested in any industrial undertaking or to the desirability of encouraging small undertakings generally *or to the stage of development of any scheduled industry,* that it would not be in public interest to apply all or any of the provisions of this Act thereto, it may by notification in the Official Gazette, exempt, subject to such conditions as it may think fit to impose, any Industrial undertaking or class of industrial undertakings or any scheduled industry or class of scheduled industries as it may specify in the notification from the operation of all or any of the provisions of this Act or any rule or order made thereunder,"

20. It may be mentioned that after the impugned judgment of the High Court dated 24.8.2005, several developments have taken place relating to the sugar industry which have a substantial effect on the issues involved in these appeals. These are as follows :

(i) The High Court of Delhi in a case reported as *Ojas Industries P. Ltd. vs. Union of India & Ors* 2006 (86) DRJ 593 upheld the validity of the Press Note dated 31.08.98 being a policy of the Government of India under Article 73 of the COI. Therefore Delhi High court upheld the validity of the Press Note dated 31.08.98 which was quashed by the Allahabad HC on 24.08.05.

(ii) Thereafter the Government of India in exercise of its power under Section 3 of the Essential Commodities Act, 1955 amended the Sugarcane (Control) Order, 1966 by inserting Clauses 6A to 6E vide the Sugarcane (Control) Amendment Order, 2006, inter alia, laying down the "effective steps" which the applicant is required to take such as purchase of required land in the name of the mill, payment of advance and opening of LOC with suppliers, commencement certificate of civil work and construction of building, sanction of requisite term loans from the banks

or financial institutions and any other steps prescribed by the Central Government in this regard.

(iii) This Court by its judgment dated 02.04.07 in *Ojas Industries P. Ltd. vs. Oudh Sugar Mills Ltd & Ors* (2007) 4 SCC 723 considered the Press Note dated 31.08.98, the amendment of Sugarcane Control Order, 2006 and the liberalization policy of the Government of India in sugar industry. This Court after analyzing the provisions of the Press Notes in respect of prescribing minimum distance between two sugar mills, and the new Sugarcane Control Order, 2006 held that the defect pointed out by the Delhi High Court in paragraph 63 of its judgment has been removed by the Government of India by bringing in the amendment in 2006. This Court held that this amendment is clarificatory in nature and retrospective in operation and shall apply to all cases pending in various courts.

21. In view of the judgment of this Court in *Ojas Industries* (supra) upholding the validity of the Press Note prescribing distance norms and subsequent amendments in 2006 in Sugarcane Control Order 1966 and making it retrospective, the issues involved in the present case have been substantially decided. The challenge of the writ petitioner in the High Court was based on the setting up of a sugar mill in its vicinity (though beyond 15 kms away) because of the policy of de-licensing prescribed under Notification dated 11.09.98 issued in exercise of powers under Section 29(B) (1) of the IDR Act, 1951. This Court has upheld the distance norms i.e. a minimum distance of 15 kms between two mills retrospectively. The main thrust of the petitioner's challenge to the de-licensing policy thus disappears.

22. It is settled law that in the areas of economics and commerce, there is far greater latitude available to the executive than in other matters. The Court cannot sit in judgment over the wisdom of the policy of the legislature or the executive.

23. Thus in *Balco Employees' Union (Regd.) vs. Union of India and Ors.* 2002(2) SCC 333 it was observed (vide paragraph 92 and 93) :

"**92.** In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot *per se* be interfered with by the court.

93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved."…….

24. In the same decision in paragraph 39 it was observed :

"39. In *Premium Granites vs. State of T.N.,* 1994(2) SCC 691 while considering the Court's powers in interfering with the policy decision, it was observed at page 715 as under: (SCC para 54)

"54. It is not the domain of the Court to embark upon the unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be."

25. In paragraph 42 of the aforesaid decision this Court quoted from its earlier decision in *M.P. Oil Extraction vs. State of M.P.* 1997(7) SCC 592 as follows :

"……The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. *Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive function of the State*. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasized. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of the judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

(emphasis added)

26. The same view has been taken by this court in *Ugar Sugar Works Ltd. vs. Delhi Administration and Ors.* (2001) 3 SCC 635 (vide para 18), *Bhavesh D. Parish and Ors. vs. Union of India and Anr.* (2000) 5 SCC 471 (vide para 23 and

24), *Netai Bag and Ors. vs. State of West Bengal and Ors.* (2000) 8 SCC 262 (vide para 20), etc..

27. In *P.T.R. Exports (Madras) Pvt. Ltd. vs. Union of India and Ors.* 1996(5) SCC 268 (vide para 3 and 5) this Court held that the power to frame a policy by executive or legislative decision included the power to withdraw the same.

28. In the present case the de-licensing has been done under Section 29B of the Act and we see no illegality in the same.

29. In our opinion the High Court has placed an erroneous interpretation on the language of Section 29B. Section 29B provides that having regard to any of the four specified factors, if the Central Government is of the opinion that it would not be in public interest to apply "all or any" of the provisions of this Act to a scheduled industry, it may by notification in the official gazette exempt (conditionally or otherwise) any industrial undertaking or any class of industrial undertakings, or any scheduled industry or class of scheduled industries. The four specified factors on the basis of which the power may be exercised are as follows :

(a) the smallness of the number of workers employed or

(b) the amount invested in any industrial undertaking or

(c) the desirability of encouraging small undertakings generally or

(d) the stage of development of any scheduled industry.

30. A plain reading of Section 29B shows that *having regard to the stage of development of any schedule industry* if the Central Government is of the opinion that there should be an exemption from some or all of the provisions of the Act, it can issue an appropriate notification for this purpose. Sub-

section 2 of the Section 29B also confers upon the Central Government an express power of cancellation of such exemption. In our opinion sufficient guidelines have been provided by the legislature for the Government in this connection. The power conferred under Section 29B is in our opinion not tainted by the vice of excessive delegation because the essential legislative policy is specified in the preamble to the IDR Act and is writ large throughout the provisions of the Act. The grounds on which exemption from licensing can be granted – one of them being the stage of development of the industry – are also specified in Section 29B. The legislative policy having been clearly stated, in our opinion there is no excessive delegation. See in this connection *P.J. Irani vs. State of Madras* (1962) 2 SCR 169at pages 179-180, *Sitaram Bishambar Dayal vs. State of U.P.* (1972) 4 SCC 485 (vide para 5 and 7), *Mahe Beach Trading Co. and Ors. vs. Union Territory of Pondicherry and Ors.* (1996) 3 SCC 741 (vide para 13), *State of Tamil Nadu vs. K. Sabhanayagam* (1998) 1 SCC 318 (vide para 14, 19, 20 and 21), *Consumer Action Group vs. State of Tamil Nadu* (2000) 7 SCC 425 (vide para 5-18, 41 reviews case law on delegated legislation right from F. N. Balsara) and *Kishan Prakash Sharma and Ors. vs. Union of India and Ors.* (2001) 5 SCC 212 (vide para 18-20).

31. The legislative history of Section 29B clearly establishes the legislative intention to confer a wide power of exemption upon the Central Government.

(a) Section 28, as was originally enacted, conferred upon the Central Government, in general terms, the power to exempt any scheduled industry or any industrial undertaking from the operation of all or any provisions of this Act. There was no further provision of any parliamentary control (by way of placing the exemption notifications before parliament for its approval or otherwise) contemplated in the said original Section.

(b) Amendments were made to the IDR in 1953 when Section 29B was inserted in substitution of Section 28. The amended provision contemplated the grant of exemption on the four factors indicated hereinbefore. However, no power of reservation for the Small Scale Sector was contemplated in these provisions. In 1956 further amendments were made by way of insertion of Sub-section 2, which confers the power of cancellation of exemptions.

(c) The Central Government sought to make reservation of certain industries for the Small Scale Sector. The Bombay High Court in *Shree Vindhya Paper Mills Case* AIR (1983) Bom 270 held that Section 29B confers power to exempt, but not to reserve. Hence it was held that such reservation was ultra-vires Section 29B. To overcome the effect of this judgment Section 29B was amended again in 1984 by inserting the provisions of Sub-section 2(A) to 2(H) including a validating provision for validating all reservations made on or from 19th February, 1970. In the amended provision, Section 2(H) contemplated laying before each House of Parliament, the notified orders made under Sub-section 2(A). It is significant that no similar requirement was contemplated even then, in relation to notified orders issued under Sub-Section (1) granting exemption.

32. The High Court has in the impugned judgment held that the de-licensing could only be done by the legislature and not by the executive. We do not agree. It is well settled that the executive power of Union of India is co-extensive with the legislative power vide Article 73(1) of the Constitution. Hence in our opinion it was not necessary to amend the Act to de-license the sugar industry. The notification under Section 29B was sufficient for this purpose.

33. In the impugned judgment the High Court has observed:

> "Licensing is a part of regulation of the scheduled industry. Therefore licensing policy of the Government cannot be said not to be in the public interest. De-licensing policy largely affects the interest of the people. Somebody may say for socialism or somebody may say for globalization, but the thought of majority people has to be reflected in the House by the majority vote. Then and then alone the policy can be accepted as a law by its amendment. Therefore, without ascertaining the pros and cons on that line mere issuance of notification by the pen of the executive is an action without jurisdiction and as such illegal."

34. With respect we cannot agree with this observation. There is nothing in the 1951 Act which required a notification under Section 29B(1) to be approved by Parliament. Also, whether it is in the public interest to issue such a notification is ordinarily for the Government to decide, and the Court should exercise judicial restraint in this connection. Whether there should be licensing of an industry or not is for the executive authorities to decide.

35. The High Court has further observed :

> "The necessity of de-licensing came in the mind of the Government by the passage of time since when the waves of liberalization started coming. The Government was considering the same and possibly for this reason reports from the Advisory Committees were sought for. But after placement before the Lok Sabha and Rajya Sabha what prompted them not to place before the Parliament, but issue a Press Note and Notification directly omitting the sugar industry from the list of compulsorily licensable industry is fishy state of affairs. Therefore, the elements of illegality, unfair play, adopting back door process, arbitrariness, malafides, and abuse of power cannot be ruled out."

36. With respect to the above observation we may say that the High Court has probably overlooked that the Lok Sabha and Rajya Sabha together constitute Parliament in India. Also, as already stated above, the 1951 Act does not require a notification under Section 29B(1) to be approved by Parliament. Hence there was nothing fishy about the impugned notification. To say that elements of illegality, unfair play etc. cannot be ruled out is really acting on conjectures and surmises, not on evidence.

37. The High Court has held that exemption from licensing can be granted under Section 29B to small industries but not to large industries. With respect we cannot agree. A perusal of Section 29B(1), which has been quoted above, shows that a notification under the said provision can be issued in respect to four categories. Smallness of the industry, is only one of such categories. The fourth category viz. 'the stage of development of any scheduled industry' is very wide, and thus gives wide power to the Central Government to de-license even large industries.

38. In his dissenting judgment in *New State Ice Co. vs. Liebmann* 285 U.S. 262 (1932) Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court, observed that the Government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on "a process of trial and error" and Courts must not interfere with necessary experiments. In the same decision Justice Brandeis also observed :

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." (See also 'The Legacy of Holmes and Brandeis' by Samuel Konefsky).

39. In the Constitution bench decision of the Supreme Court in *Shri Sitaram Sugar Co. Ltd. vs. Union of India* AIR 1990 SC 1277 it was observed :

> "What is best for the sugar industry and in what manner the policy should be formulated and implemented, bearing in mind the fundamental object of the statute viz. supply and equitable distribution of essential commodity at fair prices in the best interest of the general public is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review."

40. It was held in the above decision as well as in *India Cement Ltd. vs. Union of India* AIR 1991 SC 724 that *even if some persons are at a disadvantage and suffered losses* on account of formulation and implementation of the Government policy that is not by itself sufficient ground for interference by the Court.

41. In *Secretary of Agriculture vs. Central Roig Refining Co.* (1949) 338 US 604 (617): 94 Law Ed. 381 to 392, Mr. Justice Frankfurter of the U.S. Supreme Court observed :

> "Congress was confronted with the formulation of policy peculiarly within its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate, restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses……"

42. We should not be understood to have meant that the judiciary should never interfere with administrative decisions. However, such interference should be only within narrow limits e.g. when there is clear violation of the statute or a constitutional provision, or there is arbitrariness in the Wednesbury sense. It is the administrators and legislators who are entitled to frame

policies and take such administrative decisions as they think necessary in the public interest. The Court should not ordinarily interfere with policy decisions, unless clearly illegal.

43. Economic and fiscal regulatory measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters. The impugned policy parameters were fixed by experts in the Central Government, and it is not ordinarily open to this Court to sit in appeal over the decisions of these experts. We have not been shown any violation of law in the impugned notification or Press Note.

44. The power to lay policy by executive decisions or by legislation includes power to withdraw the same unless it is by mala fide exercise of power, or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. *In matters of economic policy, it is settled law that the court gives a large leeway to the executive and the legislature.* Granting licences for import or export is an executive or legislative policy. The Government would take diverse factors for formulating the policy in the overall larger interest of the economy of the country. When the Government is satisfied that change in the policy was necessary in the public interest it would be entitled to revise the policy and lay down a new policy.

45. In *Prag Ice & Oil Mills vs. Union of India* AIR 1978 SC 1296 the Supreme Court observed :

> "We do not think that it is the function of the Court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them are matters of prediction of ultimate results on which even experts can seriously err and

doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts."

46. In *Shri Sitaram Sugar Co. Ltd. vs. Union of India* (1990) 3 SCC 223 the Supreme Court observed :

> "Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the view of experts by its own views."

It must be remembered that certain matters are by their nature such as best be left to experts in the field. This Court does not have the technical and administrative expertise in this respect.

47. In the words of Chief Justice Neely :

> "I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financer, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator."

48. In our opinion there should be judicial restraint in fiscal and economic regulatory measures. The State should not be hampered by the Court in such measures unless they are clearly illegal or unconstitutional. All administrative decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated this inevitably entails special treatment for distinct social phenomena. The State must therefore be left with wide latitude in devising ways and means of imposing fiscal regulatory measures, and the Court should not, unless

compelled by the statute or by the Constitution, encroach into this field.

49. In our opinion, it will make no difference whether the policy has been framed by the legislature or the executive and in either case there should be judicial restraint. The Court can invalidate an executive policy only when it is clearly violative of some provisions of the Statute or Constitution or is shockingly arbitrary but not otherwise.

50. As held by this Court in *Divisional Manager, Aravali Golf Club & Anr. vs. Chander Hass & Anr.* JT (2008) 3 SC 221, the Court must maintain judicial restraint and not ordinarily encroach in the domain of executive or legislature.

51. In our opinion the impugned Press Note and Notification were validly issued under Section 29B of the Act. Hence the impugned judgment cannot be sustained and it is hereby set aside.

52. The appeal is allowed. No costs.

Civil Appeal Nos. 5857/2005 & 5858/2005

53. In view of our order passed in Civil Appeal No.5856 of 2005, these appeals stand disposed of. No costs.

D.G. Appeal allowed.

LAXMI RAM PAWAR
v.
SITABAI BALU DHOTRE & ANR.
(Civil Appeal No. 2789 of 2005)

DECEMBER 1, 2010

[AFTAB ALAM AND R.M. LODHA, JJ.]

Maharashtra Slum areas (Improvement, Clearance and Redevelopment) Act, 1971:

ss. 4 and 2(e)(v) – 'Slum area' – 'Occupier' – 'Trespasser' – HELD: 'Occupier' as defined in Clause (v) of s.2(e) includes any person who is liable to pay to the owner damages for use and occupation of any land or building and would take within its fold and sweep a trespasser since such person is not only liable for damages for an act of trespass, but also liable to pay damages for use and occupation of land or building trespassed by him – It is immaterial whether damages for use and occupation are, in fact, claimed or not.

ss. 4, 2(e)(v) and 22(1)(a) – 'Slum area' – 'Occupier' – Suit for eviction of trespasser – Prior permission of competent authority – HELD: Before initiation of any suit or proceedings for eviction of a trespasser who is 'occupier' within the meaning of s.2(e)(v), the written permission of the Competent Authority u/s 22(1)(a) is mandatorily required – In the instant case, though the 'occupier' is a trespasser, but the suit for her eviction was not maintainable for want of written permission of the competent Authority and was rightly dismissed by the trial court.

Words and Phrases:

'Trespass' – 'Trespasser' – Connotation of.

Plaintiff-respondent no. 1 filed a suit against the

defendant-appellant and respondent no. 2, the Executive Engineer of the State Electricity Board, for declaration, possession and permanent injunction in respect of a room admeasuring 8' x 10' (the subject room) situate in the city of Pune. Her case was that she constructed the subject room in 1987, got electricity connection in her name, was paying taxes to the Municipal Corporation and had the photopass in her name; that she permitted her friend, the appellant, to stay temporarily in the subject room and when she was asked to vacate it, she refused denying the right of the plaintiff. It was stated that the defendant was neither a tenant nor a licensee but a trespasser and had no right to remain in possession of the subject room. The defendant-appellant contested the suit stating that she had the photopass for the subject room. She denied the room to have been constructed in 1987 and her status of a trespasser. She claimed that the subject room was situate in the slum area declared under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 and the suit was not maintainable without the written permission of the Competent Authority in view of the prohibition contained in s. 22(1)(a) of the Act. The trial court accepted the title of the plaintiff over the subject room, but dismissed the suit holding that the suit without permission of the Competent Authority was not maintainable. On plaintiff's appeal, the first appellate court decreed the suit holding that as the defendant was a trespasser, the permission of the Competent Authority was not necessary. The second appeal of the defendant having been dismissed by the High Court *in limine*, she filed the appeal.

The question for consideration before the Court was: "is a trespasser covered by the definition of 'occupier' in s. 2(e)(v) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971"

and if yes, "whether for his eviction from the land or building in a declared slum area, the written permission of the Competent Authority u/s 22(1)(a) of the 1971 Act is mandatorily required."

Allowing the appeal, the Court

HELD:

1.1 A 'trespass' is an unlawful interference with one's person, property or rights. With reference to property, it is a wrongful invasion of another's possession. [para 10] [194-F-G]

Words and Phrases, Permanent Edition (West Publishing Company), **pages 108 and 115;** *Black's Law Dictionary (Sixth Edition),* **1990, page 1504;** *Halsbury's Laws of England; Volume 45* (*Fourth Edition*), **page 631 – referred to.**

1.2 The definition of 'occupier' in s. 2(e) of the Maharashtra Slum areas (Improvement, Clearance and Redevelopment) Act, 1971 is not exhaustive but inclusive. Clause (v) that reads, `occupier', includes 'any person who is liable to pay to the owner damages for the use and occupation of any land or building' would surely take within its fold and sweep a trespasser since such person is not only liable for damages for an act of trespass but also liable to pay to the owner damages for the use and occupation of any land or building trespassed by him. It is immaterial whether damages for the use and occupation are in fact claimed or not by the owner in an action against the trespasser. Clause (v), includes a person who enters the land or building in possession of another with permission or consent but remains upon such land or building after such permission or consent has been revoked since after revocation of permission or consent, he is liable to pay damages for unauthorised use of land or building. The

first appellate court relied upon *Shanker Dagadu Bakade's case* which has already been overruled in *Taj Mohamed Yakub* and distinguished the latter on superficial reasoning without properly appreciating the statement of law exposited therein. The High Court failed to notice such grave error in the judgment of the first appellate court. [para 15] [198-B-G; 199-A-B]

Taj Mohamed Yakub vs. Abdul Gani Bhikan **(1991) Mh L J 263 – approved.**

Shankar *Dagadu Bakade and Ors. vs. Bajirao Balaji Darwatkar* **1990(2) Bom CR 38 – stood overruled.**

2.1 Once it is held that a trespasser is included in the definition of 'occupier' in s. 2(e)(v) of the 1971 Act, what necessarily follows is that before initiation of any suit or proceeding for eviction of such trespasser, the previous written permission of the Competent Authority is required as mandated by s. 22(1). Section 22(1) starts with *non obstante* clause and it is clear from the provision contained in clause (a) thereof that no person shall institute any suit or proceeding for obtaining any decree or order for eviction of the occupier from any building or land in a slum area or for recovery of any arrears of rent or compensation from any such occupier or for both without the previous written permission of the Competent Authority. The use of words `no' and `shall' in sub-s. (1) of s. 22 makes it abundantly clear that prior written permission of the Competent Authority for an action under clause (a) thereof is mandatorily required and is a must. The role of the Competent Authority under the 1971 Act is extremely important as the legislature has conferred power on him to carry out execution of works in improvement of the slum. These provisions contained in s. 22 are salutary in light of the scheme of 1971 Act and have to be followed. [para 16] [199-B-H]

2.2 In the instant case, respondent no.1 set up the case in the plaint that the appellant was a trespasser in the subject room. The first appellate court has also recorded a categorical finding, which has not been disturbed by the High Court, that the appellant was occupying the subject room as trespasser. In the circumstances, the suit was clearly not maintainable for want of written permission from the Competent Authority and was rightly dismissed by the trial court. [para 17] [200-C]

2.3 The judgment of the High Court affirming the judgment of the first appellate court is set aside. The suit filed by respondent no.1 stands dismissed. However, this will not preclude respondent no.1 from instituting fresh suit or proceeding for eviction against the appellant after obtaining necessary written permission from the Competent Authority. [para 18] [200-D-E]

Case Law Reference:

(1991) Mh L J 263	**approved**	**para 15**
1990(2) Bom CR 38	**stood overruled**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2789 of 2005.

From the Judgment & Order dated 20.09.2004 of the High Court of Judicature at Bombay in Second Appeal No. 1125 of 2004.

Ravindra Keshavrao Adsure for the Appellant.

Punam Kumari for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The decision in this appeal, in our opinion, turns upon the answer to the following question : is a

trespasser covered by the definition of 'occupier' in Section 2(e)(v) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short, ' the 1971 Act') and if yes, whether for his eviction from the land or building in a declared slum area, the written permission of the Competent Authority under Section 22(1)(a) of the 1971 Act is mandatorily required.

2. The aforesaid question arises in this way. The first respondent—Sitabai Balu Dhotre filed a suit for declaration, possession and permanent injunction in respect of a room admeasuring 8 x 10 ft. situate in Survey No. 1001, Wadarwadi bearing Hut No. 12/161/B/P/424, Taluka Haveli, Pune (for short, 'subject room') against the appellant—Laxmi Ram Pawar and the second respondent—the Executive Engineer, Shivajinagar, Sub Division, Maharashtra State Electricity Board, Pune in the Court of 10th Joint Civil Judge, Junior Division, Pune. The case set up by the first respondent was that the subject room was constructed by her in 1987; she got electricity connection in her name and has been paying taxes to the Pune Municipal Corporation. She claimed that she was having photopass in her name. According to her, she permitted the appellant being her friend to stay temporarily for two months in the subject room as she (appellant) was not having any shelter to live in. After expiry of two months, the first respondent asked the appellant to vacate the subject room but she requested the first respondent to allow her to stay in that room for some more time as she was arranging for some alternative accommodation but later on, the appellant denied the first respondent's right in the subject room necessitating the legal proceedings against her. The first respondent averred that the appellant was neither tenant nor licensee but a trespasser and has no right to remain in possession of the subject room.

3. The appellant traversed the first respondent's claim and set up the case in the written statement that the subject room was constructed by her in 1987 and she was holding a

photopass for the said room. She denied that she was a trespasser. She set up a plea that subject room was situate in the slum area declared under the 1971 Act and the suit filed by the first respondent was not maintainable without written permission of the Competent Authority in view of the prohibition contained in Section 22(1)(a) of that Act.

4. On the basis of the pleadings of the parties, the trial court framed the following issues :

"1. Does plaintiff prove that he has title over the hutment bearing No. 12/261/B/P/424 situated at S.No. 1001 Wadarwadi, Shivajinagar, Pune?

2. Does plaintiff further prove that defendant No. 1is residing in the said hutment?

3. Does plaintiff further prove that defendants are trying to cut off the electric supply from theelectric meter No. 26540?

4. Whether the suit is tenable without permission of competent authority?

5. Is plaintiff entitled to claim possession of the suit hutment from defendant No. 1?

6. Is plaintiff entitled to claim permanent injunctionas prayed for?

7. What order and decree?"

5. After recording the evidence and hearing the parties, the trial court recorded its findings in the negative in respect of issue nos. 1,3,5 and 6 and in the affirmative with regard to issue no. 2. While dealing with issue no. 4, the trial court held that the suit without obtaining the written permission from the Competent Authority was not tenable. Accordingly, the trial court dismissed the suit on August 31, 2000.

6. The first respondent challenged the judgment and decree passed by the trial court in appeal before the District Court, Pune which was transferred to the court of the 8th Additional District Judge, Pune for hearing and final disposal. The first appellate court reversed the findings of the trial court on issue nos. 1 and 4 and held that the suit filed by the first respondent was maintainable without the permission of the Competent Authority as she was a trespasser and in case of trespasser in occupation of slum area governed by the 1971 Act, the permission of the Competent Authority was not necessary. The first appellate court, thus, set aside the judgment and decree of the trial court and decreed the suit filed by the first respondent on July 30, 2004 and directed the appellant to deliver the possession of the subject room to the first respondent within 60 days therefrom.

7. Being not satisfied with the judgment and decree dated July 30, 2004 passed by the first appellate court, the appellant preferred second appeal before the High Court of Judicature at Bombay but without any success as the second appeal was dismissed *in limine* on September 20, 2004.

8. The answer to the question which has been framed by us at the outset has to be found in light of the statutory provisions contained in the 1971 Act. Section 2(e) of the 1971 Act defines 'occupier' as follows :

"S.2*(e)* "occupier" indudes,-

(i) any person who for the time being is paying or is liable to pay to the owner the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;

(ii) an owner in occupation of, or otherwise using, his land or building;

(iii) a rent-free tenant of any land or building;

(iv) a licensee in occupation of any land or building; and

(v) any person who is liable to pay to the owner damages for the use and occupation of any land or building;"

9. Section 3(1) empowers the State Government to appoint the Competent Authority for the purposes of the 1971 Act. Section 4 provides for declaration of slum area/s by the Competent Authority on its satisfaction to the aspects stated therein. Chapter VI of the 1971 Act deals with the subject titled 'Protection of Occupiers in Slum Areas from Eviction and Distress Warrants'. Section 22 which falls in Chapter VI to the extent it is relevant for the present appeal reads as follows :

"S.22. *(I)* Notwithstanding anything contained in any other law for the time being in force, no person shall except with the previous permission in writing of the Competent Authority—

(a) institute, after commencement of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, any suit or proceeding for obtaining any decree or order for the eviction of an occupier from any building or land in a slum area or for recovery of any arrears of rent or compensation from any such occupier, or for both; or

. . . . . .

(2) Every person desiring to obtain the permission referred to in sub-section (1)……..shall make an application in writing to the Competent Authority in such form and containing such particulars as may be prescribed.

(3) On receipt of such application. the Competent Authority, after giving an opportunity to the parties of being heard and after making such summary inquiry into the circumstances of the case as it thinks fit, shall, by order in writing, either grant or refuse to grant such permission.

(4) In granting or refusing to grant the permission under clause *(a)* or *(b)* of subsection (1), ... the Competent Authority shall take into account the following factors, namely :-

(a) whether alternative accommodation within the means of the occupier would be available to him, if he were evicted;

(b) whether the eviction is in the interest of improvement and clearance of the slum area;

*(b-1)*whether, having regard to the relevant circumstances of each case, the total amount of arrears of rent or compensation and the period for which it is due and the capacity of the occupier to pay the same, the occupier is ready and willing to pay the whole of the amount of arrears of rent or compensation by reasonable installments within a stipulated time;

(c) any other factors. if any, as may be prescribed. . . . . .

(5) Where the Competent Authority refuses to grant the permission under any of the clauses of sub-section (*l*) it shall record a brief statement of the reasons for such refusal, and furnish a copy thereof to the applicant."

10. A 'trespass' is an unlawful interference with one's person, property or rights. With reference to property, it is a wrongful invasion of another's possession. In Words and Phrases, Permanent Edition (West Publishing Company), pages 108, 109 and 115, in general, a 'trespasser' is described, inter alia, as follows:

"A "trespasser" is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. In re Wimmer's Estate, 182 P.2d 119, 121, 111 Utah 444."

"A "trespasser" is one entering or remaining on land in another's possession without a privilege to do so created by possessor's consent, express or implied, or by law. Keesecker v. G.M. Mckelvey Co., 42 N.E. 2d 223, 226, 227, 68 Ohio App. 505."

. . . . . .

"A "trespass" is a transgression or wrongful act, and in its most extensive signification includes every description of wrong, and a 'trespasser" is one who does an unlawful act, or a lawful act in an unlawful manner, to the injury of the person or property of another. Carter v. Haynes, Tex., 269 S.W. 216, 220."

11. In Black's Law Dictionary (Sixth Edition), 1990, page 1504, the term 'trespasser' is explained as follows :

"Trespasser. One who has committed trespass. One who intentionally and without consent or privilege enters another's property. One who enters upon property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in performance of any duties to owner, but merely for his own purpose, pleasure or convenience".

12. In Halsbury's Laws of England; Volume 45 (Fourth Edition), pages 631-632, the following statement is made under the title 'What Constitutes Trespass to Land'.

"Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades

the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

In the same volume, page 634, under the title 'trespass ab initio', the legal position is stated thus :

"If a person enters on the land of another under an authority given him by law, and, while there, abuses the authority by an act which amounts to a trespass, he becomes a trespasser ab initio, and may be sued as if his original entry were unlawful. Instances of an entry under the authority of the law are the entry of a customer into a common inn, of a reversioner to see if waste has been done, or of a commoner to see his cattle.

To make a person a trespasser ab initio there must be a wrongful act committed; a mere nonfeasance is not enough."

The aforesaid statement takes into consideration *the Six Carpenters' case*[1] wherein the general rule given is this, 'when entry, authority or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio'.

13. In Law Lexicon, The Encyclopaedic Law Dictionary by P. Ramanatha Aiyar, 2nd Edition, Reprint 2000, page 1917, the word 'trespass' is explained by relying upon Tomlins Dictionary of Law Terms as follows:

"Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or the country in which we live; whether it relates to a man's person or his property. Therefore beating another is a trespass; for which an action of trespass in assault and battery will lie. Taking or detaining

1. (1610) 8 Co Rep 146.

a man's goods are respectively trespasses, for which an action of trespass on the case in trover and conversion, is given by the Law; so, also, non-performance of promises or undertakings is a trespass, upon which an action of Trespass on the case in assumesit is grounded: and, in general, any misfeasance, or act of one man, whereby another is injuriously affected or damnified, is a transgression, or trespass, in its largest sense; for which an action will lie."

14. In Salmond on the Law of Torts, 17th Edition by R.F.V. Heuston, 1977, page 41, the expression, 'Trespass by remaining on land' is explained in the following manner :

"Even a person who has lawfully entered on land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff's land or vehicle is as much a trespass as to enter originally without right. Thus, any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time he fails to leave the premises."

Under the title 'Continuing Trespasses', page 42, it is stated:

"That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrong doer, and giving rise to actions de die in diem so long as it lasts, is sufficiently obvious. It is well-settled, however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing; successive actions will lie from day to day until it is so removed; and in each action damages (unless

awarded in lieu of an injunction) are assessed only upto the date of the action. Whether this doctrine is either logical or convenient may be a question, but it has been repeatedly decided to be the law."

15. Insofar as the definition of 'occupier' in Section 2(e) of the 1971 Act is concerned, it must be immediately stated that the said definition is not exhaustive but inclusive. Clauses (i) to (iv) of Section 2(e) definitely do not embrace within itself a trespasser but Clause (v) that reads, `occupier' includes 'any person who is liable to pay to the owner damages for the use and occupation of any land or building' would surely take within its fold and sweep a trespasser since such person is not only liable for damages for an act of trespass but also liable to pay to the owner damages for the use and occupation of any land or building trespassed by him. It is immaterial whether damages for the use and occupation are in fact claimed or not by the owner in an action against the trespasser. By no stretch of imagination, a trespasser could be taken out of the definition of 'occupier' in Section 2(e)(v) of the 1971 Act. Clause (v), in our opinion, includes a person who enters the land or building in possession of another with permission or consent but remains upon such land or building after such permission or consent has been revoked since after revocation of permission or consent, he is liable to pay damages for unauthorised use of land or building. The Division Bench of the Bombay High Court in *Taj Mohamed Yakub* v. *Abdul Gani Bhikan*[2] has taken the view that a trespasser is included in the definition of `occupier' under Section 2(e)(v) of the 1971 Act which, we hold, is the correct view. The contrary view taken by a Single Bench of the Bombay High Court in *Shankar Dagadu Bakade and Ors.* v. *Bajirao Balaji Darwatkar*[3] is not right on this point and has rightly been overruled by the Division Bench in *Taj Mohamed Yakub*[2]. Strangely, the first appellate court relied upon *Shanker Dagadu Bakade's* case[3] which has already been

2. (1991) Mh LJ 263.

3. 1990 (2) Bom CR 38.

overruled in *Taj Mohamed Yakub*[2] and distinguished *Taj Mohamed Yakub*[2] on superficial reasoning without properly appreciating the statement of law exposited therein. The High Court, unfortunately, failed to notice such grave error in the judgment of the first appellate court.

16. Once it is held that a trespasser is included in the definition of 'occupier' in Section 2(e)(v) of the 1971 Act, what necessarily follows is that before initiation of any suit or proceeding for eviction of such trespasser, the previous written permission of the Competent Authority is required as mandated by Section 22(1). Section 22(1) starts with *non obstante* clause and it is clear from the provision contained in clause (a) thereof that no person shall institute any suit or proceeding for obtaining any decree or order for eviction of the occupier from any building or land in a slum area or for recovery of any arrears of rent or compensation from any such occupier or for both without the previous written permission of the Competent Authority. The use of words `no' and `shall' in sub-section (1) of Section 22 makes it abundantly clear that prior written permission of the Competent Authority for an action under clause (a) thereof is a must. The role of the Competent Authority under the 1971 Act is extremely important as the legislature has conferred power on him to carry out execution of works in improvement of the slum. Sub-Section (2) of Section 22 requires the person desiring to obtain the permission to make an application in writing to the Competent Authority. As per sub-section (3) on receipt of such application, the Competent Authority by an order in writing may either grant or refuse to grant such permission after giving an opportunity to the parties of being heard and after making such summary enquiries into the circumstances of the case as it thinks fit. Sub-section (4) of Section 22 requires the Competent Authority to take into account the factors set out therein for granting or refusing the permission. These provisions contained in Section 22 are salutary in light of the scheme of 1971 Act and have to be followed. It has to be held, therefore, that for eviction of a

trespasser who is 'occupier' within the meaning of Section 2(e)(v) of 1971 Act from the land or building or any part thereof in a declared slum area, the written permission of the Competent Authority under Section 22(1)(a) is mandatorily required.

17. Insofar as present case is concerned, the first respondent set up the case in the plaint that the appellant was a trespasser in the subject room. The first appellate court has also recorded a categorical finding, which has not been disturbed by the High Court, that the appellant was occupying the subject room as trespasser. In the circumstances, the suit was clearly not maintainable for want of written permission from the Competent Authority and was rightly dismissed by the trial court.

18. In view of the above, the appeal is allowed; the judgment of the High Court dated September 20, 2004 affirming the judgment of the 8th Additional District Judge dated July 30, 2004 is set aside. The suit filed by the first respondent stands dismissed. However, this will not preclude the first respondent in instituting fresh suit or proceeding for eviction against the appellant after obtaining necessary written permission from the Competent Authority. The parties shall bear their own costs.

R.P. Appeal allowed.

SIDDHARAM SATLINGAPPA MHETRE

v.

STATE OF MAHARASHTRA AND OTHERS

(Criminal Appeal No. 2271 of 2010)

DECEMBER 02, 2010

[DALVEER BHANDARI AND K.S. PANICKER RADHAKRISHNAN, JJ.]

Code of Criminal Procedure, 1973:

s. 438 – Anticipatory bail – Grant of – Appellant was member of a political party – FIR alleging that appellant and his brother instigated their party workers to fire gun shots at the workers of opponent political party which resulted in the murder of one person – Murder took place eight days after the incident of instigation – Application for anticipatory bail by appellant – Rejection of, by the High Court – Sustainability of – Held: Order passed by the High Court not sustainable – Appellant directed to join investigation and in the event of arrest, appellant to be released on bail on his furnishing a personal bond – Judgment of Constitution Bench of the Supreme Court in ****Sibbia's*** *case being on the same issue regarding ambit, scope and object of the concept of anticipatory bail u/s. 438 followed – Judicial discipline – Bail – Precedent.*

ss. 438 and 437 – Power u/s 438, if subject to limitations u/s. 437 – Held: The limitations mentioned in s. 437 cannot be read into s. 438 – Plentitude of s. 438 must be given its full play – Court can impose conditions for the grant of bail – Bail.

s. 438 – Anticipatory bail – Grant of, for limited period – Held: Order granting anticipatory bail for a limited duration and, thereafter, directing the accused to surrender and apply

*before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in ****Sibbia's case*** *– When the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case – Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty – s.438 does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted – Courts should not impose restrictions on the ambit and scope of s. 438 which are not envisaged by the legislature – Constitution of India, 1950 – Article 21 – Interpretation of statutes – Legislative intent.*

s. 438 – Anticipatory bail – Scope and ambit of – Discussed.

s. 438 – Anticipatory bail – Grant or refusal of – Exercise of power – Relevant considerations for – Held: Courts should maintain fine balance between societal interest vis-à-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and sanctity of individual liberty – Discretion must be exercised on the basis of the available material and the facts of the particular case – When accused joins investigation and fully co-operates with the investigating agency, custodial interrogation should be avoided – Bail – Criminal jurisprudence.

Jurisprudence : Liberty – Personal liberty – Relevance and importance of – Explained.

Constitution of India, 1950: Articles 21 and 19(1) – Right to life and personal liberty – Concept of – Explained.

Doctrines: Doctrine of per incuriam – Judgment passed in ignorance of binding precedent – Held: Is rendered *per incuriam*.

Constitution of India, 1950: Article 141 – Reference to

larger Bench – When – Held: In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to refer the matter to a larger Bench of appropriate strength – Reference to larger Bench.

The appellant was a member of the Congress party. According to the prosecution, the appellant alongwith his brother instigated their party workers to fire gun shots at the workers of BJP party which led to killing of one person. The incident of murder took place eight days after the alleged incident of instigation. The appellant filed an application for grant of anticipatory bail. The High Court rejected the application. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 In the instant case, there is a direct judgment of the Constitution Bench of this Court in *Sibbia's* case dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under Section 438 of the Code of Criminal Procedure, 1973. The controversy is no longer *res integra.* The judicial discipline obliges this Court to follow the said judgment in letter and spirit. The impugned judgment and order of the High Court declining anticipatory bail to the appellant cannot be sustained and is consequently set aside. The appellant is directed to join the investigation and fully cooperate with the investigating agency. In the event of arrest the appellant would be released on bail. [Paras 151, 152 and 153] [273-H; 274-A-C]

1.2 This Court in the *Sibbia's case laid down the following principles with regard to anticipatory bail:

(a) Section 438(1) Cr.P.C. is to be interpreted in light of Article 21 of the Constitution of India.

(b) Filing of FIR is not a condition precedent to exercise of power under Section 438 Cr.P.C.

(c) Order under Section 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in Section 437 Cr.P.C. cannot be read into Section 438 Cr.P.C.

(e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only."

(f) Powers are discretionary to be exercised in light of the circumstances of each case.

(g) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the Section and suitable conditions should be imposed on the applicant. [Para 119] [261-B-H; 262-A]

1.3 The Constitution Bench in *Sibbia's case comprehensively dealt with almost all aspects of the concept of anticipatory bail under Section 438 Cr.P.C. In view of the clear declaration of law laid down by the Constitution Bench in *Sibbia's case, it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter, the accused should apply to the regular court for bail, that means the life of Section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The

Constitution Bench in ****Sibbia's case* **clearly observed that it is not necessary to re-write Section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under Section 438 Cr.P.C. granting bail cannot be curtailed. [Paras 133 and 134] [267-C-H; 268-A]

Gurbaksh Singh Sibbia and Ors. vs. State of Punjab* **(1980) 2 SCC 565 - followed.

2.1 The society has a vital interest in grant or refusal of bail because every criminal offence is an offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty. [Para 3] [221-C-D]

2.2 Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Sessions or to the High Court before the arrest. It is clear from the statement of objects and reasons that the purpose of incorporating Section 438 in the Code of Criminal Procedure, 1973 was to recognize the importance of personal liberty and freedom in a free and democratic country. On analyzing Section 438 Cr.P.C. the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-

old principle that an individual is presumed to be innocent till he is found guilty by the court. [Paras 14 and 17] [227-B-C; F-H]

3.1 All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why 'liberty' is called the very quintessence of a civilized existence. [Paras 42 and 43] [235-H; 236-A-B]

3.2 The term 'liberty' may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, harmonious balance of personality, the absence of restraint upon the exercise of that affirmation and organization of opportunities for the exercise of a continuous initiative. 'Liberty' generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to 'liberty' and freedom is lost. At the same time 'liberty' without restraints would mean liberty won by one and lost by another. So 'liberty' means doing of anything one desires but subject to the desire of others. [Paras 45, 46 and 47] [236-G-H; 237-A-E]

3.3 In a properly constituted democratic State, there cannot be a conflict between the interests of the citizens and those of the State. The harmony, if not the identity, of the interests of the State and the individual, is the

fundamental basis of the modern Democratic National State. Yet the existence of the State and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State. The individuals composing the State must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals. [Para 51] [238-D-G]

Chambers' Twentieth Century Dictionary; Essays on Freedom and Power by John E.E.D.; Treatise on War and Civil Liberties by M.C. Setalvad; Development of Constitutional Guarantee of Liberty by Rosco Pound; Commentaries on the Laws of England by Blackstone **Vol. I, p.134;** *Constitutional Law by Dicey* **9th Edn., pp.207-08 - referred to.**

4.1 The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the State. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes. [Para 59] [240-E-F]

4.2 Article 21 of the Constitution of India, 1950 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of the Constitution, personal liberty of man is at root of Article

21 and each expression used in Article 21 enhances human dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in *A.K. Gopalan case.* **But in course of time, the scope of the application of the Article against arbitrary encroachment by the executives was expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus, protection against arbitrary privation of "life" no longer means mere protection of death, or physical injury, but also an invasion of the right to "live" with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. [Paras 67, 69 and 71] [242-H; 243-A, D-F, H; 244-A-B]**

A. K. Gopalan v. The State of Madras **AIR 1950 SC 27;** *Kharak Singh v. State of U.P. and* Ors. **AIR 1963 SC 1295;** *Maneka Gandhi v. Union of India and Anr.* **(1978) 1 SCC 248;** *State of A.P. v. Challa Ramakrishna Reddy and Ors.* **(2000) 5 SCC 712;** *Kartar Singh v. State of Punjab and Ors.* **(1994) 3 SCC 569;** *Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors.* **(1981) 1 SCC 608;** *P. Rathinam/ Nagbhusan Patnaik v. Union of India and Anr.* **(1994) 3 SCC 394;** *Khedat Mazdoor Chetana Sangath v. State of M.P. and Ors.* **(1994) 6 SCC 260;** *Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr.*

(1986) 3 SCC 156; *Prem Shankar Shukla v. Delhi Administration* **(1980) 3 SCC 526 - relied on.**

Bugdaycay v. Secretary of State for the Home Department **(1987) 1 All ER 940;** *R on the application of Pretty v. Director of Public Prosecutions* **(2002) 1 All ER 1;** *R. v. Curr* **(1972) S.C.R. 889 - referred to.**

5.1 The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court. [Paras 94 and 95] [252-G-H; 253-A-C]

5.2 It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully co-operating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. [Paras 96] [253-D-E]

6.1 The Constitution Bench in *Sibbia's case* **clearly observed that there is no justification for reading into Section 438 Cr.P.C. the limitations mentioned in Section 437 Cr.P.C. The plentitude of the Section must be given its full play. [Para 98] [253-H; 254-A-B]**

6.2 The proper course of action for grant of anticipatory bail ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case. [Para 101] [254-G-H; 255-A-B]

6.3 The court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time. [Para 103] [255-D]

6.4 The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in *Sibbia's case* **clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case; and that the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session must be respected. [Para 104] [255-E-F]**

7.1 The order granting anticipatory bail for a limited duration and, thereafter, directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia's case.* [Para 102] [255-C]

7.2 The court which grants the bail also has the power to cancel it according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case. [Para 105] [256-D]

7.3 The restriction on the provision of anticipatory bail under Section 438 Cr.P.C. limits the personal liberty of the accused granted under Article 21 of the Constitution. In order to meet the challenge of Article 21 of the Constitution the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. [Para 107] [256-F-H; 257-A]

Maneka Gandhi v. Union of India and Anr. **(1978) 1 SCC 248 – relied on.**

7.4 Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned court would be fully justified in imposing conditions including direction of joining investigation. [Para 108] [257-B-C]

7.5 In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court

and again apply for regular bail. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and, thereafter, he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. [Paras 110 and 111] [257-E-H; 258-A]

7.6 The courts should not impose restrictions on the ambit and scope of Section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this Section could be granted. Once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused. [Paras 113, 114 and 117] [258-E-H; 260-G-H; 261-A]

8.1 No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. No attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with

the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. [Para 121] [262-F-G]

8.2 The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail. [Para 122] [263-A-H; 264-A-D]

8.3 The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record. [Paras 123 and 124] [264-D-F]

8.4 Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. In case, the State considers the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions which are only illustrative and not exhaustive are:

(1) Direct the accused to join investigation and only when the accused does not co-operate with the investigating agency, then only the accused be arrested.

(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

(3) Direct the accused to execute bonds;

(4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

(6) Bank accounts be frozen for small duration during investigation. [Paras 127 and 128] [265-D-H; 266-A-C]

8.5 In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer. [Para 129] [266-D]

8.6 The exercise of jurisdiction under Section 438 Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications. It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-à-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests. The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case. [Paras 130, 131 and 132] [266-E-H; 267-A-B]

8.7 The discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations. [Para 137] [268-E-F]

Joginder Kumar v. State of U.P. and Ors. **(1994) 4 SCC 260 – referred to.**

9.1 The judgments and orders in *S*alauddin *Abdulsamad Shaikh* v. *State of Maharashtra; K. L. Verma v. State and Anr.*; *Adri Dharan Das* v. *State of West Bengal*; *Sunita Devi* v. *State of Bihar and Anr. and*; *Naresh Kumar Yadav v Ravindra Kumar* ***case*** **are clearly contrary to the law declared by the Constitution Bench of this Court in *Sibbia's* case. These judgments are also contrary to the legislative intention. The court would not be justified in re-writing Section 438 Cr.P.C. [Para 138] [268-G]**

9.2 The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, the judgments by two or three judges of this Court in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra; K. L. Verma v. State and Anr.*; *Adri Dharan Das* v. *State of West Bengal*; *Sunita Devi* v. *State of Bihar and Anr. and*; *Naresh Kumar Yadav v Ravindra Kumar* ***case*** **have clearly ignored a Constitution Bench judgment of this Court in *Sibbia's* case which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of Cr.P.C.. Consequently, the said judgments are** *per incuriam*. **[Para 149] [273-D-F]**

Salauddin Abdulsamad Shaikh v. State of Maharashtra **(1996) 1 SCC 667;** *K. L. Verma v. State and Anr.* **(1998) 9 SCC 348;** *Adri Dharan Das v. State of West Bengal* **(2005) 4 SCC 303;** *Sunita Devi v. State of Bihar and Anr.* **(2005) 1 SCC 608;** *Naresh Kumar Yadav v Ravindra Kumar* **(2008) 1 SCC 632 - per incuriam.**

Government of A.P. and Anr. v. B. Satyanarayana Rao (dead) by LRs. and Ors. **(2000) 4 SCC 262;** *Union of India v. Raghubir Singh* **(1989) 2 SCC 754;** *Thota Sesharathamma*

and another v. Thota Manikyamma (Dead) by LRs. and Ors. **(1991) 4 SCC 312;** *Mst. Karmi v. Amru* **(1972) 4 SCC 86;** *R. Thiruvirkolam v. Presiding Officer and Anr.* **(1997) 1 SCC 9;** *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha* **(1980) 2 SCC 593;** *P.H. Kalyani v. Air France* **(1964) 2 SCR 104;** *Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and Ors.* **(2001) 4 SCC 448;** *Central Board of Dawoodi Bohra Community v. State of Maharashtra* **(2005) 2 SCC 673;** *Official Liquidator v. Dayanand and Ors.* **(2008) 10 SCC 1;** *State of Karnataka and Ors.v. Umadevi (3) and Ors.* **(2006) 4 SCC 1;** *Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors.* **(2009) 15 SCC 458 – referred to.**

Young v. Bristol Aeroplane Company Limited **(1994) All ER 293;** *Huddersfield Police Authority v. Watson* **(1947) 2 All ER 193 - referred to.**

9.3 In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength. [Para 150] [273-G]

Pokar Ram v. State of Rajasthan and Ors. **(1985) 2 SCC 597;** *N. Meera Rani* v. *Government of Tamil Nadu and Anr.* **(1989) 4 SCC 418;** *Vijayalaxmi Cashew Company and Ors. v. Dy. Commercial Tax Officer and Anr.* **(1996) 1 SCC 468;** *Union of India and Ors.* v. *K. S. Subramanian* **(1976) 3 SCC 677;** *State of U.P.* v. *Ram Chandra Trivedi* **(1976) 4 SCC 52;** *Palanikumar and Anr. v. State* **2007 (4) CTC 1 - referred to.**

Case Law Reference:

(1980) 2 SCC 565	**Referred to**	**Para 119, 149, 151**

(1985) 2 SCC 597	**Referred to**	**Para 31**
(1989) 4 SCC 418	**Referred to**	**Para 33**
(1996) 1 SCC 468	**Referred to**	**Para 34**
(1976) 3 SCC 677	**Referred to**	**Para 35**
(1976) 4 SCC 52	**Referred to**	**Para 35**
2007 (4) CTC 1	**Referred to**	**Para 39**
AIR 1950 SC 27	**Relied on**	**Para 62, 69**
AIR 1963 SC 1295	**Relied on**	**Para 64**
(1978) 1 SCC 248	**Relied on**	**Para 65**
(2000) 5 SCC 712	**Relied on**	**Para 66**
(1994) 3 SCC 569	**Relied on**	**Para 66**
(1981) 1 SCC 608	**Relied on**	**Para 69**
(1994) 3 SCC 394	**Relied on**	**Para 70**
(1994) 6 SCC 260	**Relied on**	**Para 71**
(1986) 3 SCC 156	**Relied on**	**Para 72**
(1980) 3 SCC 526	**Relied on**	**Para 74**
(1987) 1 All ER 940	**Referred to**	**Para 78**
(2002) 1 All ER 1	**Referred to**	**Para 78**
(1972) S.C.R. 889	**Referred to**	**Para 84**
(1994) 4 SCC 260	**Referred to**	**Para 120**
(2008) 1 SCC 632	**Referred to**	**Para 136**
(1994) All ER 293	**Referred to**	**Para 139**
(1947) 2 All ER 193	**Referred to**	**Para 140**
(2000) 4 SCC 262	**Referred to**	**Para 141**

(1989) 2 SCC 754	**Referred to**	**Para 142**
(1991) 4 SCC 312	**Referred to**	**Para 143**
(1972) 4 SCC 86	**Referred to**	**Para 143**
(1997) 1 SCC 9	**Referred to**	**Para 144**
(1980) 2 SCC 593	**Referred to**	**Para 144**
(1964) 2 SCR 104	**Referred to**	**Para 144**
(2001) 4 SCC 448	**Referred to**	**Para 145**
(2005) 2 SCC 673	**Referred to**	**Para 146**
(2008) 10 SCC 1	**Referred to**	**Para 147**
(2006) 4 SCC 1	**Referred to**	**Para 147**
(2009) 15 SCC 458	**Referred to**	**Para 148**
(1996) 1 SCC 667	**Per incuriam**	**Para 149**
(1998) 9 SCC 348	**Per incuriam**	**Para 149**
(2005) 4 SCC 303	**Per incuriam**	**Para 149**
(2005) 1 SCC 608	**Per incuriam**	**Para 149**
(2008) 1 SCC 632	**Per incuriam**	**Para 149**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2271 of 2010.

From the Judgment & Order dated 06.10.2009 of the High Court of Judicature at Bombay in Criminal Application No. 4465 of 2009.

Shanti Bhushan, Mahesh Jethmalani, Naveen Chomal, Sudhir Halli, A. Raghunath, Pravin Satale, Pranav Badheka, Priyal Sardha, Rajiv Shankar Dvivedi, Arun R. Pednekar, Sanjay Kharde, Shankar Chillarge, Asha Gopalan Nair, Rajeev K. Dubey, Kamlendra Mishra for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest.

3. The society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of bails dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

The appellant, who belongs to the Indian National Congress party (for short 'Congress party') is the alleged accused in this case. The case of the prosecution, as disclosed in the First Information Report (for short 'FIR'), is that Sidramappa Patil was contesting election of the State assembly on behalf of the Bhartiya Janata Party (for short 'BJP'). In the FIR, it is incorporated that Baburao Patil, Prakash Patil, Mahadev Patil, Mallikarjun Patil, Apparao Patil, Yeshwant Patil were supporters of the Congress and so also the supporters of the appellant Siddharam Mhetre and opposed to the BJP candidate.

5. On 26.9.2009, around 6.00 p.m. in the evening, Sidramappa Patil of BJP came to the village to meet his party workers. At that juncture, Shrimant Ishwarappa Kore,

Bhimashankar Ishwarappa Kore, Kallapa Gaddi, Sangappa Gaddi, Gafur Patil, Layappa Gaddi, Mahadev Kore, Suresh Gaddi, Suresh Zhalaki, Ankalgi, Sarpanch of village Shivmurti Vijapure met Sidramappa Patil and thereafter went to worship and pray at Layavva Devi's temple. After worshipping the Goddess when they came out to the assembly hall of the temple, these aforementioned political opponents namely, Baburao Patil, Prakash Patil, Gurunath Patil, Shrishail Patil, Mahadev Patil, Mallikarjun Patil, Annarao @ Pintu Patil, Hanumant Patil, Tammarao Bassappa Patil, Apparao Patil, Mallaya Swami, Sidhappa Patil, Shankar Mhetre, Usman Sheikh, Jagdev Patil, Omsiddha Pujari, Panchappa Patil, Mahesh Hattargi, Siddhappa Birajdar, Santosh Arwat, Sangayya Swami, Anandappa Birajdar, Sharanappa Birajdar, Shailesh Chougule, Ravi Patil, Amrutling Koshti, Ramesh Patil and Chandrakant Hattargi suddenly came rushing in their direction and loudly shouted, "why have you come to our village? Have you come here to oppose our Mhetre Saheb? They asked them to go away and shouted Mhetre Saheb Ki Jai."

6. Baburao Patil and Prakash Patil from the aforementioned group fired from their pistols in order to kill Sidramappa Patil and the other workers of the BJP. Bhima Shankar Kore was hit by the bullet on his head and died on the spot. Sangappa Gaddi, Shivmurti Vjapure, Jagdev Patil, Layappa Patil, Tammaro Patil were also assaulted. It is further mentioned in the FIR that about eight days ago, the appellant Siddharam Mhetre and his brother Shankar Mhetre had gone to the village and talked to the abovementioned party workers and told them that, "if anybody says anything to you, then you tell me. I will send my men within five minutes. You beat anybody. Do whatever."

7. According to the prosecution, the appellant along with his brother instigated their party workers which led to killing of Bhima Shanker Kora. It may be relevant to mention that the alleged incident took place after eight days of the alleged incident of instigation.

8. The law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973. Section 436 deals with situation, in what kind of cases bail should be granted. Section 436 deals with the situation when bail may be granted in case of a bailable offence. Section 439 deals with the special powers of the High Court or the Court of Sessions regarding grant of bail. Under sections 437 and 439 bail is granted when the accused or the detenu is in jail or under detention.

9. The provision of anticipatory bail was introduced for the first time in the Code of Criminal Procedure in 1973.

10. Section 438 of the Code of Criminal Procedure, 1973 reads as under:

> *"438. Direction for grant of bail to person apprehending arrest.*- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors, namely:-
>
> (i) the nature and gravity of the accusation;
>
> (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
>
> (iii) the possibility of the applicant to flee from justice; and
>
> (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

> Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.
>
> (1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.
>
> (1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.
>
> (2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -
>
> (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
>
> (ii) a condition that the person shall not, directly or indirectly,- make any inducement, threat or promise to any person acquainted with the facts of the case

so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

Why was the provision of anticipatory bail introduced? – Historical perspective

11. The Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether the courts had an inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.

12. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant "anticipatory bail". It observed in para 39.9 of its report (Volume I) and the same is set out as under:

"The suggestion for directing the release of a person on

bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

The Law commission recommended acceptance of the suggestion.

13. The Law Commission in para 31 of its 48th Report (July, 1972) made the following comments on the aforesaid clause:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only

for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

14. Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Sessions or to the High Court before the arrest.

Scope and ambit of Section 438 Cr.P.C.

15. It is apparent from the Statement of Objects and Reasons for introducing section 438 in the Code of Criminal Procedure, 1973 that it was felt imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases.

16. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present section 438 Cr.P.C. The only two clear provisions of law by which bail could be granted were sections 437 and 439 of the Code. Section 438 was incorporated in the Code of Criminal Procedure, 1973 for the first time.

17. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in the Cr.P.C. was to recognize the importance of personal liberty and freedom in a free and democratic country. When we carefully analyze this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.

18. The High Court in the impugned judgment has declined to grant anticipatory bail to the appellant and aggrieved by the said order, the appellant has approached this Court by filing this appeal.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the appellant submitted that the High Court has gravely erred in declining the anticipatory bail to the appellant. He submitted that section 438 Cr.P.C. was incorporated because sometime influential people try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. He pointed out that in recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase.

20. Mr. Bhushan submitted that the appellant has been implicated in a false case and apart from that he has already joined the investigation and he is not likely to abscond, or otherwise misuse the liberty while on bail, therefore, there was no justification to decline anticipatory bail to the appellant.

21. Mr. Bhushan also submitted that the FIR in this case refers to an incident which had taken place on the instigation of the appellant about eight days ago. According to him, proper analysis of the averments in the FIR leads to irresistible conclusion that the entire prosecution story seems to be a cock and bull story and no reliance can be placed on such a concocted version.

22. Mr. Bhushan contended that the personal liberty is the most important fundamental right guaranteed by the Constitution. He also submitted that it is the fundamental principle of criminal jurisprudence that every individual is presumed to be innocent till he or she is found guilty. He further submitted that on proper analysis of section 438 Cr.P.C. the legislative wisdom becomes quite evident that the legislature wanted to preserve and protect personal liberty and give

impetus to the age-old principle that every person is presumed to be innocent till he is found guilty by the court.

23. Mr. Bhushan also submitted that an order of anticipatory bail does not in any way, directly or indirectly, take away from the police their power and right to fully investigate into charges made against the appellant. He further submitted that when the case is under investigation, the usual anxiety of the investigating agency is to ensure that the alleged accused should fully cooperate with them and should be available as and when they require him. In the instant case, when the appellant has already joined the investigation and is fully cooperating with the investigating agency then it is difficult to comprehend why the respondent is insistent for custodial interrogation of the appellant? According to the appellant, in the instant case, the investigating agency should not have a slightest doubt that the appellant would not be available to the investigating agency for further investigation particularly when he has already joined investigation and is fully cooperating with the investigating agency.

24. Mr. Bhushan also submitted that according to the General Clauses Act, 1897 the court which grants the bail also has the power to cancel it. The grant of bail is an interim order. The court can always review its decision according to the subsequent facts, circumstances and new material. Mr. Bhushan also submitted that the exercise of grant, refusal and cancellation of bail can be undertaken by the court either at the instance of the accused or a public prosecutor or a complainant on finding fresh material and new circumstances at any point of time. Even the appellant's reluctance in not fully cooperating with the investigation could be a ground for cancellation of bail.

25. Mr. Bhushan submitted that a plain reading of the section 438 Cr.P.C. clearly reveals that the legislature has not placed any fetters on the court. In other words, the legislature has not circumscribed court's discretion in any manner while granting anticipatory bail, therefore, the court should not limit

the order only for a specified period till the charge-sheet is filed and thereafter compel the accused to surrender and ask for regular bail under section 439 Cr.P.C., meaning thereby the legislature has not envisaged that the life of the anticipatory bail would only last till the charge-sheet is filed. Mr. Bhushan submitted that when no embargo has been placed by the legislature then this court in some of its orders was not justified in placing this embargo.

26. Mr. Bhushan submitted that the discretion which has been granted by the legislature cannot and should not be curtailed by interpreting the provisions contrary to the legislative intention. The courts' discretion in grant or refusal of the anticipatory bail cannot be diluted by interpreting the provisions against the legislative intention. He submitted that the life is never static and every situation has to be assessed and evaluated in the context of emerging concerns as and when it arises. It is difficult to visualize or anticipate all kinds of problems and situations which may arise in future.

Law has been settled by an authoritative pronouncement of the Supreme Court

27. The Constitution Bench of this Court in *Gurbaksh Singh Sibbia and Others v. State of Punjab* (1980) 2 SCC 565 had an occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 Cr.P.C. is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest. The Constitution Bench's relevant observations are set out as under:

> "……..A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care

and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

28. Mr. Bhushan referred to a Constitution Bench judgment in *Sibbia's* case (supra) to strengthen his argument that no such embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on para 15 of *Sibbia's* case (supra), which reads as under:

> **"15.** Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will

> be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

29. Mr. Bhushan submitted that the Constitution Bench in *Sibbia's* case (supra) also mentioned that "we see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal".

30. Mr. Bhushan submitted that the court's orders in some cases that anticipatory bail is granted till the charge-sheet is filed and thereafter the accused has to surrender and seek bail application under section 439 Cr.P.C. is neither envisaged by the provisions of the Act nor is in consonance with the law declared by a Constitution Bench in *Sibbia's* case (supra) nor it is in conformity with the fundamental principles of criminal jurisprudence that accused is considered to be innocent till he is found guilty nor in consonance with the provisions of the Constitution where individual's liberty in a democratic society is considered sacrosanct.

31. Mr. Mahesh Jethmalani, learned senior counsel appearing for respondent no. 2, submitted that looking to the facts and circumstances of this case, the High Court was justified in declining the anticipatory bail to the appellant. He submitted that the anticipatory bail ought to be granted in rarest of rare cases where the nature of offence is not very serious. He placed reliance on the case of *Pokar Ram v. State of Rajasthan and Others* (1985) 2 SCC 597 and submitted that in murder cases custodial interrogation is of paramount

importance particularly when no eye witness account is available.

32. Mr. Jethmalani fairly submitted that the practice of passing orders of anticipatory bail operative for a few days and directing the accused to surrender before the Magistrate and apply for regular bail are contrary to the law laid down in *Sibbia's case* (supra). The decisions of this Court in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra* (1996) 1 SCC 667, *K. L. Verma v. State and Another* (1998) 9 SCC 348*, Adri Dharan Das* v. *State of West Bengal* (2005) 4 SCC 303 and *Sunita Devi* v. *State of Bihar and Another* (2005) 1 SCC 608 are in conflict with the above decision of the Constitution Bench in *Sibbia's case* (supra). He submitted that all these orders which are contrary to the clear legislative intention of law laid down in *Sibbia's case* (supra) are *per incuriam.* He also submitted that in case the conflict between the two views is irreconcilable, the court is bound to follow the judgment of the Constitution Bench over the subsequent decisions of Benches of lesser strength.

33. He placed reliance on *N. Meera Rani v. Government of Tamil Nadu and Another* (1989) 4 SCC 418 wherein it was perceived that there was a clear conflict between the judgment of the Constitution Bench and subsequent decisions of Benches of lesser strength. The Court ruled that the dictum in the judgment of the Constitution Bench has to be preferred over the subsequent decisions of the Bench of lesser strength. The Court observed thus:

> ".…….All subsequent decisions which are cited have to be read in the light of the Constitution Bench decision since they are decisions by Benches comprising of lesser number of judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution bench in *Rameshwar Shaw's case (1964) 4 SCR 921*"

34. He placed reliance on another judgment of this Court in *Vijayalaxmi Cashew Company and Others v. Dy. Commercial Tax Officer and Another* (1996) 1 SCC 468. This Court held as under:

> ".……It is not possible to uphold the contention that perception of the Supreme Court, as will appear from the later judgments, has changed in this regard. A judgment of a Five Judge Bench, which has not been doubted by any later judgment of the Supreme Court cannot be treated as overruled by implication."

35. He also placed reliance on *Union of India and Others* v. *K. S. Subramanian* (1976) 3 SCC 677 and *State of U.P.* v. *Ram Chandra Trivedi* (1976) 4 SCC 52 and submitted that in case of conflict, the High Court has to prefer the decision of a larger Bench to that of a smaller Bench.

36. Mr. Jethmalani submitted that not only the decision in *Sibbia's* case (supra) must be followed on account of the larger strength of the Bench that delivered it but the subsequent decisions must be held to be *per incuriam* and hence not binding since they have not taken into account the ratio of the judgment of the Constitution Bench.

37. He further submitted that as per the doctrine of *'per incuriam'*, any judgment which has been passed in ignorance of or without considering a statutory provision or a binding precedent is not good law and the same ought to be ignored. A perusal of the judgments in *Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma* v. *State and Another, Adri Dharan Das* v. *State of West Bengal* and *Sunita Devi* v. *State of Bihar and Another* (supra) indicates that none of these judgments have considered para 42 of *Sibbia's case* (supra) in proper perspective. According to Mr. Jethmalani, all subsequent decisions which have been cited above have to be read in the light of the Constitution Bench's decision in *Sibbia's case* (supra) since they are decisions of Benches comprised

of lesser number of judges. According to him, none of these subsequent decisions could be intended taking a view contrary to that of the Constitution Bench in *Sibbia's case* (supra).

38. Thus, the law laid down in para 42 by the Constitution Bench that the normal rule is not to limit operation of the order of anticipatory bail, was not taken into account by the courts passing the subsequent judgments. The observations made by the courts in the subsequent judgments have been made in ignorance of and without considering the law laid down in para 42 which was binding on them. In these circumstances, the observations made in the subsequent judgments to the effect that anticipatory bail should be for a limited period of time, must be construed to be *per incuriam* and the decision of the Constitution Bench preferred.

39. He further submitted that the said issue came up for consideration before the Madras High Court reported in *Palanikumar and Another v. State* 2007 (4) CTC 1 wherein after discussing all the judgments of this court on the issue, the court held that the subsequent judgments were in conflict with the decision of the Constitution Bench in *Sibbia's case* (supra) and in accordance with the law of precedents, the judgment of the Constitution Bench is biding on all courts and the ratio of that judgment has to be applicable for all judgments decided by the Benches of same or smaller combinations. In the said judgment of *Sibbia's case* (supra) it was directed that the anticipatory bail should not be limited in period of time.

40. We have heard the learned counsel for the parties at great length and perused the written submissions filed by the learned counsel for the parties.

Relevance and importance of personal liberty

41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are

fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.

42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why "liberty" is called the very quintessence of a civilized existence.

43. Origin of "liberty"' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his "republic" as the best source for the achievement of the self-realization of the people.

44. Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility".

45. It is very difficult to define the "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and

thirdly, organization of opportunities for the exercise of a continuous initiative.

46. "Liberty" may be defined as a power of acting according to the determinations of the will. According to Harold Laski, liberty was essentially an absence of restraints and John Stuard Mill viewed that "all restraint", qua restraint is an evil". In the words of Jonathon Edwards, the meaning of "liberty" and freedom is:

> "Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."

47. It can be found that "liberty" generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute discretion, which when used in this manner brings an end to "liberty" and freedom is lost. At the same time "liberty" without restraints would mean liberty won by one and lost by another. So "liberty" means doing of anything one desires but subject to the desire of others.

48. As John E.E.D. in his monograph Action on "Essays on Freedom and Power" wrote that Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization.

49. A distinguished former Attorney General for India, M.C. Setalvad in his treatise "War and Civil Liberties" observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty.

50. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. In brief, according to this doctrine, the state exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The state exists for the benefit of the individual.

51. Mr. Setalvad in the same treatise further observed that it is also true that the individual cannot attain the highest in him unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. According to Justice Holmes, these liberties are the indispensable conditions of a free society. The justification of the existence of such a state can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore, in a properly constituted democratic state, there cannot be a conflict between the interests of the citizens and those of the state. The harmony, if not the identity, of the interests of the state and the individual, is the fundamental basis of the modern Democratic National State. And, yet the existence of the state and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State. The individuals composing the state must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals.

52. Harold J. Laski in his monumental work in "Liberty in

the Modern State" observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book "The Development of Constitutional Guarantee of Liberty" that whatever, 'liberty' may mean today, the liberty is guaranteed by our bills of rights, "is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals."

54. Blackstone in "Commentaries on the Laws of England", Vol.I, p.134 aptly observed that "Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law".

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, "Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

56. Eminent English Judge Lord Alfred Denning observed:

> "By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person…. It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live."

57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that "liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body".

Right to life and personal liberty under the Constitution

58. We deem it appropriate to deal with the concept of personal liberty under the Indian and other Constitutions.

59. The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.

60. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. American Constitution provides that no person shall be deprived of his life, liberty, or property without due process of law. The due process clause not only protects the property but also life and liberty, similarly Article 21 of the Indian Constitution asserts the importance of Life and

Liberty. The said Article reads as under:-

> "no person shall be deprived for his life or personal liberty except according to procedure established by law"

the right secured by Article 21 is available to every citizen or non-citizen, according to this article, two rights are secured.

1. Right to life

2. Right to personal liberty.

61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

62. This court defined the term "personal liberty" immediately after the Constitution came in force in India in the case of *A. K. Gopalan v. The State of Madras*, AIR 1950 SC 27. The expression 'personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of 'personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherjea, J. in the said judgment observed that 'Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. 'Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J. however, said that whatever may be the generally accepted connotation of the expression 'personal liberty', it was used in Article 21 in a

sense which excludes the freedom dealt with in Article 19.

Thus, the Court gave a narrow interpretation to 'personal liberty'. This court excluded certain varieties of rights, as separately mentioned in Article 19, from the purview of 'personal liberty' guaranteed by Art. 21.

64. In *Kharak Singh v. State of U.P. and Others* AIR 1963 SC 1295, Subba Rao, J. defined 'personal liberty, as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. The court held that 'personal liberty' in Article 21 includes all varieties of freedoms except those included in Article 19.

65. In *Maneka Gandhi v. Union of India and Another* (1978) 1 SCC 248, this court expanded the scope of the expression 'personal liberty' as used in Article 21 of the Constitution of India. The court rejected the argument that the expression 'personal liberty' must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). It was observed: "The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19." So, the phrase 'personal liberty' is very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Article 19.

66. Right to life is one of the basic human right and not even the State has the authority to violate that right. [*State of A.P. v. Challa Ramakrishna Reddy and Others* (2000) 5 SCC 712].

67. Article 21 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of this Constitution, personal liberty of man is at root of Article 21 and each expression used in this Article enhances human

dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. [*Kartar Singh v. State of Punjab and Others* (1994) 3 SCC 569].

68. While examining the ambit, scope and content of the expression "personal liberty" in the said case, it was held that the term is used in this Article as a compendious term to include within itself all varieties of rights which goes to make up the "personal liberties" or man other than those dealt within several clauses of Article 19(1). While Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes on and comprises the residue.

69. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in *A.K. Gopalan (*supra*)*. But in course of time, the scope of this application of the Article against arbitrary encroachment by the executives has been expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus protection against arbitrary privation of "life" no longer means mere protection of death, or physical injury, but also an invasion of the right to "live" with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. [*Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Others* (1981) 1 SCC 608]

70. Article 21 has received very liberal interpretation by this court. It was held: "The right to live with human dignity and same does not connote continued drudging. It takes within its fold some process of civilization which makes life worth living and expanded concept of life would mean the tradition, culture, and heritage of the person concerned." [*P. Rathinam/Nagbhusan Patnaik v. Union of India and Another* (1994) 3 SCC 394.]

71. The object of Article 21 is to prevent encroachment

upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in *Khedat Mazdoor Chetana Sangath v. State of M.P. and Others* (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.

72. This court in *Central Inland Water Transport Corporation Ltd. and Another v. Brojo Nath Ganguly and Another* (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

73. This court remarked that an undertrial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape.

74. In *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526, this court has made following observations:

> "……. The Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (para 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary. Indian humans shall not be dichotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22 that every under-trial who is accused of a non-bailable offence punishable with more than 3 years prison term shall be routinely handcuffed is

violative of Articles 14, 19 and 21. The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the court where the victim is produced. ... Handcuffs are not summary punishment vicariously imposed at police level, at once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed under-trial and extra guards can make up exceptional needs. In very special situations, the application of irons is not ruled out. The same reasoning applies to (e) and (f). Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of under-trial custody is thus contrary to the unedifying escort practice. (Para 31)

Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the court directs that handcuffs shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorities stringent deprivation of life and liberty. (Para 30)

It is implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding

escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safekeeping. (Para 23)

Whether handcuffs or other restraint should be imposed on a prisoner is a matter for the decision of the authority responsible for his custody. But there is room for imposing supervisory regime over the exercise of that power. One sector of supervisory jurisdiction could appropriately lie with the court trying the accused, and it would be desirable for the custodial authority to inform that court of the circumstances in which, and the justification for, imposing a restraint on the body of the accused. It should be for the court concerned to work out the modalities of the procedure requisite for the purpose of enforcing such control."

75. After dealing with the concept of life and liberty under the Indian Constitution, we would like to have the brief survey of other countries to ascertain how life and liberty has been protected in other countries.

UNITED KINGDOM

76. Life and personal liberty has been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights, first time the King had acknowledged that there were certain rights of the subject could be called Magna Carta 1215. In 1628 the petition of rights was presented to King Charles-I which was the 1st step in the transfer of Sovereignty from the King to Parliament. It was passed as the Bill of Rights 1689.

77. In the Magna Carta, it is stated "no free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land".

78. Right to life is the most fundamental of all human rights and any decision affecting human right or which may put an individual's life at risk must call for the most anxious scrutiny. *See: Bugdaycay v. Secretary of State for the Home Department* (1987) 1 All ER 940. The sanctity of human life is probably the most fundamental of the human social values. It is recognized in all civilized societies and their legal system and by the internationally recognized statements of human rights. *See: R on the application of Pretty v. Director of Public Prosecutions* (2002) 1 All ER 1.

U.S.A.

79. The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of U.S.A. (1791) which declares as under :-

> "No person shall be…..deprived of his life, liberty or property, without due process of law." (The 'due process' clause was adopted in s.1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by 'the principles of fundamental justice' [s.7].

80. The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the 'due process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in accordance with 'due process', even though the legislation may be within the competence of the Legislature concerned. Due process is conveniently understood means procedural regularity and fairness. (Constitutional Interpretation by Craig R. Ducat, 8th Edn. 2002 p.475.).

WEST GERMANY

81. Article 2(2) of the West German Constitution (1948) declares:

> "Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order."

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the 'legal order' (or 'pursuant to a law, according to official translation). Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This gives the individual the rights to challenge the validity of a law or an executive act violative the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-2(2) provides:

> "(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein…….
>
> (2) Only the Judge shall decide on the admissibility and continued deprivation of liberty."

82. These provisions correspond to Article 21 of our Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed there.

JAPAN

83. Article XXXI of the Japanese Constitution of 1946 says:

> "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law."

This article is similar to Article 21 of our Constitution save that

it includes other criminal penalties, such as fine or forfeiture within its ambit.

CANADA

84. S. 1(1) of the Canadian Bill of Rights Act, 1960, adopted the 'Due Process' Clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian status, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself (s.2). The result was obvious : The Canadian Supreme Court in ***R***. v. ***Curr*** (1972) S.C.R. 889 held that the Canadian Court would not import 'substantive reasonableness' into s.1(a), because of the unsalutary experience of substantive due process in the U.S.A.; and that as to 'procedural reasonableness', s.1(a) of the Bill of Rights Act only referred to 'the legal processes recognized by Parliament and the Courts in Canada'. The result was that in Canada, the 'due process clause' lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes, - much the same as 'procedure established by law' in Article 21 of the Constitution of India, as interpreted in *A.K. Gopalan (*supra*).*

BANGADESH

85. Article 32 of the Constitution of Bangladesh, 1972 [3 SCW 385] reads as under:

> "No person shall be deprived of life or personal liberty save in accordance with law."

This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provision, it should be interpreted as in India.

PAKISTAN

86. Article 9 Right to life and Liberty. – "Security of Person : No person shall be deprived of life and liberty save in accordance with law."

NEPAL

87. In the 1962 – Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.

INTERNATIONAL CHARTERS

88. **Universal Declaration, 1948.** – Article 3 of the Universal Declaration says:

> "Everyone has the right to life, liberty and security of person."

Article 9 provides:

> "No one shall be subjected to arbitrary arrest, detention or exile."

Cl.10 says:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." [As to its legal effect, see M. v. Organisation Belge, (1972) 45 Inter, LR 446 (447, 451, et. Sq.)]

89. **Covenant on Civil and Political Rights** - Article 9(1) of the U.N. 1966, 1966 says:

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such

grounds and in accordance with such procedure as are established by law."

90. **European Convention on Human Rights, 1950.** – This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

91. In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in its 177th Report under the heading 'Introduction to the doctrine of "arrest" has described as follows:

> "Liberty is the most precious of all the human rights". It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The universal declaration of human rights adopted by the general assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the international covenant on civil and political rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, "one realizes the value of liberty only when he is deprived of it." Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless, there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres."

92. Just as the Liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important.

93. It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because section 438 Cr.P.C. has not been allowed its full play. The Constitution Bench in *Sibbia's case* (supra) clearly mentioned that section 438 Cr.P.C. is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that section 438 Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in *Sibbia's case* (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest *vis-à-vis* personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.

94. The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint

is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

95. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

96. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

97. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

Whether the powers under section 438 Cr.P.C. are subject to limitation of section 437 Cr.P.C.?

98. The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in *Sibbia's* case (supra) has

clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by section 438 Cr.P.C. to a dead letter. The Court observed that "We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

99. As aptly observed in *Sibbia's case* (supra) that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

100. The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall enlarged on bail.

101. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor the court may

either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

102. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in *Sibbia's* case (supra).

103. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.

104. The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in *Sibbia's* case (supra) has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session. The Constitution Bench observed as under:

> "We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their

> discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all "the legislature in, its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

GRANT OF BAIL FOR LIMITED PERIOD IS CONTRARY TO THE LEGISLATIVE INTENTION AND LAW DECLARED BY THE CONSTITUTION BENCH:

105. The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.

106. The judgment in *Salauddin Abdulsamad Shaikh* (supra) is contrary to legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.

107. The restriction on the provision of anticipatory bail under section 438 Cr.P.C. limits the personal liberty of the accused granted under Article 21 of the constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in *Maneka Gandhi's* case (supra) in which the court observed that in order to meet the challenge of Article 21 of the Constitution the procedure

established by law for depriving a person of his liberty must be fair, just and reasonable.

108. Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned court would be fully justified in imposing conditions including direction of joining investigation.

109. The court does not use the expression 'anticipatory bail' but it provides for issuance of direction for the release on bail by the High Court or the Court of Sessions in the event of arrest. According to the aforesaid judgment of *Salauddin's* case, the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.

110. In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

111. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate

consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this court in *Sibbia's* case (supra).

112. The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail. This is contrary to the basic intention and spirit of section 438 Cr.P.C. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

113. It is a settled legal position crystallized by the Constitution Bench of this court in *Sibbia's* case (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.

114. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this court in the *Sibbia's* case (supra).

"The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit

in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

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Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence."

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"I desire in the first instance to point out that the discretion given by the section is very wide. . . Now it seems to me that when the Act is so expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free

discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

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"The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

115. The Apex Court in *Salauddin's* case (supra) held that anticipatory bail should be granted only for a limited period and on the expiry of that duration it should be left to the regular court to deal with the matter is not the correct view. The reasons quoted in the said judgment is that anticipatory bail is granted at a stage when an investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender.

116. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and Sessions Court are granted under sections 437 and 439 also at such stages and they are granted till the trial.

117. The view expressed by this Court in all the above referred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the

anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

SCOPE AND AMBIT OF ANTICIPATORY BAIL:

118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in *Sibbia's* case (supra) was correctly understood, appreciated and applied.

119. This Court in the *Sibbia's* case (*supra*) laid down the following principles with regard to anticipatory bail:

(a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

(b) Filing of FIR is not a condition precedent to exercise of power under section 438.

(c) Order under section 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in section 437 cannot be read into section 438.

(e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such *ad interim order* must conform to requirements of the section and suitable

conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw 'no justification' to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this court in *Sibbia's* case (supra) and *Joginder Kumar v. State of U.P. and Others* (1994) 4 SCC 260.

Relevant consideration for exercise of the power

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Sibbia's* case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do.

In any event, this is the legislative mandate which we are bound to respect and honour.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of

anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the

judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In *Joginder Kumar's* case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

128. In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

(1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

(3) Direct the accused to execute bonds;

(4) The accused may be directed to furnish sureties of

number of persons which according to the prosecution are necessary in view of the facts of the particular case.

(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

(6) Bank accounts be frozen for small duration during investigation.

129. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

131. It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-à-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests.

132. The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by

them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

133. In our considered view, the Constitution Bench in *Sibbia's* case (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under section 438 Cr.P.C. A number of judgments have been referred to by the learned counsel for the parties consisting of Benches of smaller strength where the courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the court granting the anticipatory bail should leave it to the regular court to deal with the matter. This view is clearly contrary to the view taken by the Constitution Bench in *Sibbia's* case (supra). In the preceding paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under section 438 Cr.P.C. The Constitution Bench has aptly observed that "we see no valid reason for rewriting section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session but, for the purpose of limiting it".

134. In view of the clear declaration of law laid down by the Constitution Bench in *Sibbia's* case *(*supra*)*, it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in *Sibbia's* case (supra) clearly observed that it is not necessary to re-write

section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed.

135. The ratio of the judgment of the Constitution Bench in *Sibbia's* case (supra) perhaps was not brought to the notice of their Lordships who had decided the cases of *Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State and Another, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Another* (supra).

136. In *Naresh Kumar Yadav v. Ravindra Kumar* (2008) 1 SCC 632, a two-Judge Bench of this Court observed "the power exercisable under section 438 Cr.P.C. is somewhat extraordinary in character and it should be exercised only in exceptional cases. This approach is contrary to the legislative intention and the Constitution Bench's decision in *Sibbia's* case (supra).

137. We deem it appropriate to reiterate and assert that discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

138. The judgments and orders mentioned in paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in *Sibbia's* case (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing section 438 Cr.P.C.

139. Now we deem it imperative to examine the issue of *per incuriam* raised by the learned counsel for the parties. In

Young v. Bristol Aeroplane Company Limited (1994) All ER 293 the House of Lords observed that 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

> "……. In *Halsbury's Laws of England* (4th Edn.) Vol. 26: *Judgment and Orders*: *Judicial Decisions as Authorities* (pp. 297-98, para 578) per incuriam has been elucidated as under:
>
> > "A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (*Young v. Bristol Aeroplane Co. Ltd.,* 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300.
> >
> > In *Huddersfield Police Authority v. Watson,* 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

140. Lord Godard, C.J. in *Huddersfield Police Authority v. Watson* (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam.*

141. This court in *Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs. and Others* (2000) 4 SCC 262 observed as under:

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

142. In a Constitution Bench judgment of this Court in *Union of India v. Raghubir Singh* (1989) 2 SCC 754, Chief Justice Pathak observed as under:

> "The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

143. In *Thota Sesharathamma and another v. Thota Manikyamma (Dead) by LRs. and others (1991) 4 SCC 312* a two Judge Bench of this Court held that the three Judge Bench decision in the case of *Mst. Karmi v. Amru* (1972) 4 SCC 86 was per incuriam and observed as under:

> "…It is a short judgment without adverting to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in *Badri Pershad v. Smt. Kanso Devi.* The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act."

144. In *R. Thiruvirkolam v. Presiding Officer and Another*

(1997) 1 SCC 9 a two Judge Bench of this Court observed that the question is whether it was bound to accept the decision rendered in *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha* (1980) 2 SCC 593*,* which was not in conformity with the decision of a Constitution Bench in *P.H. Kalyani v. Air France* (1964) 2 SCR 104*.* J.S. Verma, J. speaking for the court observed as under:

> "With great respect, we must say that the above-quoted observations in *Gujarat Steel at P. 215* are not in line with the decision in *Kalyani* which was binding or with *D.C. Roy* to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For the reasons, we are bound to follow the Constitution Bench decision in *Kalyani,* which is the binding authority on the point."

145. In *Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and others* (2001) 4 SCC 448 a Constitution Bench of this Court ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness.

146. A Constitution Bench of this Court in *Central Board of Dawoodi Bohra Community v. State of Maharashtra* (2005) 2 SCC 673 has observed that the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

147. A three-Judge Bench of this court in *Official Liquidator v. Dayanand and Others* (2008) 10 SCC 1 again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in *State of Karnataka and Others v. Umadevi (3) and Others* (2006) 4 SCC 1 is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser

strength. In para 90, the court observed as under:-

> "We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."

148. In *Subhash Chandra and Another v. Delhi Subordinate Services Selection Board and Others* (2009) 15 SCC 458, this court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any Bench of smaller strength taking contrary view is *per incuriam.* The court in para 110 observed as under:-

> "Should we consider *S. Pushpa v. Sivachanmugavelu* (2005) 3 SCC 1 *t*o be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, *Marri Chandra Shekhar Rao v. Seth G.S. Medical College* (1990) 3

SCC 139 and *E.V. Chinnaiah v. State of A.P.* (2005) 1 SCC 394*. Marri Chandra Shekhar Rao* (supra) had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. *S. Pushpa* (supra) therefore, could not have ignored either *Marri Chandra Shekhar Rao* (supra) or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following *Official Liquidator v. Dayanand and Others* (2008) 10 SCC 1 therefore, we are of the opinion that the dicta in *S. Pushpa* (supra) is an obiter and does not lay down any binding ratio."

149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have clearly ignored a Constitution Bench judgment of this court in *Sibbia's case* (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C.. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are *per incuriam.*

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

151. In the instant case there is a direct judgment of the Constitution Bench of this court in *Sibbia's case* (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under section

438 Cr.P.C. The controversy is no longer *res integra.* We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit.

152. In our considered view the impugned judgment and order of the High Court declining anticipatory bail to the appellant cannot be sustained and is consequently set aside.

153. We direct the appellant to join the investigation and fully cooperate with the investigating agency. In the event of arrest the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs.50,000/- with two sureties in the like amount to the satisfaction of the arresting officer.

154. Consequently, this appeal is allowed and disposed of in terms of the aforementioned observations.

N.J. Appeal allowed.

SAINATH MANDIR TRUST
v.
VIJAYA & ORS.
(Civil Appeal No. 3030 of 2004)

DECEMBER 13, 2010

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Trust and Charities:

Bombay Public Trusts Act, 1950 – ss. 50, 51, 19, 20, 79 and 80 – Disputes relating to property of trusts – Permission of Charity Commissioner to institute the suit – Original owner dedicating plot in favour of idol by virtue of gift deed – Trustee of temple taking possession of the property – After eight years, original owner executing sale deed for consideration of Rs. 17,500/- in respect of the same property, in favour of purchaser – Suit for possession of property and claim of Rs. 17,500/- as damages by purchaser – Suit for possession dismissed, however, decreed to the extent of damages to be paid by original owner to purchaser, with future interest – Order passed by trial court set aside by first appellate court as also High Court – On appeal, held: Purchaser of the property was not in possession of the property – They published notice inviting objections before purchasing property – Possession of the property was delivered to the trust, thus, it is obligatory for the purchaser to seek permission from the Charity Commissioner u/ss. 50 and 51 before instituting a civil suit – Also it was incumbent upon the original owner to seek permission from Charity Commissioner before executing a sale deed – Gift being a dedication of idol, transfer in favour of trust was valid transfer and did not require registration – Thus, suit for possession barred in terms of ss. 19, 20, 79 and 80 – Order of High Court is set aside and that of trial court is restored with modification to the extent that trust would pay the

purchaser Rs. 17,500/- without interest – Transfer of Property Act, 1882 – s. 123 – Registration – Deeds and documents.

In the year 1974, respondent No. 8 dedicated certain property to the idol of Saibaba by way of a gift deed. The possession was handed over to the appellant-temple trust, registered under the Bombay Public Trusts Act 1950, for building a residential accommodation for devotees of the temple run by the appellant-temple trust. In the year 1982, the predecessor of respondent Nos. 1 to 7 intended to purchase the said property and published notice in the newspaper, inviting objections before the purchase of the property. Thereafter, they purchased the property from respondent No. 8 by a registered sale deed for a consideration of Rs. 17,000/- and took possession of the property; and subsequently sent a notice to the appellant-trust to vacate the property but the appellant-trust refused to vacate stating that they were the owners of the property.

The predecessor of respondent Nos. 1 to 7 then filed a suit for possession and claimed Rs. 17,500/- as damages against the appellant-temple trust. The trial court dismissed the suit as regards the recovery of the possession of the property. However, the suit was decreed to the extent of damages of Rs. 17,500/- to be paid to the respondent Nos. 1 to 7 by respondent No. 8 with future interest. The first appellate court set aside the order passed by the trial court. The High Court upheld the order passed by the first appellate court. Therefore, the appellant-temple trust filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. It is evident from the record that it was the case of the plaintiff/respondent that they were not in possession of the plot in question. The finding recorded by the trial court which was not interfered either by the

first appellate court or the High Court was that the plaintiff/ respondent was not in possession of the suit property in spite of the sale deed dated 14.10.1982 and the possession of the suit property was never delivered to the plaintiff or their legal heirs, respondent Nos. 1 to 7. It can logically be inferred that for this very reason the plaintiff/respondent published a notice in a daily newspaper inviting objections before purchasing the property as in the normal circumstance, if a sale deed is executed by a private party holding title to the suit property in favour of another private party, the question of publishing a notice in the newspaper does not arise since the transaction of sale between two private parties do not normally require issuance of a notice in the newspaper inviting objections. [Para 12] [289-C-G]

1.2. When the disputed plot had already been dedicated in favour of the idol by virtue of a deed of gift, of which the appellant is a trustee, and the same was acted upon, as possession also was delivered to the appellant trust, it was surely necessary for respondent Nos. 1 to 7-purchaser of the suit land and also incumbent upon respondent No. 8-vendor of the sale deed to seek permission from the Charity Commissioner under Sections 50 and 51 of the Bombay Public Trusts Act, 1950 before a sale deed could be executed in regard to the disputed plot and more so before a civil suit could be instituted. Therefore, the dedication of the plot for charitable purpose in the nature of gift having been acted upon as a result of which the possession was also delivered to the appellant-trust, the civil suit filed by the predecessor of contesting respondent Nos. 1-7 for possession was expressly barred in terms of Sections 19, 20, 79 and 80 of the Act. [Para 13] [290-A-D]

1.3. The gift deed was an unregistered instrument and no title could pass on the basis of the same under

Section 123 of the Transfer of Property Act, 1882. However, when the document is in the nature of a dedication of immovable property to God, the same does not require registration as it constitutes a religious trust and is exempted from registration. [Para 14] [290-E-F]

Narasimhaswami vs. Venkatalingam and Ors. **AIR 1927 Mad. 636;***Bhupati Nath vs. Basantakumari* **AIR 1936 Cal. 556;** *Chief Controlling Revenue Authority vs. Sarjubai* **AIR 1944 Nag. 33;** *Pallayya vs. Ramavadhanulu* **13 M.L.J. 364 – referred to.**

1.4. Even if no final opinion is expressed that the deed of gift executed in favour of the appellant-trust having not been registered, did not confer any title on the appellant-trust, it is not possible to brush aside the contention that the respondent Nos.1 to 7-purchaser of the plot were legally bound by Section 51 of the Act to obtain consent of Charity Commissioner before institution of the suit against the appellant which was admittedly in possession of the property after the gift deed was executed in its favour by the respondent No.8. Section 51 further envisages the right of appeal by the affected party if the Charity Commissioner refuses his consent to the institution of the suit. Prior to this, Section 50 (ii) already envisages that *where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust, a suit by or against or relating to public trust or trustees or other although may be filed, consent under Section 51 of the Charity Commissioner is clearly required under Section 51 of the Act.* **[Paras 15 and 16] [292-E-F; 293-B-D]**

1.5. The respondent-purchaser of plot went to the extent of publishing a notice in a local daily inviting objections indicating that he intended to purchase a suit land, but he conveniently ignored the provisions of

Section 51 of the Act and refused to apply to the Charity Commissioner before instituting a suit against the appellant-trust even though the possession of the plot was delivered to the appellant-trust way back in the year 1974 and after more than eight years, the respondent No.8-vendor executed a sale deed in favour of the predecessor of respondent Nos.1 to 7. Although the relevance of Section 51 of the Act is clearly apparent and the appellant also raised it before the High Court, the Single Judge of the High Court did not even address the important issue having a legal bearing on the right of the appellant to retain the plot, which, although in the form of a deed of gift, was practically in the nature of dedication to the appellant-trust for the charitable purpose of constructing a 'Bhakt Niwas' for the devotees of Saibaba. In view of the possession of the property by the appellant-trust, it was obligatory on the part of the purchasers of the plot to seek permission from the Charity Commissioner under Section 51 of the Act, to recover the property by filing a suit or initiating a proceeding. [Paras 17 and 18] [293-D-H; 294-A-E]

K. Shamrao and Ors. vs. Assistant Charity Commissioner **(2003) 3SCC 563 – referred to.**

1.6 Section 79 (1) of the Act lays down that any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, is required to be decided under its statutory force by the Deputy or Assistant Charity Commissioner as provided under the Act and Section 80 bars jurisdiction of the civil court to decide or deal with any question which is by or under the Act to be decided or dealt with by any officer or authority under the Act. Thus, when the appellant-trust was in occupation and possession of the property, then the respondent-plaintiff clearly could not have approached the civil court ignoring the specific

provision under the Bombay Public Trusts Act, 1950 which laid down the provisions to deal with disputes relating to the property of the trusts. It was the statutory requirement of the Act to approach the Charity Commissioner before a suit could be instituted. [Paras 18 and 19] [294-F-H; 295-A-C]

1.7 The judgment and order of the High Court as also the first appellate court is set aside and the judgment and order of the trial court dismissing the suit filed by the plaintiff-respondents No.1 to 7 is restored. The trial court, however, had decreed the suit for return of the money of Rs.17,500/- to the predecessor of respondents No.1 to 7 and had also directed the respondent No.8 to pay interest on the said amount. The respondent No.8 had already been divested of his title to execute a sale deed in favour of respondent Nos.1 to 7 as he had already executed a deed of gift in favour of the appellant-trust for charitable purpose. In the interest of equity, respondent No.8 should not be saddled with the financial liability to return the amount of Rs.17,500/- with interest to the respondent Nos.1-7. The amount, in the interest of equity and fair play, should be paid by the appellant-trust to the respondent Nos.1-7 on behalf of respondent No.8, since the said part of the decree which was passed by the trial court in favour of respondent Nos. 1-7 was not challenged by way of an appeal by respondent No.8. But since the appellant-trust is the rightful owner of the disputed plot and the respondent No.8 as a consequence was divested of the property, the amount paid by the predecessor of respondent Nos.1-7, should be refunded to respondent Nos.1-7 without interest and, thus, the decree of the trial court is modified to the said extent. [Para 20] [295-D-H; 296-A-B]

Case Law Reference:

AIR 1927 Mad. 636 Referred to. Para 14

AIR 1936 Cal. 556	**Referred to.**	**Para 14**
AIR 1944 Nag. 33	**Referred to.**	**Para 14**
13 M.L.J. 364	**Referred to.**	**Para 14**
(2003) 3 SCC 563	**Referred to.**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3030 of 2004.

From the Judgment & Order dated 27.3.2003 of the High Court of Judicature at Bombay, bench at Nagpur in Second Appeal No. 246 of 1990.

U.U. Lalit, Anil Kadu, Satyajit A. Desai, Anangha S. Desai, Venkateswara Rao Anumolu for the Appellant.

Shivaji M. Jadhav for the Respondent.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. This appeal by special leave has been filed against the Judgment and Order dated 27.03.2003 passed by the High Court of Judicature at Bombay, Bench at Nagpur, in Second Appeal No. 246 of 1990 whereby the appeal was dismissed on merit. Consequently, the judgment of reversal passed by the Additional District Judge, Amaravati allowing the appeal and setting aside the judgment and order of the Trial Court which had dismissed the suit of the plaintiff/ respondent, was upheld.

2. The origin of this appeal at the instance of the defendant/ appellant herein emanates from a Regular Civil Suit No. 166 of 1983 which had been filed by the deceased plaintiff-Shri Vitthal Motiramji Mandale who is now represented by his legal heirs Respondent Nos. 1-7, for possession and damages valued at Rs. 17,500/- in the Court of Civil Judge Senior Division, Amaravati, against the appellant - Sainath Mandir Trust which is a registered public trust within the provisions of

Bombay Public Trusts Act 1950. The suit land comprises of a plot bearing No. 57, arising out of original fields bearing Survey No. 33, situated at Saturana in the outskirts of Amravati Township. As per the case of the defendant/appellant herein, which admittedly is a public trust, the suit property was dedicated to the idol of Saibaba by the respondent No. 8 / original defendant No.2 by way of a gift deed executed way back on 31.1.1974 which according to the appellant's version, was immediately acted upon as possession was also handed over to the appellant-trust which is in occupation of the suit property till date. It is the specific case of the defendant/appellant that the suit plot was donated by way of a gift deed executed by the original defendant No.2 /respondent No. 8 herein Shri Vasant Mahadeo Fartode on 31.1.1974 essentially for building a residential accommodation for devotees of the Saibaba Mandir run by the appellant-trust. Thus, by virtue of the gift deed, the admitted owner respondent No. 8 / original defendant No. 2 Shri Vasant Mahadeo Fartode was divested of the title over the suit property after he executed the gift deed and also delivered possession of the plot to the appellant-trust. Hence, as per the case of the appellant Sainath Mandir Trust, the gift deed dated 31.1.1974 was duly acted upon since the appellant immediately came in possession of the suit property and continues to remain in possession of the same till date ever since 1974.

3. As against the aforesaid case of the appellant, the predecessor of the contesting respondent Nos. 1-7, late Shri Vitthal Motiramji Mandale who is now legally represented by the respondent Nos. 1-7, intended to purchase the suit property and therefore issued a notice in daily "Matrbhumi" dated 2.10.1982 thereby inviting objections in respect of the said plot. Further, case of the respondent Nos. 1 to 7 is that no objections were received in response to the notice as a result of which the predecessor of respondent Nos. 1 to 7 i.e. late Shri Vitthal Motiramji Mandale purchased the plot from the respondent No.

8-Shri Vasant Mahadeo Fartode by a registered sale deed dated 14.10.1982 for a consideration of Rs. 17,000/-. As per the plaintiff/respondent's case, they also claimed to have immediately taken possession of the said property after execution of the sale deed and it is further averred that when the contesting respondents wanted to put fence around the said plot, then on 4.12.1982 they noticed a board on the disputed plot which was put up by the appellant-trust on which it was mentioned that the respondent No. 8/defendant No.2 had given the said plot to the appellant-trust for construction of a residential accommodation for the devotees of Saibaba Mandir. In view of this notice, the respondents sent a notice on 7.12.1982 to the appellant-trust to remove the board and further do not obstruct to the fencing of the suit plot which was responded by the appellant-trust stating that they are in possession of the suit plots since 31.1.1974 and are owners of the plot in question and cannot be directed to vacate.

4. The respondent felt seriously aggrieved with this response and hence a Regular Civil Suit No. 166 of 1983 was filed by the predecessor of the contesting respondent Nos. 1 to 7 - Shri Vitthal Motiramji Mandale for possession and damages valued at Rs. 17,500/- in the Court of Civil Judge, Senior Division, Amaravati. The appellant-trust contested the suit by filing a written statement on 19.12.1983 asserting their ownership and possession over the suit property since 31.1.1974. It was stated therein that the suit land had already been gifted to the appellant-trust by gift deed dated 31.1.1974 which was properly executed and validly attested and had also been acted upon by the parties concerned. It was, therefore, submitted therein that by virtue of the gift deed respondent No. 8/defendant No. 2 had no subsisting title or ownership as regards the suit property and as such he was not entitled to subsequently execute any sale deed in respect of the suit property.

5. The learned IInd Joint Civil Judge, Junior Division,

Amravati who tried the suit was finally pleased to dismiss the suit and denied the relief regarding the recovery of possession of the said plot. However, the suit was decreed to the extent of damages of Rs. 17,500/- to be paid to the respondent/original plaintiff by the respondent No. 8/original defendant No.2 within 30 days alongwith the costs of the suit. It was further directed that the respondent No. 8/original defendant No.2 shall pay future interest on the principal amount of Rs. 17,000/- from the date of filing of the suit till its full realization at the rate of Rs. 10/- per cent per annum to the predecessor of respondent Nos. 1 to 7 herein as it was held that respondent No. 8 could not execute the sale deed in favour of a third party i.e. the predecessor of respondent Nos. 1 to 7 herein as he had already executed a gift deed in favour of the appellant way back on 31.1.1974 which was acted upon as a result of which the appellant-trust was already in possession of the suit land. Thus, the Trial Court was pleased to dismiss the respondent/ original plaintiff's claim in so far as the recovery of possession of the suit plot is concerned.

6. The predecessor of the plaintiff/respondent Nos. 1 to 7 assailed the judgment and order of the Trial Court before the Court of learned District Judge, Amaravati and the appellant-trust also filed cross-objections challenging the findings of the trial court in so far as the validity of the gift deed executed in favour of the appellant was concerned. It had been submitted therein that the gift dated 31.1.1974 was for a price below Rs. 100 and it was in favour of the deity and as such was admissible; hence the Trial Court committed an error in holding that the gift deed was not valid. The appellant therein had also contended that the gift deed conferred a legal and valid title coupled with possession in favour of the appellant-trust and hence the subsequent documents of sale deed claimed to have been executed in favour of the plaintiff/contesting respondents ought not to have been ignored as the vendor Shri Vitthal Motiramji Mandale was not left with any title concerning the suit property. It was further pointed out from various circumstances

and evidence brought on record, that a fraudulent collusion exited between the original plaintiff and the defendant Nos.1 and 2 i.e. vendor and the vendee and the alleged sale deed did not confer any title to the vendee since the vendor had already executed a gift deed in favour of the appellant-trust almost 8 years prior to execution of the gift deed which was acted upon and possession was delivered to the appellant-trust. However, the First Appellate Court being the Court of Additional District Judge, Amaravati was pleased to allow the appeal of the plaintiff/respondents and rejected the cross-objections filed by the appellant-trust.

7. Being aggrieved by the Judgment and Order dated 4.5.1990 passed by the Additional District Judge, Amaravati, the appellant-trust was constrained to prefer a Second Appeal No. 246 of 1990 before the High Court of Judicature at Bombay, Nagpur Bench, Nagpur wherein the substantial questions of law, inter alia, was raised that the civil suit filed by the plaintiff/respondent was expressly barred in terms of the provisions of Sections 19, 20, 79 and 80 of the Bombay Public Trusts Act 1950. The substantial question of law was further raised whether the gift deed dated 31.1.1974 being an Act of "Dedication" of the suit property by the respondent No. 8 to the deity which is not a "living person" would not be "Dedication" of property in terms of Section 123 of the Transfer of Property Act and hence whether the provisions of the same are not applicable to the deed of gift which had been executed in favour of the deity. Substantial question was also raised whether the suit could be entertained without permission of the Charity Commissioner under Sections 50 and 51 of the Bombay Public Trusts Act 1950 which had not been obtained by the original plaintiff prior to filing of the suit. The gift deed dated 31.1.1974 having been acted upon in pursuance of which the appellant-trust came in possession of the said property since 31.1.1974 and continues to be in possession till date, could not have been ordered to be restored in favour of the plaintiff/respondent predecessor as the sale deed dated

14.10.1982 which was subsequently executed by the vendor, could not confer any right and title to the respondent / purchaser as the plot in question had already been dedicated to the idol of which the appellant is the trust.

8. The learned single Judge of the High Court of Bombay at Nagpur Bench, Nagpur, however, was pleased to dismiss the appeal as it was held that Section 123 of the Transfer of Property Act lays down the procedure in which the property can be transferred by way of a gift and it is necessary that the said document should have been registered and it should have been signed by the donor attested by two witnesses. It was held that none of the requirements have been complied and, therefore, the appeal against the judgment and order of the Additional District Judge, Amaravati was not fit to be entertained. Consequently the appeal stood dismissed against which this appeal by special leave has been filed by the appellant -Sainath Mandir Trust and the special leave having been granted in favour of the appellant, this appeal has come up before us for hearing and its adjudication.

9. In so far as the contention of the plaintiff/respondent in support of the Judgment and Order of the High Court as also First Appellate Court is concerned, the arguments advanced before the Courts below have been reiterated which was accepted by the High Court which held that the gift deed executed in favour of the deity of which the appellant is a trustee, conferred no right and title in favour of the deity and therefore the donor had every right to execute subsequently a sale deed in favour of the predecessor of the contesting respondents in view of which the suit filed by the predecessor of contesting respondent Nos. 1 to 7 was rightly decreed in their favour by the First Appellate Court being the Court of Additional District Judge which was upheld by the High Court.

10. Learned counsel for the contesting defendant/the appellant-trust on its part submitted at the threshold that the gift deed which was executed in favour of the deity clearly reveals

that the same is a "Dedication" to an idol and not a "living person" by the respondent No. 8/original defendant No. 2 and thus the same can be said to be a valid transfer in terms of Section 123 of the Transfer of Property Act. Elaborating on this aspect, it was submitted that the idea, intention and the feelings of the donor behind the gift deed has not been taken into consideration and going by the nomenclature of the document, if the intention of the donor is appropriately construed from the words of the gift deed, the same will clearly and unambiguously suggest that the defendant No.2-Vasant Fartode who was a devotee of Saibaba had dedicated the said property to the idol for the construction of 'Bhakta Niwas'. This issue was specifically raised in the cross-appeal filed before the District Judge and was reiterated in the Second Appeal. The gift in question was a 'dedication to the idol' and hence the same was a valid transfer in favour of the appellant-trust and, therefore, there was no question of any registration of the same, since the gift deed was executed on 31.1.1974 and was clearly acted upon as possession was also handed over to the appellant-trust. The finding of the Trial Court would clearly demonstrate that the appellant was in possession of the said property in question and the same is an undisputed position. The very fact that the suit for possession was required to be filed by the respondent/original plaintiff further substantiates the fact that the gift deed was acted upon and possession was delivered to the appellant-trust.

11. Supplementing the aforesaid arguments, it was still further contended that in view of the "dedication" of the property to the idol of which the appellant is a trustee, any suit for possession against such property could not have been filed without the requisite permission of the Charity Commissioner under Sections 50 and 51 of the Bombay Public Trusts Act 1950. A mere perusal of Section 50 Sub-Section (2) of the Bombay Public Trusts Act specifically indicates that "where a direction or decree is required to recover the possession or to follow property belonging 'or alleged' to be belonging to a public

trust" and a dispute arises in regard to the same, permission of the Charity Commissioner was clearly a necessary legal requirement. Hence, it was submitted that as the appellant-trust is in possession of the plot in question and the relief of possession was sought by plaintiff/respondent, the requisite permission under Sections 50 and 51 became mandatory before filing such a suit, failing which the suit ought to have been rendered as not maintainable. The requirement or necessity of such a permission is the basic requirement at the very threshold and it is impermissible for the Court to enter into the merits of the matter vis-à-vis the validity of the transfer etc. in such a suit which does not comply with the basic requirement of obtaining such a permission. Hence, it was contended that First Appellate Court as also the High Court have clearly erred in going into the issues of title and validity of the transfer which are only subsequent issues which would arise only if the suit qualified the test of Sections 50 and 51 of the Act. The Courts below also failed to take into consideration that the suit was bad for non-joinder of necessary parties in terms of Order XXXI Rule 2 of C.P.C. as all the trustees of the Trust were not joined as parties and hence the Trial Court was clearly justified in dismissing the suit as not maintainable for want of necessary permission of the Charity Commissioner under Sections 50 and 51 of the Act as well as non-joinder of all the trustees in terms of Order XXXI Rule 2 of the C.P.C. It was also submitted that the appellant-trust has been in uninterrupted possession of the suit land since 31.1.1974 and the suit property in question had already been included and recorded by the Charity Commissioner as a property of the trust *and the Change Report to that effect was required in terms of* Section 22 of the Bombay Public Trusts Act. It was finally submitted that the property in question was gifted for a pious purpose of construction of 'Bhakta Niwas' and, therefore, considering the aforesaid factors and the comparative hardships to the parties, the suit for possession is not only fit to be dismissed on the ground of its maintainability but even on the merits of the matter.

12. Having heard the counsel for the parties and considering the merits of the arguments advanced by learned counsel for the contesting parties, it is evident from the record that the plaintiff/respondent first of all intended to purchase the suit property in the year 1982 and, therefore, published a notice in the daily "Matrbhumi" dated 2.10.1982 whereby objections were invited in respect of the said plot. It is the case of the contesting respondent Nos. 1 to 7 that since no objections were received, the original plaintiff - Shri Vitthal Motiramji Mandale purchased it from the respondent No. 8/original defendant No.2 by registered sale deed dated 14.10.1982 for a consideration of Rs. 17,000/- but even as per the case of the contesting respondent No. 7, the appellant-trust resisted their action in taking physical possession of the suit land as they were restrained from putting up fence on the land in question which prompted them to immediately take action and they were compelled to file a suit for possession. Thus, even as per their own case, the plaintiff/respondent was not in possession of the plot in question. In addition to this, the finding recorded by the Trial Court which has not been interfered either by the First Appellate Court or the High Court, the plaintiff/respondent was not in possession of the suit property in spite of the sale deed dated 14.10.1982 and the possession of the suit property was never delivered to the plaintiff predecessor or their legal heirs i.e. respondent Nos. 1 to 7. It can logically be inferred that it is for this very reason that the plaintiff/respondent had published a notice in a daily newspaper "Matrbhumi" inviting objections before purchasing the property as in the normal circumstance, if a sale deed is executed by a private party holding title to the suit property in favour of another private party, the question of publishing a notice in the newspaper does not arise since the transaction of sale between two private parties do not normally require issuance of a notice in the newspaper inviting objections.

13. Under the aforesaid background, the contention of learned counsel for the appellant that permission should have

been obtained from the Charity Commissioner under Sections 50 and 51 of the Bombay Public Trusts Act assumes significance and its legal implication cannot be overlooked. When the disputed plot had already been dedicated in favour of the idol by virtue of a deed of gift, of which the appellant is a trustee and the same was acted upon as possession also was delivered to the appellant trust, it was surely necessary for the plaintiff/respondent Nos. 1 to 7/purchaser of the suit land and also incumbent upon respondent No. 8 /vendor of the sale deed to seek permission from the Charity Commissioner before a sale deed could be executed in regard to the disputed plot and more so before a civil suit could be instituted. We, therefore, find substance in the contention of learned counsel for the appellant, that the dedication dated 31.1.1974 of the plot for charitable purpose in the nature of gift having been acted upon as a result of which the possession also was delivered to the appellant-trust, the civil suit filed by the predecessor of contesting respondent Nos. 1-7 for possession was expressly barred in terms of Sections 19, 20, 79 and 80 of the Bombay Public Trusts Act 1950.

14. It is no doubt true that the gift deed was an unregistered instrument and no title could pass on the basis of the same under Section 123 of the Transfer of Property Act. However, when the document is in the nature of a dedication of immovable property to God, the same does not require registration as it constitutes a religious trust and is exempt from registration. We have taken note of a Full Bench decision of the Madras High Court reported in AIR 1927 Mad. 636 in the case of *Narasimhaswami vs. Venkatalingam and others,* wherein it was held that Section 123 of the Transfer of Property Act does not apply to such a case for "God" is not a "living person" and so the transaction is not a "transfer" as defined by Sec.5 of the Transfer of Property Act. Thus, a gift to an idol may be oral and it may be effected also by an unregistered instrument. But a different view has been taken in the case of *Bhupati Nath vs. Basantakumari,* AIR 1936 Cal. 556; *Chief*

Controlling Revenue Authority vs. Sarjubai, AIR 1944 Nag. 33. In the Full Bench decision of the Madras High Court in the matter of *Narasimhaswami* (supra), it had been argued that a gift to idol of lands worth over Rs.100 requires registration and that a mere recital in the deed of gift which had been made, would not pass property. But it had been held by the Full Bench that dedication of property to God by a Hindu does not require any document and that property can be validly dedicated without any registered instrument. In the aforesaid case, the deed of gift was not to a specified idol but to the Almighty Sri Kodanda Ramachandra Moorti. Dealing with this matter, the Full Bench took note of the observation in the matter of *Pallayya vs. Ramavadhanulu***,** reported in 13 M.L.J. 364 wherein it was held by Benson and Bhashyam Aiyangar, JJ. that a declaration of trust in relation to immovable property for a public religious purpose is not governed by the Indian Trusts Act which by S. 1 declares it inapplicable to religious trusts. It was also held that S. 123 of the Transfer of Property Act has no application to dedication of land to the public as the section only applied to cases when the donee is an ascertained or ascertainable person by whom or on whose behalf a gift can be accepted or refused. Taking notice of several authorities, it was held that no document was necessary for the dedication of property to charity. The Full Bench recorded as follows: "We have not been referred to any case where it has been held that an oral gift for a religious purpose requires registration. In this connection, I may point out that S. 123 of the Transfer of Property Act only applies to transfer by one living person to another". S. 5 of the Act runs as follows: "In the following sections, 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons and 'to transfer property' is to perform such act. The learned Judges noted that a gift to God which in the said case was Sri Kodanda Ramachandra Moorti cannot be held to be a gift to a living person. It had been argued in the said matter that an idol in law is recognised to be a juristic person capable

of holding property and it must be held that a gift to an idol is a gift to a living person. But it was held therein that the Almighty by no stretch of imagination, legal or otherwise, can be said that the Almighty is a living person within the meaning of the Transfer of Property Act. The learned Judges of the Full Bench saw no reason to differ from the Madras case cited in that matter where the law had been settled for several years as it was observed that the principle of '*stare decisis'* should be applied unless there are strong reasons to the contrary as otherwise it would unsettle many titles. Concurring with this view, Chief Justice Reilly held that if the gift is not intended to a living person within the meaning of S. 5 of the Transfer of Property Act, the document would not require registration. This judgment surely has a persuasive value to the issue with which we are confronted in the instant matter and tilts the scale of justice in favour of the appellant-trust as the plot was essentially dedicated to Sai Baba for a charitable purpose, although the same was in the form of an unregistered deed of gift.

15. But even if we were to accept the contentious issue or leave it open and express no final opinion that the deed of gift executed in favour of the appellant-trust having not been registered, did not confer any title on the appellant-trust, it is not possible to brush aside the contention that the respondent Nos.1 to 7-purchaser of the plot in question were legally bound by Section 51 of the Bombay Public Trusts Act 1950 to obtain consent of Charity Commissioner before institution of the suit against the appellant which was admittedly in possession of the property after the gift deed was executed in its favour by the respondent No.8. It would be relevant to quote Section 51 at this stage which lays down as follows:

> 51 (1) : "If the persons having an interest in any public trust intend to file a suit of the nature specified in section 50, they shall apply to the Charity Commissioner in writing for his consent. If the Charity Commissioner after hearing the parties and making such enquiries (if any) as he thinks

fit is specified that there is a *prima facie* case, he may within a period of six months from the date on which the application is made, grant or refuse his consent to the institution of such suit. The order of the Charity Commissioner refusing his consent shall be in writing and shall state the reasons for the refusal."

16. Section 51 further envisages right of appeal by the affected party if the Charity Commissioner refuses his consent to the institution of the suit. Prior to this Section 50 (ii) already envisages that *where a direction or decree is required to recover the possession of or to follow a property belonging or alleged to be belonging to a public trust, a suit by or against or relating to public trust or trustees or other although may be filed, consent under Section 51 of the Charity Commissioner is clearly required under Section 51 of the Act of 1950 which is quoted hereinbefore.*

17. It is difficult to overlook that the decree holder/ respondent herein although had gone to the extent of publishing a notice in a local daily "Matrbhumi" inviting objections indicating that he intended to purchase a suit land, he conveniently ignored the provisions of Section 51 of the Bombay Public Trusts Act, 1950 and refused to apply to the Charity Commissioner before instituting a suit against the appellant-trust especially when the possession of the plot was delivered to the appellant-trust way back in the year 1974 but after more than eight years, the vendor/respondent No.8 executed a sale deed in favour of the predecessor of respondent Nos.1 to 7. The relevance of Section 51 of the Bombay Trusts Act, 1950 although is clearly apparent and the appellant had also raised it before the High Court, the learned Single Judge of the High Court has not even addressed this important issue having a legal bearing on the right of the appellant to retain the plot, which although had been in the form of a deed of gift, in fact it was practically in the nature of dedication to the appellant-trust for charitable purpose which was to construct a 'Bhakt Niwas' for the devotees of Saibaba.

18. Hence, even if it were to be held that the deed of gift in favour of the appellant-trust did not confer any title to the appellant-trust as the same was not registered and were also to be held that the same cannot be treated to be a dedication to any idol, as this point was neither pressed hard nor was argued threadbare and the Courts below have also not gone into this question, we do not wish to enter into this question further. However, the fact remains that in view of the possession of the property in question of the appellant-trust, it was obligatory on the part of the purchasers of the plot in question/ respondent Nos.1 to 7 to seek permission from the Charity Commissioner under Section 51 of the Bombay Trusts Act, 1950 to recover the property by filing a suit or initiating a proceeding. In fact, in the matter of *K. Shamrao and others vs. Assistant Charity Commissioner* reported in (2003) 3 SCC 563, a two Judge Bench of this Court had been pleased to hold that the Assistant Charity Commissioner under the scheme of the Act of 1950 i.e. Bombay Public Trusts Act, 1950 possesses all the attributes of a Court and has almost all the powers which an ordinary civil court has including the power of summoning witnesses, compelling production of documents, examining witnesses on oath and coming to a definite conclusion on the evidence induced and arguments submitted.

Section 79 (1) of the same Act also lays down that any question, whether or not a trust exists and such trust is a public trust or particular property is the property of such trust, is required to be decided under its statutory force by the Deputy or Assistant Charity Commissioner as provided under the Act and Section 80 bars jurisdiction of the civil court to decide or deal with any question which is by or under this Act to be decided or dealt with by any officer or authority under this Act.

19. Thus, when the appellant-trust was in occupation and possession of the property in question then the respondent-plaintiff clearly could not have approached the civil court ignoring the specific provision under the Bombay Public Trusts

Act, 1950 which has laid down provisions to deal with disputes relating to the property of the trusts. It also cannot be overlooked that in the instant case, it is the original owner of the property i.e. respondent No.8 who had executed a deed of gift in favour of the appellant-trust and subsequently after ten years, executed a sale deed in favour of the predecessor of respondent Nos.1 to 7, who approached the Court for recovery of his property in which case it could perhaps have been available for the owner of the property to approach the civil court. But in the case at hand, it is the purchaser of the property predecessor of Respondent Nos. 1-7 who filed the suit for possession which clearly can be construed as the suit for recovery of possession from the appellant-trust which was in possession of the property. In that view of the matter, it was the statutory requirement of the Bombay Public Trusts Act, 1950 to approach the Charity Commissioner before a suit could be instituted.

20. In view of the aforesaid discussion and in the light of the reasons assigned hereinbefore, we set aside the judgment and order of the High Court as also the First Appellate Court and restore the judgment and order of the Trial Court which had been pleased to dismiss the suit filed by the plaintiff-respondents No.1 to 7. The Trial Court, however, had decreed the suit for return of the money of Rs.17,500/- to the predecessor of respondents No.1 to 7 and also interest was ordered to be paid on this amount by the vendor-respondent No.8. Since the respondent No.8 had already been divested of his title to execute a sale deed in favour of respondent Nos.1 to 7 as he had already executed a deed of gift in favour of the appellant-trust for charitable purpose, we are of the view that in the interest of equity, he should not be saddled with the financial liability to return the amount of Rs.17,500/- with interest to the respondent Nos.1-7. This amount, in our view, in the interest of equity and fair play should be paid by the appellant-trust to the respondent Nos.1-7 on behalf of Respondent No.8, as this part of the decree which had been passed by the Trial Court in favour of respondent Nos. 1-7 had not been challenged

by way of an appeal by the respondent No.8. But as we have held that the appellant-trust is the rightful owner of the disputed plot and the Respondent No.8 as a consequence has been held to have been divested of the property, the amount paid by the predecessor of Respondent Nos.1-7, should be refunded to Respondent Nos.1-7 without interest and thus the decree of the Trial Court shall be treated as modified to this extent. This appeal accordingly is allowed, without any order as to costs.

N.J. Appeal allowed.