A.P. DAIRY DEVELOPMENT CORPORATION FEDERATION
v.
B. NARASIMHA REDDY & ORS.
(Civil Appeal No. 2188 of 2008)

SEPTEMBER 2, 2011

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

Co-operative Societies:

Andhra Pradesh Mutually Aided Co-operative Societies (Amendment) Act, 2006 – 2006 Amendment Act excluding the milk dairy co-operative societies from the societies covered by the 1995 Act and importing the fiction that such dairies would be deemed to have been registered under the 1964 Act – Constitutional validity of the 2006 Amendment Act – Held: By the Amendment Act, the extensive control of co-operative societies by the Registrar under the Act 1964 became incompatible and inconsistent with the co-operative principles which mandate ensuring democratic member control and autonomy and independence in the manner of functioning of the co-operatives – It obstructed and frustrated the object of the development and growth of vibrant co-operative societies in the State – Restrictions so imposed by the 2006 Amendment Act, with retrospective effect, extending over a decade and importing the fiction that all the dairy/milk co-operative societies shall be deemed to have been excluded from the provisions of the 1995 Act and the societies would be deemed to have been registered under the 1964 Act, without giving any option to such societies suggest the violation of Article 19(1)(c) and are not saved by clause (4) of Article 19 – It is arbitrary and violative of Article 14 – Reverting back to the co-operative societies under the Act 1964 is a retrograding process by which the government would

enhance its control of these societies registered under the Act 1995 – They would be deprived not only of benefits under the said Act, but rights accrued under the Act 1995 would also be taken away with retrospective effect – Thus, the order passed by the High Court that 2006 Amendment Act is unconstitutional, is upheld – Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995 – Andhra Pradesh Co-operative Societies Act, 1964.

Constitution of India, 1950:

Article 14 – Class legislation – Permissibility of – Held: Article 14 forbids class legislation – However, it does not forbid reasonable classification for the purpose of legislation – Thus, class legislation is permitted in law provided the classification is founded on an intelligible differentia.

Article 14 – Violation of – Held: Article 14 strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality – Doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature – There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14.

Article 19(1)(c) – Right to form associations or unions under – Scope of statutory intervention – Held: Formation of the unions under Article 19(1)(c) is a voluntary act – Thus, unwarranted/impermissible statutory intervention is not desired – By statutory interventions, the State is not permitted to change the fundamental character of the association or alter the composition of the society itself – Encroachment upon associational freedom cannot be justified on the basis of any interest of the Government – However, when the association gets registered under the Co-operative Societies Act, it is governed by the provisions of the Act and rules framed thereunder – In case the association has an option/choice to

get registered under a particular statute, if there are more than one statutes operating in the field, the State cannot force the society to get itself registered under a statute for which the society has not applied – Co-operative societies.

Administrative law – Doctrine of estoppel – Applicability of, to policy decision – Held: State, being a continuing body can be stopped from changing its stand in a given case, but where after holding enquiry it came to the conclusion that action was not in conformity with law, the doctrine of estoppel would not apply – Thus, unless the act done by the previous Government is found to be contrary to the statutory provisions, unreasonable or against policy, the State should not change its stand merely because the other political party has come into power – Estoppel – Doctrines.

On the commencement of the Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995, the existing Andhra Pradesh Dairy Development Co-operative Societies registered under the Andhra Pradesh Co-operative Societies Act, 1964 could opt to be covered by the 1995 Act with certain conditions. Some of the societies already registered under the 1964 Act committed some irregularities in getting themselves registered under the 1995 Act. The Statutory Authority were issued notices to show cause as to why their registration under the 1995 Act should not be cancelled. Eight District Milk Unions filed writ petitions challenging the said show cause notices. The Andhra Pradesh Dairy Development Co-operative Federation Ltd. filed original petition in various Co-operative Tribunals seeking dissolution of the said societies and the same was dismissed against 'V' District Union. Thereafter, a House Committee was constituted to investigate into the irregularities committed by two of the District Unions who had got themselves registered under the 1995 Act. The Committee submitted its report that the said Unions had committed certain irregularities; and that

the Act 1995 had adverse consequences on the dairy co-operatives, as it had broken down 3-tier structure. The State Government constituted a Committee to consider the recommendations of the House Committee. This Committee recommended that dairy co-operatives be excluded from the purview of the Act 1995 and brought back under the Act 1964 and be restored to 3-tier structure. Pursuant to the said policy decision of the Government, the order passed by the Co-operative Tribunal was challenged. Thereafter, the State promulgated the Ordinance No.2/2006 excluding the milk dairy co-operative societies from the societies covered by the 1995 Act and imported the fiction that such dairies would be deemed to have been registered under the 1964 Act, with effect from the date of registration under the Act 1995. Government Order dated 4.2.2006 was issued to give effect to such amendments. Various District Milk Producers Co-operative Unions filed writ petitions challenging Ordinance No.2/2006 and consequential Government Order dated 4.2.2006. The High Court by an interim order stayed the operation of the Government Order dated 4.2.2006. Meanwhile, the Ordinance was converted into the Andhra Pradesh Mutually Aided Co-operative Societies (Amendment) Act, 2006. Thereafter, the High Court allowed the writ petitions striking down the provisions of the 2006 Act as unconstitutional and held that even if the 2006 Act is to be considered constitutional, provisions providing that the Boards of Directors appointed under the Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995 shall be deemed to have been continued under the provisions of Andhra Pradesh Co-operative Societies Act, 1964, and that the G.O.Ms. No.10 Animal Husbandry, Dairy Development & Fisheries (Dairy-II) Department, dated 4.2.2006 and the consequential proceedings/orders of the Milk Commissioner and Registrar of Milk Co-operatives and

the District Collectors are quashed. Therefore, the appellants filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1. Article 14 forbids class legislation, however, it does not forbid reasonable classification for the purpose of legislation. Thus, it is permissible in law to have class legislation provided the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question. Law also permits a classification even if it relates to a single individual, if, on account of some special circumstances or reasons applicable to him, and not applicable to others, that single individual may be treated as a class by himself. It should be presumed that legislature has correctly appreciated the need of its people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. There is further presumption in favour of the legislature that legislation had been brought with the knowledge of existing conditions. The good faith on the legislature is to be presumed, but if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. The law should not be irrational, arbitrary and unreasonable in as much as there must be nexus to the object sought to be achieved by it. [Para 8] [26-E-H; 27-A-C]

Budhan Choudhry & Ors. v. State of Bihar **AIR 1955 SC 191: 1955 SCR 1045;** *Ram Krishna Dalmia v. Justice S.R. Tendolkar & Ors.* **AIR 1958 SC 538:1959 SCR 279 – relied on.**

Harbilas Rai Bansal v. State of Punjab & Anr. **AIR 1996 SC 857: 1995 (6) Suppl. SCR 178 – referred to.**

2. Article 19(1)(c) guarantees to all citizens, the right to form associations or unions of their choice voluntarily, subject to reasonable restrictions imposed by law. Formation of the unions under Article 19(1)(c) is a voluntary act, thus, unwarranted/impermissible statutory intervention is not desired. The right of the citizens to form the association are different from running the business by that association. Therefore, right of individuals to form a society has to be understood in a completely different context. Once a co-operative society is formed and registered, for the reason that co-operative society itself is a creature of the statute, the rights of the society and that of its members stand abridged by the provisions of the Act. The activities of the society are controlled by the statute. Therefore, there cannot be any objection to statutory interference with their composition or functioning merely on the ground of contravention of individual's right of freedom of association by statutory functionaries. [Paras 10, 16] [28-A; 31-C-E]

All India Bank Employees' Association v. National Industrial Tribunal (Bank Disputes) Bombay & Ors. **AIR 1962 SC 171: 1962 SCR 269;** *S. Azeez Basha & Anr. v. The Union of India etc.* **AIR 1968 SC 662: 1968 SCR 833;** *D.A.V. College, etc.etc. v. State of Punjab & Ors.* **(1971) 2 SCC 269 – relied on.**

M/s. Raghubar Dayal Jai Prakash v. The Union of India & Anr. **AIR 1962 SC 263: 1962 SCR 547;** *Smt. Damyanti*

Naranga v. The Union of India & Ors. **AIR 1971 SC 966: 1971 (3) SCR 840;** *Daman Singh & Ors. v. State of Punjab & Ors.* **AIR 1985 SC 973: 1985 (3) SCR 580;** *Dharam Dutt & Ors. v. Union of India & Ors.* **(2004) 1 SCC 712: 1964 SCR 885;** *The Tata Engineering and Locomotives Co. Ltd. v. The State of Bihar & Ors.* **AIR 1965 SC 40 – referred to.**

3. Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. [Para 17] [31-F-H]

Ajay Hasia etc. v. Khalid Mujib Sehravardi & Ors. etc. **AIR 1981 SC 487: 1981 (2) SCR 79;** *Reliance Airport Developers (P) Ltd. v. Airports Authority of India & Ors.* **(2006) 10 SCC 1: 2006 (8) Suppl. SCR 398;** ***B****idhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board & Ors.* **AIR 2007 SC 2276: 2007 (7) SCR 430;** *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited & Ors.* **AIR 2009 SC 2337: 2009 (3) SCR 668;** *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.* **(2011) 8 SCALE 474 – relied on.**

State of Andhra Pradesh & Anr. v. P. Sagar **AIR 1968 SC 1379:1968 SCR 565;** *Indra Sawhney II v. Union of India* **AIR 2000 SC 498: 1999 (5) Suppl. SCR 229;** *Harman Singh &*

Ors. v. Regional Transport Authority, Calcutta Region & Ors. **AIR 1954 SC 190: 1954 SCR 371;** *D.C. Bhatia & Ors. v. Union of India & Anr.* **(1995) 1 SCC 104: 1994 (4) Suppl. SCR 539;** *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.* **AIR 1984 SC 161:1983 (2) SCR 287;** *B.S. Yadav & Ors. v. State of Haryana &* Ors. **AIR 1981 SC 561: 1981 SCR 1024;** *Chairman, Railway Board & Ors. v. C. R. Rangadhamaiah & Ors.* **AIR 1997 SC 3828: 1997 (3) Suppl. SCR 63;** *Tulsi Das and Ors. vs. Government of A.P. & Ors.* **AIR 2003 SC 43;** *National Agricultural Cooperative Marketing Federation of India Ltd. & Anr. v. Union of India & Ors.* **(2003) 5 SCC 23: 2003 (3) SCR 1 – referred to.**

4. In the matter of Government of a State, the succeeding Government is duty bound to continue and carry on the unfinished job of the previous Government, for the reason that the action is that of the "State", within the meaning of Article 12 of the Constitution, which continues to subsist and therefore, it is not required that the new Government can plead contrary from the State action taken by the previous Government in respect of a particular subject. The State, being a continuing body can be stopped from changing its stand in a given case, but where after holding enquiry it came to the conclusion that action was not in conformity with law, the doctrine of estoppel would not apply. Thus, unless the act done by the previous Government is found to be contrary to the statutory provisions, unreasonable or against policy, the State should not change its stand merely because the other political party has come into power. "Political agenda of an individual or a political party should not be subversive of rule of law". The Government has to rise above the nexus of vested interest and nepotism etc. as the principles of governance have to be tested on the touchstone of justice, equity and fair play. The decision must be taken in good faith and must be legitimate. [Para 27] [36-A-E]

Onkar Lal Bajaj etc. etc. v. Union of India & Anr. etc. etc. **AIR 2003 SC 2562: 2002 (5) Suppl. SCR 605;** *State of Karnataka & Anr. v. All India Manufacturers Organization & Ors.* **AIR 2006 SC 1846: 2006 (1) Suppl. SCR 86;** *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.* **(2011) 8 SCALE 474 – relied on.**

A. Manjula Bhashini and Ors. v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. & Anr. **(2009) 8 SCC 431: 2009 (10) SCR 634;** *M. Ramanathan Pillai v. State of Kerala & Anr.* **(1973) 2 SCC 650: 1974 (1) SCR 515;** *State of Kerala & Anr. v. The Gawalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc.* **(1973) 2 SCC 713: 1974 (1) SCR 671– referred to.**

5. The Government has inherent power to promote the general welfare of the people and in order to achieve the said goal, the State is free to exercise its sovereign powers of legislation to regulate the conduct of its citizens to the extent, that their rights shall not stand abridged. The co-operative movement by its very nature, is a form of voluntary association where individuals unite for mutual benefit in the production and distribution of wealth upon principles of equity, reason and common good. So, the basic purpose of forming a co-operative society remains to promote the economic interest of its members in accordance with the well recognised co-operative principles. Members of an association have the right to be associated only with those whom they consider eligible to be admitted and have right to deny admission to those with whom they do not want to associate. The right to form an association cannot be infringed by forced inclusion of unwarranted persons in a group. Right to associate is for the purpose of enjoying in expressive activities. The constitutional right to freely associate with others encompasses associational ties designed to further the social, legal and economic

benefits of the members of the association. By statutory interventions, the State is not permitted to change the fundamental character of the association or alter the composition of the society itself. The significant encroachment upon associational freedom cannot be justified on the basis of any interest of the Government. However, when the association gets registered under the Co-operative Societies Act, it is governed by the provisions of the Act and rules framed thereunder. In case the association has an option/choice to get registered under a particular statute, if there are more than one statutes operating in the field, the State cannot force the society to get itself registered under a statute for which the society has not applied. [Para 31] [38-D-H; 39-A-C]

6.1 In the instant case, the recommendations of the House Committee and the Group of Ministers, were not based on relevant material as there was no investigation of all the co-operative societies either converted to or registered under the Act 1995. The House Committee did not recommend the amendment with retrospective effect, particularly, for the conversion of dairy co-operative societies registered under the Act 1995 into societies deemed to have been registered under the Act 1964. More so, the Committee did not consider at all as to whether it was permissible in law, to provide for such a course, so far as the societies initially registered under the Act 1995, were concerned. [Paras 32, 33] [39-D-F; 40-B-C]

6.2 The restrictions so imposed by the Act 2006, with retrospective effect, extending over a decade and importing the fiction that the societies would be deemed to have been registered under the Act 1964, without giving any option to such societies suggest the violation of Article 19(1)(c) and are not saved by clause (4) of Article 19 of the Constitution. It is by no means conceivable, that the grounds on the basis of which

reasonable restrictions could be invoked were available. [Para 34] [40-D-E]

6.3 The impugned provisions have no nexus with the object of enforcing the 3-tier structure inasmuch as the 1964 and the 1995 Acts, both permit registration of Federations; the Act 1964 does not contain any express provision providing for 3-tier structure; the object of having a 3-tier structure could be achieved by the Federation registering itself under the Act 1995 as decided at the meeting of co-operative milk unions convened by the Chief Secretary on 26.8.2003; and even the Act 1964 does not treat Dairy Co-operatives as a separate class to be governed by a separate structure. As such from the stand point of structure and basic co-operative principles, all co-operative societies, are alike. The impugned provisions are arbitrary and violative of Article 14 as they deprived the Dairy Co-operative Societies of the benefit of the basic principles of co-operation. The amendments are contrary to the national policy on Co-operatives. They obstruct and frustrate the object of the development and growth of vibrant co-operative societies in the State. [Para 36] [41-B-D]

6.4 After conversion into Mutually-Aided Societies under the Act 1995 with the permission of the Government as stipulated by Section 4(3)(a), the co-operative societies originally registered under the Act 1964 cannot be treated as aided societies or societies holding the assets of the government or of the Federation. The Statement of Objects and Reasons itself shows that the government decided not to withdraw its own support suddenly. In fact, there was no aid given by the State after conversion. Chapter X of the Act 1964 which empowers the Registrar to recover dues by attachment and sale of property and execution of orders having been expressly incorporated in the Act 1995 by Section 36, thereof there was no

justification at all for the impugned Amendments. [Para 37] [41-E-G]

6.5 After the incorporation of the co-operative principles in Section 4 of the A.P. Cooperative Societies Act, 1964 read with Rule 2(a) of the A.P. Co-operative Societies Rules, 1964, by Amendment Act No. 22 of 2001, the extensive control of co-operative societies by the Registrar under the Act 1964 has become incompatible and inconsistent with the said co-operative principles which mandate ensuring democratic member control and autonomy and independence in the manner of functioning of the co-operatives. These two, namely, extensive State control and ensuring operation of co-operative principles cannot be done at the same time. [Para 38] [41-H; 42-A-C]

6.6 The comparative study of the statutory provisions of the Act 1964 with that of Act 1995 makes it crystal clear that Government has much more control over the co-operative societies registered under the Act 1964 and minimal under the Act 1995. Also the role of the Registrar under the Act 1964 is much more than under the Act 1995 as under the Act 1964. [Para 39] [42-D-F]

6.7 The statement of objects and reasons of the Act 1995 clearly stipulate that State participation in the financing and management of co-operatives in the past had led to an unfortunate situation and the co-operative societies were not governed/guided by the universally accepted principles of co-operation. Thus, the purpose to enact the Act 1995 was to provide more freedom to conduct the affairs of the co-operative societies by its members. Principles of co-operation as incorporated in Section 3 and given effect to in the other provisions of the Act 1995 permit better democratic functioning of the society than under the Act 1964. Whereas the Act 1995

provides for State regulation to the barest minimum, the Act 1964 provides for extensive State control and regulation of co-operative societies which is inconsistent with the national policy with regard to co-operative societies evolved in consultation and collaboration with the States which stands accepted by the State of A.P. and reflected in the Scheme of the Act 1995 which is based on the model law recommended by the Planning Commission of India. Thus, reverting back to the co-operative societies under the Act 1964 is a retrograding process by which the government would enhance its control of these societies registered under the Act 1995. They would be deprived not only of benefits under the said Act, but rights accrued under the Act 1995 would also be taken away with retrospective effect. [Para 40] [43-H; 44-A-G]

6.8 Co-operative law is based on voluntary action of its members. Once a society is formed and its members voluntarily take a decision to get it registered under the Act X, the registration authority may reject the registration application if conditions prescribed under Act X are not fulfilled or for any other permissible reason. The registration authority does not have a right to register the said society under Act Y or even a superior authority is not competent to pass an order that the society would be registered under the Act Y. Such an order, if passed, would be in violation of the first basic cooperative principle that every action shall be as desired by its members voluntarily. Introducing such a concept of compulsion would violate Article 19(1)(c) of the Constitution of India. It is not permissible in law to do something indirectly, if it is not permissible to be done directly. [Para 41] [44-H; 45-A-C]

Sant Lal Gupta & Ors v. Modern Co-operative Group Housing Society Ltd. & Ors. **JT 2010 (11) SC 273 – relied on.**

6.9 The 2006 Act had been enacted without taking note of the basic principles of co-operatives incorporated in Section 3 of the Act 1995 which provide that membership of a co-operative society would be voluntary and shall be available without any political restriction. The co-operative society under the Act would be a democratic organisation as its affairs would be administered by persons elected or appointed in a manner agreed by members and accountable to them. [Para 42] [45-D-E]

6.10 The legislature has a right to amend the Act 1995 or repeal the same. Even for the sake of the argument, if it is considered that legislature was competent to exclude the milk cooperative dairies from the operation of the Act 1995 and such an Act was valid i.e. not being violative of Article 14 of the Constitution etc., the question does arise as to whether legislature could force the society registered under the Act 1995 to work under the Act 1964. Importing the fiction to the extent that the societies registered under the Act 1995, could be deemed to have been registered under the Act 1964 tantamounts to forcing the members of the society to act under compulsion/direction of the State rather than on their free will. Such a provision is violative of the very first basic principles of co-operatives. More so, the Act is vitiated by non-application of mind and irrelevant and extraneous considerations. [Para 43] [45-F-H; 46-A]

Mosammat Bibi Sayeeda & Ors., etc. v. State of Bihar & Ors., etc., **AIR 1996 SC 1936: 1996 (1) Suppl. SCR 799;** *Howrah Municipal Corporation & Ors. v. Ganges Rope Co. Ltd. & Ors.* **(2004) 1 SCC 663; 2003 (6) Suppl. SCR 1212;** *J.S. Yadav v. State of Uttar Pradesh & Anr.* **(2011) 6 SCC 570 – referred to.**

Case Law Reference:

1955 SCR 1045	**Relied on**	**Para 8**
1959 SCR 279	**Relied on**	**Para 8**
1995 (6) Suppl. SCR 178	**Referred to**	**Para 9**
1962 SCR 547	**Referred to**	**Para 11**
1971 (3) SCR 840	**Referred to**	**Para 12**
1985 (3) SCR 580	**Referred to**	**Para 13**
1964 SCR 885	**Referred to**	**Para 14**
AIR 1964 SC 40	**Referred to**	**Para 15**
1962 SCR 269	**Relied on**	**Para 15**
1968 SCR 833	**Relied on**	**Para 15**
(1971) 2 SCC 269	**Relied on**	**Para 15**
1981 (2) SCR 79	**Relied on**	**Para 17**
2006 (8) Suppl. SCR 398	**Relied on**	**Para 17**
2007 (7) SCR 430	**Relied on**	**Para 17**
2009 (3) SCR 668	**Relied on**	**Para 17**
(2011) 8 SCALE 474	**Relied on**	**Para 17, 28**
1968 SCR 565	**Referred to**	**Para 18**
1999 (5) Suppl. SCR 229	**Referred to**	**Para 19**
1954 SCR 371	**Referred to**	**Para 20**
1994 (4) Suppl. SCR 539	**Referred to**	**Para 21**
1983 (2) SCR 287	**Referred to**	**Para 22**
1981 SCR 1024	**Referred to**	**Para 23**
1997 (3) Suppl. SCR 63	**Referred to**	**Para 24**

AIR 2003 SC 43	**Referred to**	**Para 24**
2003 (3) SCR 1	**Referred to**	**Para 25**
1996 (1) Suppl. SCR 799	**Referred to**	**Para 26**
2003 (6) Suppl. SCR 1212	**Referred to**	**Para 26**
(2011) 6 SCC 570	**Referred to**	**Para 26**
2002 (5) Suppl. SCR 605	**Relied on**	**Para 27**
2006 (1) Suppl. SCR 86	**Relied on**	**Para 27**
2009 (10) SCR 634	**Referred to**	**Para 28**
1974 (1) SCR 515	**Referred to**	**Para 29**
1974 (1) SCR 671	**Referred to**	**Para 30**
JT 2010 (11) SC 273	**Relied on**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2188 of 2008.

From the Judgment & Order dated 01.05.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 2214 of 2006.

WITH

C.A. Nos. 2189-2212 & 4588 of 2008.

R. Venkataramani, S.S. Prasad, P.P. Rao, D. Mahesh Babu, Savita Dhanda, Alto K. Joseph, Ramesh Allanki, C.K. Sucharita, Nirada Das, Y. Rajagopala Rao, Vaismai Rao, Hitendra Rath, Harsh Reddy, Utsav Sidhu, Filza Moonis, Apeksha Sharan, Y. Ramesh, P. Venkat Reddy, Anil Kumar Tandale, Liz Mathew, Deep Kirti Verma, Niranjan Reddy, P.S. Harsha Reddy, Sana A.R. Khan, (Mclm & Co.), T. Anamika, Chandramohan Anisetty, S. Udaya Kr. Sagar, Bina Madhavan, Rayjith Mark (for Lawyer's Knit & Co.) for the appreaing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. All these appeals have been preferred against the impugned judgment and order dated 1st May, 2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 2214 of 2006, by which the High Court has struck down the provisions of Andhra Pradesh Mutually Aided Co-operative Societies (Amendment) Act, 2006 (hereinafter called as 'Act 2006') as unconstitutional and further declared that even if the Act 2006 is to be considered constitutional, provisions providing that the Boards of Directors appointed under the Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995 (hereinafter called `Act 1995') shall be deemed to have been continued under the provisions of A.P. Co-operative Societies Act, 1964 (hereinafter called 'Act 1964'), and further G.O.Ms. No.10 Animal Husbandry, Dairy Development & Fisheries (Dairy-II) Department, dated 4.2.2006 and the consequential proceedings/orders of the Milk Commissioner and Registrar of Milk Co-operatives and the District Collectors concerned in these regards, are quashed.

2. **Facts**:

A. The Government of Andhra Pradesh introduced an integrated milk project in the State with the assistance of the UNICEF, according to which, the rural surplus milk produced in the villages was transported to chilling centres and supplied to consumers of Hyderabad. A milk conservation plant/milk products factory was established at Vijayawada in 1969 as a part of the project. In the meanwhile, the Act 1964 came into force w.e.f. 1.8.1964.

B. In years 1970-71, the Government of Andhra Pradesh set up an independent Dairy Development Department (hereinafter called the 'Department') and intensive efforts were made by the Government to give a boost to the Department taking various measures.

C. In year 1974, Andhra Pradesh Dairy Development Corporation Ltd. (hereinafter called the 'Corporation'), a

company under the Indian Companies Act, 1956, fully owned by the State Government was constituted and the entire dairy infrastructure and assets of the Department of the State stood transferred to the said Corporation vide order dated 15.4.1974. The employees of the Department were absorbed in the Corporation. A huge amount has been contributed by the Government from year 1974 onwards to develop the dairy products.

D. The Andhra Pradesh Dairy Development Cooperative Federation Ltd. (hereinafter called 'the Federation') was registered as a Cooperative Society and all the assets and dairy infrastructure were transferred to the Federation. The State Government vide order dated 10.12.1980 permitted the Federation to hand over the management of the respective units set up at the State expenses to the Societies subject to conditions stipulated in the agreement. Mainly the terms incorporated therein provided for transfer of assets on lease basis, and the State to stand as a guarantor for the payment of loan component and financial assistance etc.

E. The Government further permitted the Federation to hand over the management of respective units and operation hitherto to various societies with the right of procurement and further dairy development activities such as manufacturing, processing, feed mixing plants alongwith the concerned employees to the District Milk Producers Co-operative Unions with effect from a mutually agreeable date.

F. During the years of 1991 and 1995, the benefits of financial assistance rendered to the units by the State and the Central Governments had been very huge i.e. Rs.159.45 lakhs and Rs.729.97 lakhs.

G. On commencement of the Act 1995 into force, the existing co-operative societies registered under the Act 1964 could opt to be covered by the Act 1995 with certain conditions, namely, the share capital from the Government, if any, had to

be returned and the societies should not accept any Government assistance, and further the societies had to enter into the Memorandum of Understanding (hereinafter called the MoU) for outstanding loans and guarantees or return of the government assistance. These had been conditions precedent for registration of a society under the Act 1995. A very large number of new societies came into existence and were registered under the Act 1995. Many societies already registered under the Act 1964 also got themselves registered under the Act 1995.

H. There had been some irregularities in getting the registration under the Act 1995 by certain societies registered under the Act 1964 and some of them did not execute the MoU. Thus, the Statutory Authority issued show cause notices to such societies under Section 4(3) of the Act 1995 on 29.11.2004 to show cause as to why their registration under the Act 1995 be not cancelled.

I. Eight writ petitions were filed by 8 District Milk Unions challenging the said show cause notices before the High Court. The Federation filed original petition in various Co-operative Tribunals seeking dissolution of its societies under Section 40 of the Act 1995 as the statutory requirements had not been complied with.

J. The Co-operative Tribunal vide its judgment and order dated 9.12.2004 dismissed the original petition against Visakha District Union on the premises that the Act 1995 had not mentioned about returns of assets and the Managing Director had no power to further delegate the power to some one to file the petition.

K. The Legislative Assembly of the Andhra Pradesh vide Resolution dated 8.2.2005 constituted a House Committee consisting of its members belonging to different political parties to investigate into irregularities committed by two of the eight District Unions, namely, Visakha and Ongole (Prakasham)

Unions, who also got registered under the Act 1995. The Committee submitted its report pointing out certain irregularities by the said Unions. The Committee also opined that the Act 1995 had adverse consequences on the dairy co-operatives, as it had broken down 3-tier structure, reduced the brand value of Vijaya Brand, created conflict in marketing structures, weakened the financial position of some District Milk Unions etc. and had broken down the common cadre of employees.

L. After considering the said report, the State Government constituted a Committee consisting of Ministers to consider the recommendations of the House Committee vide order dated 23.8.2005. It was this Committee which recommended that dairy co-operatives be excluded from the purview of the Act 1995 and so far as the dairy co-operatives are concerned, it should be restored to 3-tier structure. Meanwhile, the order passed by the Co-operative Tribunal was challenged in the Writ Petition No. 1420 of 2006 in pursuance to the policy decision of the Government to exclude the dairy societies from the purview of the Act 1995 and to bring them back under the Act 1964.

M. The State promulgated the Ordinance No.2/2006 excluding the milk dairy co-operative societies from the societies covered by the Act 1995 and imported the fiction that such dairies would be deemed to have been registered under the Act 1964, with effect from the date of registration under the Act 1995.

N. Government Order dated 4.2.2006 was issued to give effect to such amendments and also to take care of transitional position, particularly providing that District Collector would appoint the person in-charge under Section 32(7) of the Act 1964 to manage the affairs of all primary milk producers co-operative societies till further elections or until further orders, so that affairs of those societies would be managed properly.

O. Writ Petitions were filed before the High Court by

various District Milk Producers Co-operative Unions challenging Ordinance No.2/2006 and consequential Government Order dated 4.2.2006. The High Court vide interim order dated 8.2.2006 stayed the operation of the Government Order dated 4.2.2006. Meanwhile, the Ordinance was converted into the Act. By the impugned judgment dated 1.5.2007, the High Court allowed the writ petitions.

Hence, these appeals.

Rival Submissions:

3. Shri R. Venkataramani, Shri S.S. Prasad, learned senior counsel appearing for the appellants have submitted that the impugned judgment and order are untenable as the Legislature is competent to amend the Act and while doing so the Legislature in its wisdom had rightly decided to treat the milk dairy co-operatives distinctly from all other kinds of societies. Thus, no grievance of discrimination could be raised. More so, there is no discrimination among the milk dairies, as all such dairies have been treated as a separate class. The amendment had not taken away any vested or statutory right of the writ petitioners by the impugned Act. Both the Acts i.e. Act 1964 as well as Act 1995 are based on the same set of the co-operative principles and serve different sectors of the co-operatives in different ways. Both the Acts co-exist and are not mutually conflicting. Therefore, the question of doubting the validity of the Act 2006 merely on the ground of having retrospective application could not arise. The members of the management committee of the District Unions/writ petitioners could again contest the election for the posts in their respective society under the Act 1964. Appointment of persons in-charge was merely a temporary/transitional phase to facilitate such elections and, therefore, there was no violation of fundamental rights of any of the writ petitioners. The High Court erred in recording the finding that the Act 2006 stood vitiated on the ground that it had breached promissory estoppel. The Government undoubtedly, had transferred the management of

the assets to the District Unions and as the said District Unions would continue with such management of assets, there was no question of breach of any of the promises made by the State. Doctrine of promissory estoppel does not apply to legislature. There was a rational nexus to enact the Act 2006 as a large number of the milk dairy societies did not enter into the MoU as required under Section 4(4) of the Act 1995. Such legislative action could not be termed as arbitrary and warranting attraction of the provisions of Article 14 of the Constitution of India. There were valid reasons for excluding the milk/dairy societies from the provisions of the Act 1995. Dairy industry being peculiar and having distinct characteristics required State's moderation and intervention. Having regard to the special and distinctive features of the Dairy industry and the existence of large number of financially weak and dependent primary milk Co-operative Societies, and the necessity of State funding of these societies, it has been found necessary to take dairy industry out of the purview of 1995 Act. The High Court failed to make distinction of dairy milk societies from other co-operative societies as the dairy milk societies are having with them substantial government interest, assets and government investments. All the societies including the primary societies are dependent on the government and its assets. Such a financial assistance has been granted in view of the provisions of Section 43 of the Act 1964 and the government control over such societies under the Act 1964 is minimal. It was not that the Act 2006 had been brought to have government control over milk dairy societies as under the Act 1995 the government control was negligible. The societies under the Act 1995 "have to be self reliant". Thus, the Act assured such societies a complete autonomy. The Act 2006 was enacted on the recommendation of the House Committee which suggested remedial measures for effective functioning of the dairies in the State. It was so necessary to reconfirm the 3-tier structure e.g. apex society, central society and primary society as such a classification was not available under the Act 1995. The Statement of Objects and Reasons of the Act 2006 clearly

provided for justification of amendment (impugned). Therefore, appeals deserve to be allowed and the impugned judgment and order of the High Court is liable to be set aside.

4. On the contrary, Mr. P.P. Rao, learned senior counsel, Mr. P. Venkat Reddy, Mr. Niranjan Reddy and Mr. S. Udaya Kr. Sagar, learned counsel appearing for the respondents have submitted that the Act 2006 suffered from vice of arbitrariness, and has taken away the accrued rights of the milk dairy co-operative societies. Act 2006 has given a hostile discrimination to milk dairy co-operative societies as no other kind of society i.e. Societies of Agro Processing, Fisheries, Sheep Breeding etc. has been excluded from the operation of the Act 1995. A large number of new societies had initially/directly been registered under the Act 1995. Therefore, the question of creating a fiction that the same shall also stand excluded from the operation of the Act 1995 and would be deemed to have been registered under the Act 1964 cannot be justified for the reason that such societies had not initially been registered under the Act 1964. It was a political decision of the State Authorities to amend the statute merely because of the change of the Government and to have control on such societies. The reasons for enacting the Act 2006 have been spelled out in the Statement of Objects and Reasons of the said Act and none of them really existed in fact and in order to introduce the Act 2006, the State incorrectly construed the provisions of the Act 1995. A very few societies had the government benefits and the said societies had also ensured the compliance of the statutory provisions of the Act 1995. Almost all the societies have returned the assets of the Federation. Where it has not been returned, the matters are sub-judice, before the Co-operative Tribunal, between the Federation and the societies. More so, the character of the assets would not change upon conversion of a society into one under the Act 1995. The character of a 3-tier structure contemplated under the Act 1964 is different from one followed in the State of Gujarat under the "Anand Pattern" and such 3-tier structure is possible under the

Act 1995 also. There can be no nexus in deeming fiction created for treating the societies as having been registered under the Act 1964 and it would definitely not bring back the 3-tier structure. The farmers had not been facing any problem for redressal of which the amendment was necessary. Thus, the facts and circumstances of the case do not require any interference with the impugned judgment and appeals are liable to be dismissed.

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

6. Before we examine the merits of the arguments advanced by learned counsel for the parties, it may be necessary to make a reference to some of the relevant findings recorded by the High Court :

(i) The ordinance/Act suffers from vice of hostile discrimination against dairy farms and milk producers without scientific or rational basis for such distinction-merely because the National Dairy Development Board distinctly deals with dairy activities, cooperatives dealing with such activities cannot form a separate and distinct class in so far as co-operative activity is concerned.

(ii) The irregularities noted by the House Committee with regard to the Visakha Union, Prakasham Union are managerial lapses which are possible both under the 'Act 1964' and the 'Act 1995'.

(iii) Non-compliance with the terms and conditions of the transfer agreements regarding business and service matters and irregularities noted in the audit reports and House Committee is possible both under the 'Act 1995' and the 'Act 1964'.

(iv) The conclusion of the House Committee in respect

of two of the district unions out of eight districts converted into 'Act 1995' cannot be relevant material for any rational conclusion.

(v) Both Section 2(e) of the 'Act 1964' and Section 2(k) of the 'Act 1995' enable formation of Apex Societies, Central Societies and Primary Societies. Exclusion of the Dairy/Milk Cooperative Societies from 'Act 1995' to achieve the object of a three-tier structure is a non-existent cause.

(vi) Both the 'Act 1964' and 'Act 1995' have procedure for auditing, enquiry, inspection and surcharge etc., it is nowhere stated as to how the 'Act 1964' is more effective or comprehensive in the matter of protecting any government assets in possession of the societies or as to how the 'Act 1995' is inadequate for the purpose.

(vii) Till June 2004, the Federation found everything positive and nothing negative in the functioning of the District Union.

(viii) Adverse effects on the interest of dairy farms due to registration or conversion of dairy/milk co-operative societies under 'Act 1995' are not existing.

(ix) Fundamental right under Section 19(1)(c) of the Constitution of India to form association or union is infringed by the impugned Ordinance/Act.

(x) The retrospective legislation undoubtedly interferes with vested rights and accrued rights and such interference is based on classification not in tune with the parameters of equality under Article 14 of the Constitution and not having any nexus with the objects sought to be achieved.

(xi) The agreement dated 8.1.1981 (between the State Government and the Indian Dairy Corporation); the letter of understanding dated 21.1.1988 (between the State Government and the National Dairy Development Board) and acted upon by the State Government and the concerned agencies estopped the State Government from backing out on the assurance.

(xii) Section 32(7) of the 'Act 1964' does not confer power on the government to appoint person-in-charge. In the absence of any other provision, the government order (G.O.Ms No. 10 dated 4.2.2006) is not legal and enforceable.

7. Thus, the question does arise as to whether in view of the submissions advanced by the learned counsel for the parties, it is desirable to interfere with the aforesaid findings or any of them.

8. It is well settled law that Article 14 forbids class legislation, however, it does not forbid reasonable classification for the purpose of legislation. Therefore, it is permissible in law to have class legislation provided the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question. Law also permits a classification even if it relates to a single individual, if, on account of some special circumstances or reasons applicable to him, and not applicable to others, that single individual may be treated as a class by himself. It should be presumed that legislature has correctly appreciated the need of its people and that its laws are directed to problems made manifest by experience and that *its discriminations are based on adequate grounds.* There is further presumption in favour of the legislature that legislation had been brought with the

knowledge of existing conditions. The good faith on the legislature is to be presumed, but *if there is nothing on the face of the law or the surrounding circumstances* brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. The law should not be irrational, arbitrary and unreasonable in as much as there must be nexus to the object sought to be achieved by it. (Vide: *Budhan Choudhry & Ors. v. State of Bihar,* AIR 1955 SC 191 ; and *Ram Krishna Dalmia v. Justice S.R. Tendolkar & Ors.,* AIR 1958 SC 538)

9. In *Harbilas Rai Bansal v. State of Punjab & Anr.,* AIR 1996 SC 857, this Court struck down the provisions of the East Punjab Urban Rent Restriction (Amendment) Act, 1956, on the ground that the amendment *had taken away the right of landlord* to evict his tenant from non-residential building even on the ground of bonafide requirement holding that such provisions of amendment were violative of Article 14 of the Constitution and the landlord was entitled to seek eviction on ground of requirement for his own use. The Court further held that it is obvious from the objects and reasons of introducing the said amended Act, that the primary purpose for enacting the Act was to protect the tenants against the malafide attempts by their landlords to evict them. Bona fide requirement of a landlord was, therefore, provided in the Act – as original enactment – a ground to evict tenant from the premises whether residential or non residential.

Thus, the issues require to be examined arise as to whether the Act 2006 is arbitrary, discriminatory or unreasonable or has taken away the accrued rights of the Milk Dairy Societies registered directly under the Act 1995 or got conversion of their respective registration under the Act 1964 to the Act 1995.

10. Article 19(1)(c) guarantees to all citizens, the right to form associations or unions of their choice voluntarily, subject to reasonable restrictions imposed by law. Formation of the unions under Article 19(1)(c) is a voluntary act, thus, unwarranted/impermissible statutory intervention is not desired.

11. Constitution Bench of this Court in *M/s. Raghubar Dayal Jai Prakash v. The Union of India & Anr.,* AIR 1962 SC 263, while dealing with a similar issue held as under:

> "An application for the recognition of the association for the purpose of functioning under the enactment is a voluntary act on the part of the association and if the statute imposes conditions subject to which alone recognition could be accorded or continued it is a little difficult to see how the freedom to form the association is affected unless, of course, that freedom implies or involves a guaranteed right to recognition also."

12. In *Smt. Damyanti Naranga v. The Union of India & Ors.,* AIR 1971 SC 966, this Court examined question related to the Hindi Sahitya Sammelan, a Society registered under the Societies Registration Act, 1860. The Parliament enacted the Hindi Sahitya Sammelan Act under which outsiders were permitted to become members of the Sammelan without the volition of the original members. This court while examining its validity held that any law altering the composition of the Association compulsorily will be a breach of the right to form association because it violated the composite right of forming an association and the right to continue it as the original members desired. The Court held as follows :

> *"It is true that it has been held by this Court that, after an Association has been formed and the right under Art.19(1)(c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire. Those cases are, however, inapplicable to the present*

case. The Act ***does not merely regulate the administration of the affairs of the Society, what it does is to alter the composition of the Society itself as we have indicated above.*** *The result of this change in composition is that the members, who voluntarily formed the Association, are* ***now compelled to act in that Association with other members who have imposed as members*** *by the Act and* ***in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders****. The right to form an association, in our opinion, necessarily implies that the persons forming the Association* ***have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the voluntary Association without any opinion being given to the members to keep them out****, or any law which takes away the membership of those who have voluntarily joined it,* ***will be a law violating the right to form an association****".* (Emphasis supplied)

13. In *Daman Singh & Ors. v. State of Punjab & Ors.,* AIR 1985 SC 973, this Court examined a case where an unregistered society was by statute converted into a registered society which bore no resemblance whatever to the original society. New members could be admitted in large numbers so as to reduce the original members to an insignificant minority. The composition of the society itself was transformed by the Act and the voluntary nature of the association of the members who formed the original society was totally destroyed. The Act was struck down by the Court as contravening the fundamental right guaranteed by Art. 19(1)(f).

14. In *Dharam Dutt & Ors. v. Union of India & Ors.,* (2004)

1 SCC 712, this Court held that the first test is the test of reasonableness which is common to all the clauses under Article 19(1), and the second test, is to ask for the answer to the question, whether the restrictions sought to be imposed on the fundamental right, fall within clauses (2) to (6) respectively, qua sub-clauses (a) to (g) of Article 19(1) of the Constitution, and the Court further held that a right guaranteed by Article 19(1)(c), on the literal reading thereof, can be subjected to those restrictions which satisfy the test of clause (4) of Article 19. The rights not included in the literal meaning of Article 19(1)(c) but which are sought to be included therein as flowing therefrom i.e. *every right which is necessary in order that the association brought into existence fulfils every object for which it is formed, the qualifications therefor,* would not merely be those in clause (4) of Article 19, but would be more numerous and very different. Restrictions which bore upon and took into account the several fields in which the associations or unions of citizens might legitimately engage themselves, would also become relevant. Therefore, the freedom guaranteed under Article 19(1)(c) is not restricted merely to the formation of the association, but to the effective functioning of the association so as to enable it to achieve the lawful objectives.

15. In *The Tata Engineering and Locomotives Co.Ltd. v. The State of Bihar & Ors.,* AIR 1965 SC 40, Constitution Bench of this Court held, that a fundamental *right to form the association cannot be coupled with the fundamental right to carry on any trade or business.* As soon as citizens form a company, the right guaranteed to them by Article 19(1)(c) has been exercised, and no restrain has been placed on that right and no infringement of that right is made. Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation, and is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing alone and cannot be judged on the assumption that they are

the rights attributable to the business of individual citizens. Thus, right under Article 19(1)(c) does not comprehend any concomitant right beyond the right to form an association and right relating to formation of an association. (See also: *All India Bank Employees' Association v. National Industrial Tribunal (Bank Disputes) Bombay & Ors.,* AIR 1962 SC 171; *S. Azeez Basha & Anr. v. The Union of India etc.,* AIR 1968 SC 662; and *D.A.V. College, etc.etc. v. State of Punjab & Ors.,* (1971) 2 SCC 269.)

16. In view of the above, it becomes evident that the right of the citizens to form the association are different from running the business by that association. Therefore, right of individuals to form a society has to be understood in a completely different context. Once a co-operative society is formed and registered, for the reason that co-operative society itself is a creature of the statute, the rights of the society and that of its members stand abridged by the provisions of the Act. The activities of the society are controlled by the statute. Therefore, there cannot be any objection to statutory interference with their composition or functioning merely on the ground of contravention of individual's right of freedom of association by statutory functionaries.

17. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This *doctrine of arbitrariness* is not restricted only to executive actions, but *also applies to legislature.* Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. (Vide: *Ajay Hasia etc. v.*

Khalid Mujib Sehravardi & Ors. etc. AIR 1981 SC 487; *Reliance Airport Developers (P) Ltd. v. Airports Authority of India & Ors.,* (2006) 10 SCC 1; *Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board & Ors.* AIR 2007 SC 2276; *Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited & Ors.* AIR 2009 SC 2337; and *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.* (2011) 8 SCALE 474).

18. In *State of Andhra Pradesh & Anr. v. P. Sagar,* AIR 1968 SC 1379, this Court examined the case as to whether the list of backward classes, for the purpose of Article 15(4) of the Constitution has been prepared properly, and after examining the material on record came to the conclusion that there was nothing on record to show that the Government had followed the criteria laid down by this Court while preparing the list of other backward classes. The Court observed as under:

> "Honesty of purpose of those who prepared and published the list was not and is not challenged, but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen. The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed."

19. In *Indra Sawhney II v. Union of India,* AIR 2000 SC 498, while considering a similar issue regarding preparing a list of creamy layer OBCs, this Court held that *legislative declarations on facts are not beyond judicial scrutiny* in the constitutional context of Articles 14 and 16 of the Constitution, for the reason that a conclusive declaration could not be

permissible so as to defeat a fundamental right.

20. In *Harman Singh & Ors. v. Regional Transport Authority, Calcutta Region & Ors.,* AIR 1954 SC 190, this Court held:

> *"….A law applying to a class is constitutional if there is sufficient basis or reason for it. In other words, a statutory discrimination cannot be set aside as the denial of equal protection of the laws if any state of facts may reasonably be conceived to justify it."*

21. In *D.C. Bhatia & Ors. v. Union of India & Anr.,* (1995) 1 SCC 104, this Court held:

> "…..*This is a matter of legislative policy. The legislature could have repealed the Rent Act altogether. It can also repeal it step by step…….It is well settled that the safeguard provided by Article 14 of the Constitution can only be invoked, if the classification is made on the grounds which are totally irrelevant to the object of the statute. But, if there is some nexus between the objects sought to be achieved and the classification, the legislature is presumed to have acted in proper exercise of its constitutional power. The classification in practice may result in some hardship. But, a statutory discrimination cannot be set aside, if there are facts on the basis of which this statutory discrimination can be justified….The court can only consider whether the classification has been done on an understandable basis having regard to the object of the statute. The court will not question its validity on the ground of lack of legislative wisdom.*
>
> Moreover, the classification cannot be done with mathematical precision. The legislature must have considerable latitude for making the classification having

> regard to the surrounding circumstances and facts. The court cannot act as a super-legislature…."

22. In *State of Gujarat & Anr. v. Raman Lal Keshav Lal Soni & Ors.,* AIR 1984 SC 161, this Court while dealing with a similar issue observed as under:

> "……The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written' Constitution, and have to conform to the do's and don'ts of the Constitution neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say twenty years ago the parties had no rights therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A Legislature cannot legislate today with reference to a situation that obtained twenty years, ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history……. Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective……the provisions are so intertwined with one another that it is wellnigh impossible to consider any life saving surgery. The whole of the Third Amendment Act must go."

23. In *B.S. Yadav & Ors. v. State of Haryana & Ors.,* AIR 1981 SC 561, Constitution Bench of this Court similarly held that the date from which the rules are made to operate must be shown to have reasonable nexus with the provisions contained in the statutory rules specially when the retrospective

effect extends over a long period.

24. In *Chairman, Railway Board & Ors. v. C. R. Rangadhamaiah & Ors.,* AIR 1997 SC 3828, this Court similarly held as under:

> ".....an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution."

Thus, wherever the amendment purports to restore the status quo ante for the past period taking away the benefits already available, accrued and acquired by them, the law may not be valid. (Vide: *P. Tulsi Das & Ors. v. Government of A.P. & Ors.,* AIR 2003 SC 43)

25. In *National Agricultural Cooperative Marketing Federation of India Ltd. & Anr. v. Union of India & Ors.,* (2003) 5 SCC 23, this Court held that the legislative power to amend the enacted law with retrospective effect, is also subject to several judicially recognized limitations, *inter- alia*, the retrospectivity must be reasonable and *not excessive or harsh* otherwise it runs the risk of being struck down as unconstitutional.

26. Vested right has been defined as fixed; vested; accrued; settled; absolute; and complete; not contingent; not subject to be defeated by a condition precedent. The word 'vest' is generally used where an immediate fixed right in present or future enjoyment in respect of a property is created. It is a "legitimate" or "settled expectation" to obtain right to enjoy the property etc. (Vide: *Mosammat Bibi Sayeeda & Ors., etc. v. State of Bihar & Ors., etc.,* AIR 1996 SC 1936; *Howrah Municipal Corporation & Ors. v. Ganges Rope Co. Ltd. & Ors.,* (2004) 1 SCC 663; and *J.S. Yadav v. State of Uttar Pradesh & Anr.,* (2011) 6 SCC 570).

27. In the matter of Government of a State, the succeeding Government is duty bound to continue and carry on the unfinished job of the previous Government, for the reason that the action is that of the "State", within the meaning of Article 12 of the Constitution, which continues to subsist and therefore, it is not required that the new Government can plead contrary from the State action taken by the previous Government in respect of a particular subject. The State, being a continuing body can be stopped from changing its stand in a given case, but where after holding enquiry it came to the conclusion that action was not in conformity with law, the doctrine of estoppel would not apply. Thus, unless the act done by the previous Government is found to be contrary to the statutory provisions, unreasonable or against policy, the State should not change its stand merely because the other political party has come into power. "Political agenda of an individual or a political party should not be subversive of rule of law". The Government has to rise above the nexus of vested interest and nepotism etc. as the principles of governance have to be tested on the touchstone of justice, equity and fair play. The decision must be taken in good faith and must be legitimate. [Vide: *Onkar Lal Bajaj etc. etc. v. Union of India & Anr. etc. etc.* AIR 2003 SC 2562; *State of Karnataka & Anr. v. All India Manufacturers Organization & Ors.* AIR 2006 SC 1846; and *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.* (Supra)].

28. In *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.* (supra), this Court while dealing with the issue held as under:

> "The Statement of Objects and Reasons appended to the Bill is not admissible as an aid to the construction of the Act to be passed, but it can be used for limited purpose for ascertaining the conditions which prevailed at that time which necessitated the making of the law, and the extent and urgency of the evil, which it sought to remedy. The Statement of Objects and Reasons may be relevant to find

out what is the *objective* of any given statute passed by the legislature. It may provide for the reasons which induced the legislature to enact the statute. "For the purpose of *deciphering the objects and purport* of the Act, the court can look to the Statement of Objects and Reasons thereof". (Vide: *Kavalappara Kottarathil Kochuni @ Moopil Nayar v. The States of Madras and Kerala & Ors.,* AIR 1960 SC 1080; and *Tata Power Company Ltd. v. Reliance Energy Ltd. & Ors.,* (2009) 16 SCC 659)."

Similar view has been reiterated in *A. Manjula Bhashini & Ors. v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. & Anr.,* (2009) 8 SCC 431 observing that for the purpose of construction of a provision, the wholesome reliance cannot be placed on objects and reasons contained in the Bill, however, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid *for appreciating the true intent of the legislature* and/or the *object sought to be achieved* by enactment of the particular Act or for judging reasonableness of the classification made by such Act.

29. In *M. Ramanathan Pillai v. State of Kerala & Anr.,* (1973) 2 SCC 650, this Court relied upon American Jurisprudence, 2d. at page 783 wherein it has been stated as under:

"Generally, a State is not subject to an estoppel to the same extent as an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in government. Therefore, as a general rule the doctrine of estoppel will not be applied against the State in its governmental, public or sovereign capacity."

30. In *State of Kerala & Anr. v. The Gawalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc.,* (1973) 2 SCC 713, a

similar view has been re-iterated by this Court observing as under:

"We do not see how an agreement of the Government can preclude legislation on the subject. The High Court has rightly pointed out that the surrender by the Government of its legislative powers to be used for public good cannot avail the company or operate against the Government as equitable estoppel."

Therefore, it is evident that the Court will not pass any order binding the Government by its promises unless it is so necessary to prevent manifest injustice or fraud, particularly, when government acts in its governmental, public or sovereign capacity. Estoppel does not operate against the government or its assignee while acting in such capacity.

31. The Government has inherent power to promote the general welfare of the people and in order to achieve the said goal, the State is free to exercise its sovereign powers of legislation to regulate the conduct of its citizens to the extent, that their rights shall not stand abridged.

The co-operative movement by its very nature, is a form of voluntary association where individuals unite for mutual benefit in the production and distribution of wealth upon principles of equity, reason and common good. So, the basic purpose of forming a co-operative society remains to promote the economic interest of its members in accordance with the well recognised co-operative principles. Members of an association have the right to be associated only with those whom they consider eligible to be admitted and have right to deny admission to those with whom they do not want to associate. The right to form an association cannot be infringed by forced inclusion of unwarranted persons in a group. Right to associate is for the purpose of enjoying in expressive activities. The constitutional right to freely associate with others encompasses associational ties designed to further the social,

legal and economic benefits of the members of the association. By statutory interventions, the State is not permitted to change the fundamental character of the association or alter the composition of the society itself. The significant encroachment upon associational freedom cannot be justified on the basis of any interest of the Government. However, when the association gets registered under the Co-operative Societies Act, it is governed by the provisions of the Act and rules framed thereunder. In case the association has an option/choice to get registered under a particular statute, if there are more than one statutes operating in the field, the State cannot force the society to get itself registered under a statute for which the society has not applied.

32. The cases in hand require to be examined in the light of the aforesaid settled legal propositions.

The recommendations of the House Committee and the Group of Ministers, are not based on relevant material as there was no investigation of all the co-operative societies either converted to or registered under the Act 1995. The House Committee had primarily been assigned the task to look into the three District Milk Unions namely, Visakha, Ongole and Chittoor which had been running partly on the government aids. Out of the said three milk unions, Visakha and Ongole converted under the Act 1995, while Chittoor remained under the Act 1964 throughout and the material on record reveal that it was under liquidation even prior to the constitution of the House Committee. There is nothing on record to show that the House Committee had considered either the functioning of other more than 3500 societies registered under the Act 1995, or consensus thereof arrived at by the Government, the Federation and the Unions at the meeting convened by the Chief Secretaries on 26.8.2003 alongwith other high officials of the co-operative section to solve the problems faced by the Government, the Federation and the Milk Unions within the framework of the Act 1995 and consistent with the statutory co-

operative principles. The House Committee also placed a very heavy unwarranted reliance on the views of the Federation communicated vide its letter dated 20.8.2005, without ascertaining the views of the District Unions.

33. Be that as it may, the House Committee did not recommend the amendment with retrospective effect, particularly, for the conversion of dairy co-operative societies registered under the Act 1995 into societies deemed to have been registered under the Act 1964. More so, the Committee did not consider at all as to whether it was permissible in law, to provide for such a course, so far as the societies initially registered under the Act 1995, were concerned.

34. The restrictions so imposed by the Act 2006, with retrospective effect, extending over a decade and importing the fiction that the societies would be deemed to have been registered under the Act 1964, without giving any option to such societies suggest the violation of Article 19(1)(c) and are not saved by clause (4) of Article 19 of the Constitution. It is by no means conceivable, that the grounds on the basis of which reasonable restrictions could be invoked were available in the instant case.

35. It is evident from the record and elaborate discussion by the High Court that Mulkanoor Women Mutually Aided Milk Producers Co-operative Union Limited (W.P. No.3502 of 2006) increased its membership from 72 to 101 village dairy co-operative societies between 2000 and 2006, and increased milk procurement from 6000 litres to 17,849 litres from the value of Rs.24.24 lakhs to Rs.53.00 lakhs. The milk sales went up from Rs.9.30 lakhs to Rs.82.53 lakhs. The society declared bonus to the producers and substantially discharged its loans. It is encouraging thrift among the members by compulsorily organizing Vikasa Podupu scheme, which swelled from Rs.11.88 lakhs to Rs.1.13 crores. This society directly formed under the Act 1995 has to retain its character and there would

be no justification to bring such a society with about 15,000 women members under a nominated agency.

36. The impugned provisions have no nexus with the object of enforcing the 3-tier structure inasmuch as (a) the 1964 and the 1995 Acts, both permit registration of Federations; (b) the Act 1964 does not contain any express provision providing for 3-tier structure; (c) the object of having a 3-tier structure could be achieved by the Federation registering itself under the Act 1995 as decided at the meeting of cooperative milk unions convened by the Chief Secretary on 26.8.2003; and (d) even the Act 1964 does not treat Dairy Cooperatives as a separate class to be governed by a separate structure. As such from the stand point of structure and basic cooperative principles, all cooperative societies, are alike. The impugned provisions are arbitrary and violative of Article 14 as they deprived the Dairy Cooperative Societies of the benefit of the basic principles of cooperation. The amendments are contrary to the national policy on Cooperatives. They obstruct and frustrate the object of the development and growth of vibrant cooperative societies in the State.

37. After conversion into Mutually – Aided Societies under the Act 1995 with the permission of the Government as stipulated by Section 4 (3)(a), the cooperative societies originally registered under the Act 1964 cannot be treated as aided societies or societies holding the assets of the government or of the Federation. The Statement of Objects and Reasons itself shows that the government decided not to withdraw its own support suddenly. In fact, there was no aid given by the State after conversion. Chapter X of the Act 1964 which empowers the Registrar to recover dues by attachment and sale of property and execution of orders having been expressly incorporated in the Act 1995 by Section 36, thereof there was no justification at all for the impugned Amendments.

38. After the incorporation of the cooperative principles in

Section 4 of the A.P. Cooperative Societies Act, 1964 read with Rule 2(a) of the A.P. Cooperative Societies Rules, 1964, by Amendment Act No. 22 of 2001, the extensive control of cooperative societies by the Registrar under the Act 1964 has become incompatible and inconsistent with the said cooperative principles which mandate ensuring democratic member control and autonomy and independence in the manner of functioning of the cooperatives. These two, namely, extensive State control and ensuring operation of cooperative principles cannot be done at the same time. Therefore, the impugned Act 2006 which by a fiction in sub-section (1A) of Section 4 of the Act 1995 declares that all the dairy/milk cooperative societies shall be deemed to have been excluded from the provisions of the A.P. Cooperative Societies Act, 1964 is arbitrary and violative of Article 14 of the Constitution.

39. Comparative study of the statutory provisions of the Act 1964 with that of Act 1995 makes it crystal clear that Government has much more control over the co-operative societies registered under the Act 1964 and minimal under the Act 1995. The principles of co-operation adopted at international level have been incorporated in the Act 1995 itself, while no reference of any co-operative principle has been made in the Act 1964. The Government is empowered to make rules on every subject covered by the Act 1964, while no such power has been conferred on the Government to make rules under the Act 1995. The affairs of the co-operatives are to be regulated by the provisions of the Act 1995 and by the bye-laws made by the individual co-operative society. The Act 1995 provide for multiplicity of organisations and the statutory authorities have no right to classify the co-operative societies, while under the Act 1964 the Registrar can refuse because of non-viability, conflict of area of jurisdiction or for some class of co-operative. Under the Act 1964, it is the Registrar who has to approve the staffing pattern, service conditions, salaries etc. and his approval is required for taking some one from the Government on deputation, while under the Act 1995 the staff

is accountable only to the society. Deputation etc. is possible only if a co-operative so desires. The size, term and composition of board fixed under the Act 1964 and the Registrar is the ultimate authority for elections etc. and he can also provide for reservations in the board. Under the Act 1995, the size, term and composition of the board depend upon bye-laws of the particular society. For admission and expulsion of a member, Registrar is the final authority under the Act 1964, while all such matters fall within the exclusive prerogative of the co-operative society under the Act 1995. The Government and other non-members may contribute share capital in the societies registered under the Act 1964, wherein members alone can contribute share capital in a society registered under the Act 1995. Mobilisation of funds of co-operative society is permissible only within the limits fixed by the Registrar under the Act 1964, while such mobilisation is permissible within the limits fixed by the bye-laws in a co-operative society under the Act 1995. Subsidiary organisations may be up by a co-operative under the Act 1995, while it is not no permissible under the Act 1964. In resolving of disputes, Registrar or his nominee is the sole arbitrator under the Act 1964, while the subject is exclusively governed by the bye-laws under the Act 1995. Role of the Government and Registrar under the Act 1964 is much more than under the Act 1995 as under the Act 1964, the Registrar can postpone the elections; nominate directors to Board; can appoint persons in-charge for State level federations; frame rules; and handle appeals/revisions/reviews; can give directions to co-operatives regarding reservations on staff and set up Special Courts and Tribunals, while so much control is not under the Act 1995. Similarly, Registrar has more say under the Act 1964 in respect of registering of bye-laws; approval of transfer of assets and liabilities or division or amalgamation or in respect of transfer of all members or disqualification of members etc.

40. Statement of objects and reasons of the Act 1995

clearly stipulate that State participation in the financing and management of cooperatives in the past had led to an unfortunate situation and the cooperative societies were not governed/guided by the universally accepted principles of cooperation. Thus, the purpose to enact the Act 1995 was to provide more freedom to conduct the affairs of the cooperative societies by its members. Clause 7 thereof clearly described the salient features of the legislation, *inter-alia*, to enunciate the cooperative principles which primarily place an assent on voluntarily self-financing autonomous bodies for removal from State control; to accept the cooperative societies to regulate their functioning by framing bye-laws subject to the provisions of the Act and to change the form or extent to their liability, to transfer their assets and liabilities to provide for the constitution of board and functions of the board of directors.

Principles of co-operation as incorporated in Section 3 and given effect to in the other provisions of the Act 1995 permit better democratic functioning of the society than under the Act 1964. Whereas the Act 1995 provides for State regulation to the barest minimum, the Act 1964 provides for extensive State control and regulation of cooperative societies which is inconsistent with the national policy with regard to cooperative societies evolved in consultation and collaboration with the States which stands accepted by the State of A.P. and reflected in the Scheme of the Act 1995 which is based on the model law recommended by the Planning Commission of India.

Thus, reverting back to the cooperative societies under the Act 1964 is a retrograding process by which the government would enhance its control of these societies registered under the Act 1995. They would be deprived not only of benefits under the said Act, but rights accrued under the Act 1995 would also be taken away with retrospective effect.

41. Cooperative law is based on voluntary action of its members. Once a society is formed and its members voluntarily

take a decision to get it registered under the Act X, the registration authority may reject the registration application if conditions prescribed under Act X are not fulfilled or for any other permissible reason. The registration authority does not have a right to register the said society under Act Y or even a superior authority is not competent to pass an order that the society would be registered under the Act Y. Such an order, if passed, would be in violation of the first basic cooperative principle that every action shall be as desired by its members voluntarily. Introducing such a concept of compulsion would violate Article 19(1)(c) of the Constitution of India. It is not permissible in law to do something indirectly, if it is not permissible to be done directly. (See: *Sant Lal Gupta & Ors v. Modern Co-operative Group Housing Society Ltd. & Ors.,* JT 2010 (11) SC 273)

42. Act 2006 had been enacted without taking note of the basic principles of co-operatives incorporated in Section 3 of the Act 1995 which provide that membership of a co-operative society would be voluntary and shall be available without any political restriction. The co-operative society under the Act would be a democratic organisation as its affairs would be administered by persons elected or appointed in a manner agreed by members and accountable to them.

43. The legislature has a right to amend the Act 1995 or repeal the same. Even for the sake of the argument, if it is considered that legislature was competent to exclude the milk cooperative dairies from the operation of the Act 1995 and such an Act was valid i.e. not being violative of Article 14 of the Constitution etc., the question does arise as to whether legislature could force the society registered under the Act 1995 to work under the Act 1964. Importing the fiction to the extent that the societies registered under the Act 1995, could be deemed to have been registered under the Act 1964 tantamounts to forcing the members of the society to act under

compulsion/direction of the State rather than on their free will. Such a provision is violative of the very first basic principles of cooperatives. More so, the Act is vitiated by non-application of mind and irrelevant and extraneous considerations.

44. In view of the above, we do not see any cogent reason to interfere with the impugned judgment and order. The appeals lack merit and are accordingly dismissed. No costs.

N.J. Appeals dismissed.

TRANS MEDITERRANEAN AIRWAYS
v.
M/S UNIVERSAL EXPORTS & ANR.
(Civil Appeal No. 1909 of 2004)

SEPTEMBER 15, 2011

[G.S. SINGHVI AND H.L. DATTU, JJ.]

CONSUMER PROTECTION ACT, 1986:

Object and historical background of its enactment – Discussed.

Complaint by consignor claiming compensation – Jurisdiction of National Commission under the CP Act to entertain – Held: National Commission has jurisdiction under the CP Act to entertain and decide a complaint filed by the consignor claiming compensation for deficiency of service by the carrier, in view of the provisions of the Carriage by Air Act and the Warsaw Convention – Carriage by Air Act, 1972.

Deficiency in service – Delivery of consignments – Complaint filed before National Commission by consignor claiming compensation for deficiency in service on the ground that the consignments were delivered to wrong person – National commission held that the services rendered by carrier were deficient and held it liable to pay compensation equivalent to USD 71,615 – Order of National Commission challenged on the grounds that it had no jurisdiction to entertain the complaint and there was no deficiency of service – Held: There was no legal infirmity in the National Commission exercising its jurisdiction, as the same can be considered a Court within the territory of a High Contracting Party for the purpose of Rule 29 of the Second Schedule to the CA Act and the Warsaw Convention – Consignment was delivered to M/s LIWE ESPANOLA – Perusal of the airway

bill showed the name of the consignee as BBSAE, Madrid and thereafter, the name of M/s LIWE ESPANOLA was mentioned – The stand of the appellant-carrier cannot be accepted that since the name of M/s. LIWE ESPANOLA also appeared along with BBSAE, Madrid, the consignment was delivered to the notified party – If, for any reason, the appellant-carrier was of the view that the particulars furnished were insufficient for effecting the delivery of the consignment, it was expected from the appellant-carrier to have made enquiries – The appellant, being an airline carrier of high repute and effecting transportation of goods to various parts of the world including Spain is expected to be fully aware of the consignee's name, which was indicated in the consignee's box and they should have notified the notified party immediately after the arrival of the consignment – Since, that was not done, the National Commission was justified in holding that there was deficiency of service on the part of the carrier in not effecting the delivery of goods to the consignee.

National Commission whether a "court" – Held: The use of the word "Court" in Rule 29 of the Second Schedule of the Act has been borrowed from the Warsaw Convention – The word "Court" has not been used in the strict sense in the Convention as has come to be in our procedural law – The word "Court" has been employed to mean a body that adjudicates a dispute arising under the provisions of the CP Act – The Act gives the District Forums, State Forums and National Commission the power to decide disputes of consumers – The jurisdiction, the power and procedure of these Forums are all clearly enumerated by the Act – Though, these Forums decide matters after following a summary procedure, their main function is still to decide disputes, which is the main function and purpose of a Court.

CARRIAGE BY AIR ACT, 1972: Object and historical background of its enactment – Discussed.

WORDS AND PHRASES: Court – Meaning of – Discussed.

The appellant, an International Cargo carrier had its principal place of business at Beirut, Lebanon. Respondent No.1-consignor was a garment exporter and respondent No.2 was an accredited International Air Transport Association agent. The agent made out three airway bills for shipping of garments to Spain on behalf of the consignor through the appellant-carrier. In the consignee column, the consignment was addressed to "BB SAE MADRID, SPAIN NOTIFY: M/S LIWE ESPANOLA S.A., MAYOR S/N, 30006 PUENTE TOCINOR APARTADO, 741, MORCIA, SPAIN, L.C. No. C. 1036-92-00276". The consignments reached Madrid and were cleared by the Customs Authorities. The appellant-carrier delivered the consignment to M/s Liwe Espanola, as according to them, that was the only recognizable address available from the documents furnished by the consignor.

After nine months from the date of shipment, the agent made enquiry regarding two of the three airway bills. Since there was no response, the agent made further enquiry again after four months. In response to the query, the appellant-carrier informed the consignor that on finding the full name and complete postal address of the consignee as M/s Liwe Espanola, the appellant-carrier has delivered the goods to it. The consignor claimed that the consignee of the said consignment was Barclays Bank, Madrid and the appellant carrier had wrongly delivered the consignment to the address mentioned in the Block column instead of routing it through Barclays Bank. The consignor instituted a complaint under Section 12 of the Consumer Protection Act, 1986 (CP Act) before the National Commission, *inter alia*, claiming compensation for the alleged deficiency of service by the appellant-carrier and

the agent for not delivering the said consignment to the consignee. The National Commission held that the services rendered by the appellant-carrier was deficient and thereby, it was liable to pay compensation equivalent to US $71,615.75 with 5% interest from the date of the complaint till its realization, and imposed costs of Rs.1 lakh.

The questions which arose for consideration in the instant appeal were whether the National Commission under the CP Act has the jurisdiction to entertain and decide a complaint filed by the consignor claiming compensation for deficiency of service by the carrier, in view of the provisions of the Carriage by Air Act and the Warsaw Convention or whether domestic laws can be added to or substituted for the provisions of the conventions; and whether the appellant can be directed to compensate the consignor for deficiency of service in the facts and circumstances of the case.

Dismissing the appeal, the Court

HELD: 1. The Carriage by Air Act, 1972 (CA Act) was enacted to give effect to the convention for unification of rules relating to international carriage by air signed at Warsaw as amended at Hague in 1995 and the Montreal Convention of 1999. Section 2(ii) of the CA Act defines convention to mean convention for unification of certain rules relating to international carriage by air signed at Warsaw on 12.10.1929. Section 3 provides for the application of the Warsaw Convention to India. It says that the rules contained in the First Schedule being the provisions of the convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall have the force of law in India in relation to any carriage by air to which those rules apply irrespective of the nationality of the aircraft performing the carriage, subject to the provisions of the Act. Section

4 provides for application of amended convention to India and also provides for Second Schedule in consonance with the amended convention. This Schedule applies to the claim made in the instant case as it is a dispute that occurred in 1994 before the Montreal Convention in 1999. Section 4A provides for the application of the Montreal Convention to India and provides for the Third Schedule. Section 7 provides that every high contracting party to the convention shall, for the purpose of any suit brought in a Court in India in accordance with the provisions of Rule 28 of the First Schedule or of the Second Schedule, as the case may be, enforce a claim in respect of the carriage undertaken by him. Section 8 enables the application of the Act to carriages which are not international. [Paras 18-19] [68-D-H; 69-A]

2. The Consumer Protection Act, 1986 (CP Act) aims to protect the interests of the consumers and provide for speedy resolutions of their disputes with regard to defective goods or deficiency of service. The frame work for the CP Act was provided by a Resolution dated 09.04.1985 of the General Assembly of the United Nations Organization, which is commonly known as Consumer Protection Resolution No.39/248. India is a signatory to the said Resolution. The Act was enacted in view of the said Resolution of the General Assembly of the United Nations. The preamble to the Act suggests that it is to provide better protection for the consumers and their interests. By this Act, the Legislature has constituted quasi-judicial Tribunals/Commissions as an alternative system of adjudicating consumer disputes.Section 3 of the CP Act gives an additional remedy for deficiency of service and that remedy is not in derogation of any other remedy under any other law. The protection provided under the CP Act to consumers is in addition to the remedies available under any other Statute. It does not

extinguish the remedies under another Statute but provides an additional or alternative remedy. In the instant case, at the relevant point of time, the value of the subject matter was more than Rs.20 lakhs, by which the National Commission is conferred jurisdiction for any cause of action that arises under the Act. The Warsaw Convention and the Hague Protocol have been incorporated into the domestic law by the passage of the CA Act. Therefore, there was no legal infirmity in the National Commission exercising its jurisdiction, as the same can be considered a Court within the territory of a High Contracting Party for the purpose of Rule 29 of the Second Schedule to the CA Act and the Warsaw Convention. [Paras 22, 24, 32] [74-B; 76-G-H; 77-A-B; 80-D-F]

Proprietor, Jabalpur Tractors v. Sedmal Jainrain and Anr. **1995 Supp. (4) SCC 107: 1995 (4) Suppl. SCR 561;** *Fair Air Engineers Pvt. Ltd. and Anr. v. N.K. Modi* **(1996) 6 SCC 385: 1996 (4) Suppl. SCR 820;** *State of Karnataka vs. Vishwa Bharathi House Building Co-operative Society and Others* **(2003) 2 SCC 412: 2003 (1) SCR 397: *Secy.,*** *Thirumurugan Coop. Agricultural Credit Society v. Ma. Lalitha* **(2004) 1 SCC 305: 2003 (6) Suppl. SCR 659;** *Kishore Lal v. Chairman, Employees' State Insurance Corpn.* **(2007) 4 SCC 579: 2007 (6) SCR 139;** *Skypak Couriers Ltd. v. Tata Chemicals Ltd.* **(2000) 5 SCC 294: 2000 (1) Suppl. SCR 324;** *Patel Roadways Limited v. Birla Yamaha Ltd.*, **(2000) 4 SCC 91: 2000 (2) SCR 665 – relied on.**

Whether National Commission is a 'Court'?

3. The Oxford Advanced Learner's Dictionary [8th Edition] defines 'Court' as *"the place where legal trials take place and where crimes, etc. are judged."* The Oxford Thesaurus of English [3rd Ed] gives the following synonyms: "court of law, law court, bench, bar, court of

justice, judicature, tribunal, forum, chancery, assizes, courtroom". The use of the word "Court" in Rule 29 of the Second Schedule of the CA Act has been borrowed from the Warsaw Convention. The word "Court" has not been used in the strict sense in the Convention as has come to be in our procedural law. The word "Court" has been employed to mean a body that adjudicates a dispute arising under the provisions of the CP Act. The CP Act gives the District Forums, State Forums and National Commission the power to decide disputes of consumers. The jurisdiction, the power and procedure of these Forums are all clearly enumerated by the CP Act. Though, these Forums decide matters after following a summary procedure, their main function is still to decide disputes, which is the main function and purpose of a Court. For the purpose of the CA Act and the Warsaw Convention, the Consumer Forums can fall within the meaning of the expression "Court". When it comes to legislations like the CP Act, there can be no restricted meaning given to the word "Court". Hence, the contention that the National Commission is not a "Court" within the meaning of Rule 29 of the Second Schedule of the CA Act is rejected. [Paras 39, 42, 43] [88-D-E; 89-H; 90-A-E]

Ethiopian Airlines v. Ganesh Narain Saboo **(*Civil Appeal No.7037 of 2004*)** *Laxmi Engineering Works v. P.S.G. Industrial Institute,* **(1995) 3 SCC 583: 1995 (3) SCR 174;** *Charan Singh v. Healing Touch Hospital,* **(2000) 7 SCC 668: 2000 (3) Suppl. SCR 337;** *State of Karnataka v. Vishwabharathi House Building Coop. Society* **(2003) 2 SCC 412: 2003 (1) SCR 397;** *Union of India v. R. Gandhi, President, Madras Bar Association,* **(2010) 11 SCC 1: 2010 (6) SCR 857;** *Bharat Bank Ltd. v. Employees*, **1950 SCR 459;** *State of Bombay v. Narottamdas Jethabhai*, **1951 SCR 51** *Brajnandan Sinha v. Jyoti Narain* **(1955) 2 SCR 955;** *Ram Narain v. The Simla Banking and Industrial Co. Ltd.* **AIR 1956**

SC 614:: 1956 SCR 603; *Baradakanta Mishra v. Registrar of Orissa High Court,* **(1974) 1 SCC 374: 1974 (2) SCR 282;** *State of Tamil Nadu v. G.N. Venkataswamy*, **(1994) 5 SCC 314: 1994 (1) Suppl. SCR 322;** *Canara Bank v. Nuclear Power Corpn. of India,* **(1995) Supp 3 SCC 81: 1995 (2) SCR 482;** *P. Sarathy v. State Bank of India* **2000 (5) SCC 355: 2000 (1) Suppl. SCR 402;** *Kihoto Hollohon v. Zachillhu* **(1992) Supp (2) SCC 651: 1992 (1) SCR 686;** *State of Karnataka v. Vishwabharathi House Building Coop. Society* **(2003) 2 SCC 412: 2003 (1) SCR 397 – relied on.**

The Oxford Thesaurus of English [3rd Ed] *The Chamber's Dictionary* **[10th Ed.]; *Stroud's Judicial Dictionary* [5th Ed] – referred to.**

4. The airway bill is one of the documents produced along with the Memorandum of appeal. A perusal of the same would show that the agent of the consignor in the consignee's box specifically mentions the name of the consignee as BBSAE, Madrid and immediately thereafter, the name of M/s LIWE ESPANOLA is mentioned. It came in the evidence of the consignor and his agent that BBSAE, Madrid is Barclays Bank, Madrid and 'SAE' is a Spanish abbreviation for incorporation like 'limited'. Therefore, the consignee was only Barclays Bank, Madrid. The stand of the appellant-carrier cannot be accepted that BBSAE, Madrid is not the consignee and that it was the responsibility of the consignor and his agent to have furnished the correct and accurate particulars of the consignee and since the name of M/s. LIWE ESPANOLA also finds a place in the consignee box, the consignment is delivered to the notified party and, therefore, it cannot be said that there was deficiency of service. The consignor, through his agent, has stated that in the airway bill that is handed over to the appellant-carrier, in the consignee box, the name of BBSAE, Madrid is specifically mentioned. If, for any reason, the appellant-

carrier was of the view that the name of the consignee is not forthcoming or if the particulars furnished were insufficient for effecting the delivery of the consignment, it was expected from the appellant-carrier to have made enquiries. At this belated stage, the appellant-carrier cannot shift the burden by contending that it was expected from the consignor and his agent to have furnished the correct and proper particulars of the consignee in the airway bill. The appellant is an air line carrier of high repute and they effect transportation of goods to various parts of the world including Spain and, therefore, it can safely be presumed that the carriers were fully aware of the consignee's name, which was indicated in the consignee's box and they should have notified the notified party immediately after the arrival of the consignment. Since, that has not been done, the National Commission was justified in holding that there is deficiency of service on the part of the carrier in not effecting the delivery of goods to the consignee. [Para 51] [93-B-H; 94-A-C]

5. Rule 6 of the Rules envisages that the airway bill is required to be made by the consignor and handed over the same to the carrier with the cargo. Rule 10 stipulates that the consignor is responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the airway bill. Sub-clause (2) of Article 10 provides that the consignor shall indemnify the carrier against all damages suffered by him or to any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor. Rule 16 provides that the consignor should furnish all the information and attach it to the airway bill to meet the requirements of law enforcing agencies. In the instant case, the consignor had furnished all the relevant information in the airway bill which would satisfy the

requirements of both Rule 6 and 16 of the rules and, therefore, the consignor cannot be accused of not furnishing the correct particulars and information in the airway bill which is handed over to the appellant-carrier with the cargo. The appellant-carrier cannot absolve its responsibilities by contending that it would be practically impossible to verify the correctness of all the airway bills which are furnished with the cargo. The appellant's contention that the name and address of the consignee was inadequate is difficult to accept. There is evidence on record to show that documents supporting the letter of credit was sent by the consignors using the self same name and address and there was no difficulty in the same being delivered to the consignee bank. Rule 14 confers the right on the consignor to make complaint to the carrier if the consignment has not reached its destination qua the consignee. In the evidence of the consignor, it is elicited that necessary oral enquiries were made with the carrier within a reasonable time, when the consignor did not receive the value of the goods from the consignee and since it did not receive any reasonable explanation, it had no other alternative but to correspond with the appellant-carrier by written correspondence. Though, the witnesses of the consignor are cross examined by the appellant-carrier, nothing worthwhile is elicited. Therefore, in the absence of any contrary evidence, the statement made by the consignor and its witness require to be accepted. [Paras 52, 53] [94-D-H; 95-A-F]

Case Law Reference:

1995 (4) Suppl. SCR 561	**relied on**	**Para 25**
1996 (4) Suppl. SCR 820	**relied on**	**Para 26**
2003 (1) SCR 397	**relied on**	**Para 27**
2003 (6) Suppl. SCR 659	**relied on**	**Para 28**

2007 (6) SCR 139	**relied on**	**Para 29**
2000 (1) Suppl. SCR 324	**relied on**	**Para 30**
2000 (2) SCR 665	**relied on**	**Para 31**
1995 (3) SCR 174	**relied on**	**Para 34**
2000 (3) Suppl. SCR 337	**relied on**	**Para 34**
2003 (1) SCR 397	**relied on**	**Para 34**
2010 (6) SCR 857	**relied on**	**Paras 34, 40**
1950 SCR 459	**relied on**	**Para 35**
1951 SCR 51	**relied on**	**Para 35**
(1955) 2 SCR 955	**relied on**	**Para 35**
1956 SCR 603	**relied on**	**Para 36**
1974 (2) SCR 282	**relied on**	**Para 36**
1994 (1) Suppl. SCR 322	**relied on**	**Para 37**
1995 (2) SCR 482	**relied on**	**Paras 37, 40**
2000 (1) Suppl. SCR 402	**relied on**	**Para 38**
1992 (1) SCR 686	**relied on**	**Para 38**
2003 (1) SCR 397	**relied on**	**Para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1919 of 2004.

From the Judgment and Order dated 15.01.2004 of the National Consumer Disptes Redressal Commission in Original Petition No. 161 of 1994.

Vinoo Bhagat and Rutwik Panda for the Appellant.

Jaideep Gupta, G.S. Chatterjee, Raja Chatterjee,

Siddhartha Dave, Senthil Jagadeesan and Jemtiben AO., for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This appeal is filed under Section 23 of the Consumer Protection Act, 1986 [hereinafter referred to as "the C P Act"] against the order in Original Petition No. 161 of 1994 of the National Consumer Disputes Redressal Commission, New Delhi ["the National Commission" for short] dated 15th January, 2004, whereby the National Commission has directed the appellant to pay a sum equivalent to US $71,615.75 with 5% interest from the date of the complaint, till its realization, and imposed costs of `1 lakh for deficiency of service.

2. The appellant before us is an International Cargo carrier, with its principal place of business at Beirut, Lebanon. Respondent No.1 is a garment exporter and respondent No.2 is an accredited International Air Transport Association agent. By this appeal, we are called upon to examine and reconcile the area of operation of the C P Act on the one hand, and the Carriage by Air Act, 1972 [hereinafter referred to as "the CA Act"] along with the Warsaw Convention of 1929 [hereinafter referred to as "the Warsaw Convention"] on the other. The appellant, respondent No. 1 and respondent No. 2, hereinafter, for the sake of brevity, referred to as "appellant carrier", "the consignor" and "agent" respectively.

3. The core issues that arise for our consideration and decision in this appeal are:

1. Whether the National Commission under the CP Act has the jurisdiction to entertain and decide a complaint filed by the consignor claiming compensation for deficiency of service by the carrier, in view of the provisions of the CA Act and the Warsaw Convention. Or whether domestic laws

can be added to or substituted for the provisions of the conventions.

2. Whether the appellant can be directed to compensate the consignor for deficiency of service in the facts and circumstances of the case.

Brief Facts

4. The facts leading to this appeal are as follows:

The agent made out three airway bills for shipping of garments to Spain on behalf of the consignor through the appellant-carrier. In the consignee column, the consignment was addressed as :

> "BB SAE MADRID, SPAIN
> NOTIFY: M/S LIWE ESPANOLA S.A.,
> MAYOR S/N, 30006 PUENTE TOCINOR
> APARTADO, 741, MORCIA, SPAIN,
> *L.C. No. C. 1036-92-00276"*

In the box titled 'Handling Information', the following information was recorded:

> "MARKS: SPAIN N/C NOS: 1027-1185
> TOTAL ONE HUNDRED FIFTY NINE CARTONS ONLY/ PLS INF CNEE IMM ON ARR/DOCUMENTS ATTACHED"

The airway bills from Bombay to Amsterdam were dated 25-08-1992 and the consignment through the appellant-carrier reached Amsterdam on 30-08-1992. From Amsterdam, the consignments were sent to Madrid by road on the following day, and they reached Madrid on 03-09-1992 and were cleared by the Customs Authorities. The appellant-carrier delivered the consignment to M/s Liwe Espanola, as according to them, that was the only recognizable address available from the documents furnished by the consignor.

5. After nine months from the date of shipment, the agent

made enquiry regarding two of the three airway bills. Since there was no response, the agent made further enquiry again after four months. In response to the query, the appellant-carrier informed the consigner that on finding the full name and complete postal address of the consignee as M/s Liwe Espanola, the appellant-carrier has delivered the goods to it. It was at this stage, the consignor claimed that the consignee of the said consignment was Barclays Bank, Madrid, which had only one branch in Madrid and since the appellant carrier had wrongly delivered the consignment to the address mentioned in the Block column instead of routing it through Barclays Bank and, therefore, there is deficiency of service. Accordingly, the consignor instituted a complaint under Section 12 of the CP Act before the National Commission, *inter alia*, claiming compensation for the alleged deficiency of service by the appellant-carrier and the agent for not delivering the said consignment to the consignee. The National Commission, after considering the entire evidence on record, has come to the conclusion that the services rendered by the appellant-carrier was deficient and thereby, it was liable to pay compensation equivalent to US $71,615.75 with 5% interest from the date of the Complaint till its realization, and imposed costs of Rs. 1 lakh. It is the correctness or otherwise of this order, which is called in question in this appeal.

6.Since this is the first appeal under Section 23 of the CP Act, we are required to consider both the questions of facts as well as questions of law.

Impugned Order of the National Commission

7. The appellant-carrier before the National Commission, by way of preliminary objection, had raised jurisdiction of the National Commission in entertaining the complaint filed by the complainant. It was the contention of the appellant-carrier that in view of Rule 29 and Rule 33 of the Second Schedule to the CA Act, the National Commission in Delhi has no jurisdiction to entertain and decide the complaint. It was contended that

only the Courts at the four places mentioned in the said provision have jurisdiction to adjudicate the complaint and, therefore, no other courts, Tribunal or Commission has jurisdiction to decide the complaint filed by the complainant. It was also contended that in view of the Warsaw Convention, the National Commission had no jurisdiction to decide the dispute. The National Commission, after a detailed analysis of the provisions of the CP Act and carrier laws, has negatived the contention by holding that the CP Act has vested jurisdiction to the Consumer Courts to adjudicate upon a claim for compensation in cases of deficiency of service. It was also held that due to the pecuniary jurisdiction of the National Commission, even a matter that arose in Mumbai of value of more than Rs. 20 lakhs, could be filed for adjudication before the National Commission (prior to the 2002 amendment).

8. On merits, it was the case of the consignor before the National Commission that the services offered by the appellant-carrier and the agent were deficient and the consignment meant for the consignee was not delivered to the notified person. It was also the case of the consignor that in view of the conditions of contract on the reverse of the airway bill, it was required for the appellant-carrier to have delivered the consignment to the consignee only, and in case of any doubt regarding the address of delivery, the appellant-carrier was required to enquire with the consignor and not deliver the consignment to any other person than the notified party. Therefore, it was contended that there is a deficiency of service by the appellant-carrier.

9. The appellant-carrier has taken the defense that the address given by the agent of the consignor was incorrect and incomplete, and the only address that was properly given was that of the notified party, to which address they have delivered the said consignment. Further, it was contended that at no point of time, the appellant-carrier was made known that the "BBE SAE, MADRID SPAIN" stood for Barclays Bank, Madrid. Further, it was contended that the consignor had to file a suit

within 120 days by relying on Rule 12 and the complaint was barred by limitation. It was further contended that if there was any damage that was suffered by the consignor, it was due to the negligence of the agent. It was also contended that the consignor has received payment from the notified party. The appellant-carrier also made reference to the CA Act, Warsaw Convention and several other authorities in support of its claim.

10. The National Commission, in the impugned order, has concluded that the agent was not only the agent of the consignor, but also of the agent of the appellant-carrier, and hence any mistake committed by the agent would make the principal (appellant-carrier) liable for such damages. Further, it is held by the National Commission that the appellant-carrier was duty bound to have contacted the consignor in case it was not able to locate the address of the consignee or in the event, the consignee refused to accept the consignment. It is held that it is not open to the appellant-carrier to have delivered the consignment to the notified party without informing the consignor. On the point of limitation, the National Commission has observed that by virtue of Rule 30 of the Second Schedule, a suit could be brought within two years, and hence Rule 12 is not applicable in the facts of the case. In the light of the above findings, the National Commission has held that the services provided by the appellant-carrier were deficient and ordered payment of the compensation to the consignor.

11. Shri. Vinoo Bhagat, learned counsel, appears for the appellant-carrier, Shri. Jaideep Gupta, learned senior counsel, appears for the consignor (Respondent No.1) and Shri. Siddhartha Dave, learned counsel, appears for the agent (Respondent No.2). On the question of jurisdiction of the National Commission, we were assisted by Shri. Shyam Divan, learned senior counsel, as the *amicus curie*. For the sake of convenience, we will deal with the submissions made by the learned counsel on the issue of jurisdiction first and then, on the factual matrix.

Issue of Jurisdiction of the National Commission

12. Shri. Vinoo Bhagat, learned counsel, submits that the Warsaw Convention exclusively governs any claims arising under it, and domestic law cannot be applied for deciding such claims. The learned counsel relies on Rule 29 of the Second Schedule to the CA Act, to contend that it was only at the places mentioned in this Rule, the claim for compensation could have been filed. He further submits that the appellant-carrier could be sued at a court in Mumbai (where the contract was made), or at Beirut (where it has its principal place of business), or at Madrid (place of destination), and no where else. He further submits that the Court in Delhi has no jurisdiction to entertain any claim against the appellant-carrier and that the provisions of the CP Act could not alter the jurisdiction vested on Courts by the Warsaw Convention. By pointing out to Rule 33 of the Second Schedule, the learned counsel submits that this provision fortifies his contention of the exclusive operation of Rule 29 and states that not only are the places where the appellant-carrier can be sued are mentioned, but also the places where arbitration can take place, are expressly stated. The learned counsel also states that there is no cause of action under the CP Act, to invoke the jurisdiction of the National Commission. He further contends that the National Commission is not a Court and that a suit is maintainable only in a Court having jurisdiction. He states that it is not permissible to read the word "Court" to include quasi-judicial authorities and Tribunals. He places reliance on some decisions of this Court, the House of Lords, Supreme Court of the United States and the National Commission.

13. Shri. Jaideep Gupta, learned senior counsel, appearing for the consignor supports the finding of the National Commission. He submits that even assuming that Rule 29 of the Second Schedule to the CA Act was applicable, the jurisdiction of the National Commission is not ousted in any manner whatsoever. He further submits that the word "Court"

is not used in the strict sense of the term, thereby it cannot be said that a quasi-judicial Tribunal is excluded. He submits that the Warsaw Convention was reproduced in two languages (being English and French), and that the term "Court" seems to be used in a sense to indicate a body that resolves disputes and cannot be restricted to the meaning accorded by our judicial system. Shri. Gupta further submits that the Warsaw Convention does not contemplate the situation of alternate Tribunals replacing Courts of Law. He relies on Rule 29(2) of the Second Schedule to the CA Act and submits that the procedural law of the country, in which the suit is filed, is what is applicable, and in India, the CP Act was the legislation that lays down the remedy and procedure for the deficiency of service. He would further state that the CP Act was brought into force to expedite the justice delivery system for matters relating to deficiency of service, and the CP Act not only prescribes territorial jurisdiction, but also the pecuniary jurisdiction of the various Forums. The learned senior counsel would contend that since the State Forum did not have the pecuniary jurisdiction, the National Commission could and, in fact, has entertained the complaint. He would further submit that since deficiency of service was computed in more than twenty lakh rupees at the relevant time (it is presently one crore rupees after the 2002 amendment) or more, the National Commission would have jurisdiction by virtue of Section 29 of the CP Act. He also cited some judgments in support of his submissions and differentiated those cited by Shri. Vinoo Bhagat.

14. Shri. Siddhartha Dave, learned counsel appearing for the agent submits that the provisions of the CP Act can co-exist with those of other Statutes and the option is given to the parties as to which remedy they would like to pursue and would support this argument by referring to decisions of this Court.

15. Due to the importance of the question of law involved, Shri. Shyam Divan, learned senior counsel, was requested to assist the Court. The learned *amicus* has submitted a note on

the question of jurisdiction raised by the appellant-carrier. The learned *amicus* has stated that it is clear from Section 3 of the CP Act that Consumer Courts are additional Forums to ensure that consumers get speedy disposal of their cases/complaints with regard to deficiency of service. He lays emphasis on the phrase *"An action for damages must be brought"* at the beginning of Rule 29 and states that this Rule gives an option to the plaintiff to sue in the Courts on any one of the places mentioned. He further states that Rule 33 provides an alternate remedy to parties to resort to proceedings of arbitration in case of disputes between the parties. He concludes that there is no express bar in the CA Act to oust the jurisdiction of the Forums under the CP Act.

16. To appreciate the rival contentions, it is necessary to notice the scheme of the CA Act. The Statement of Objects and Reasons of the CA Act reads:

> "India is a signatory to the Warsaw Convention of 1929, which is an International Agreement governing the liability of the air carrier in respect of international carriage of passengers, baggage and cargo by air. Under that convention 'international carriage' means any carriage in which according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or transshipment, are situated either within the territories of two High Contracting Parties, or within the territories of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention. The Convention provides that when an accident occurring during international carriage by air causes damage to a passenger, or a shipper or cargo, there is a presumption of liability of the carrier. The carrier, however, is not liable if he proves that he or his agent had taken all necessary

> measures to avoid the damage or that it was impossible for him or them to take such measures. The Convention balances the imposition of a presumption of liability on the carrier by limiting his liability for each passenger to 1,25,000 gold francs. There is no limitation of liability if the damage is caused by the willful misconduct of the carrier, or by such default, on his part as, in accordance with the law of the Court ceased of the case, is equivalent to willful misconduct. The Convention also contains detailed provisions regarding documents of carriage.
>
> 2. The Warsaw Convention has been given effect to in India by the enactment of the Indian Carriage By Air Act, 1934 (20 of 1934) in regard to international carriage and the provisions of that Act have been extended to domestic carriage, subject to certain exception, adaptations and modifications, by means of a notification issued in 1964.
>
> 3. A diplomatic conference under the auspices of International Civil Aviation Organization was held at Hague in September, 1955 which adopted a protocol to amend the provisions of the Warsaw Convention. The Hague protocol was opened for signature on 28th September, 1955 and more than the required number of States have ratified the protocol which came into force between the ratifying States on 1st August, 1963.
>
> 4. Some of the amendments effected by the Hague protocol to the Warsaw Convention are – (a) simplification of documents of carriage; (b) an increase in the amount specified as the maximum sum for which the carrier may be liable to a passenger, that is to say, the limits of the liability of the carrier in respect of a passenger has been doubled, and unless a higher figure is agreed to by a special contract, the liability is raised from 1,25,000 gold francs per passenger to 2,50,000 gold francs; (c) making the carrier liable where the damage was caused by an

error in piloting or in the handling of the air craft or in navigation.

5. Acceptance of the Hague Protocol would put our national carrier on the same footing as many of its international competitors, since the passengers will be able to avail the limit of liability guaranteed by the Hague Protocol the limit being double than that stipulated under the Warsaw Convention.

6. Fifty seven countries have already ratified the Hague Protocol and passengers traveling between those countries would be ensured of the higher limit of compensation.

7. It is, therefore, proposed to enact a law, in place of the existing Indian Carriage By Air Act, 1934, to apply the existing provisions based on the Warsaw Convention to countries which would choose to be governed by that Convention and also to apply the provisions of the Warsaw Convention as amended by the Hague Protocol to countries which may accept the provisions thereof. Under Section 4 of the Indian Carriage By Air Act, 1934, the rules contained in Warsaw Convention have already been applied to non-international carriages subject to certain exceptions, adaptations and modifications. It is now proposed to take power to apply the rules contained in the Warsaw Convention as amended by the Hague Protocol also to non-international carriages subject to exceptions, adoptions and modifications.

8. The Bill seeks to give effect to the above objectives."

17. The preamble to The Carriage by AIR Act, 1972 reads as follows:

"An Act to give effect to the Convention for the unification of certain rules of international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said

Convention as amended by the Hague Protocol on the 28th day of September, 1955 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form (subject to the exceptions, adaptations and modifications) to non-international carriage by air and for matters connected therewith."

18. The CA Act was enacted to give effect to the convention for unification of rules relating to international carriage by air signed at Warsaw as amended at Hague in 1995 and the Montreal Convention of 1999.

19. Section 2 of the CA Act is the definition clause. Section 2(ii) of the CA Act defines convention to mean convention for unification of certain rules relating to international carriage by air signed at Warsaw on 12.10.1929. Section 3 provides for the application of the Warsaw Convention to India. It says that the rules contained in the First Schedule being the provisions of the convention relating to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, shall have the force of law in India in relation to any carriage by air to which those rules apply irrespective of the nationality of the aircraft performing the carriage, subject to the provisions of the Act. Section 4 provides for application of amended convention to India and also provides for Second Schedule in consonance with the amended convention. This Schedule applies to the claim made in the present case as it is a dispute that occurred in 1994 before the Montreal Convention in 1999. Section 4A provides for the application of the Montreal Convention to India and provides for the Third Schedule. Section 5 sets out the liability in case of death of a passenger as being those governed by the First and Second Schedules. Sections 6 and 6A provide for conversion of francs and conversion of special drawing rights. Section 7 provides that every high contracting party to the convention shall, for the purpose of any suit brought in a Court in India in accordance with the provisions of Rule

28 of the First Schedule or of the Second Schedule, as the case may be, enforce a claim in respect of the carriage undertaken by him. Section 8 enables the application of the Act to carriages which are not international.

20. The First Schedule to the Act, vide Rule 1, provides that the rules under this Schedule shall apply to all international carriage of persons, luggage or goods performed by aircraft for reward. Sub-Rule 2 defines "the High Contracting Party" to the convention. Sub-Rule 3 defines international carriage. Rule 18 provides for liability of the carrier for damages. Rule 19 provides for liability of the carrier for damages occasioned by delay and Rule 28 provides for territorial jurisdiction for suing for damages. The Second Schedule of the CA Act provides for rules for the purpose of the Act. Chapter I of the Second Schedule gives the definitions and the scope of the Schedule. Chapter II deals with the documents of carriage, viz. passenger ticket (Part I), baggage check (Part II), airway bill (Part III). Chapter III enumerates the provisions regarding the liability of the carrier with regard to the acts which the carrier will be held liable for, the jurisdiction of the Court at which the carrier can be sued, the limit of the liability, limitation for bringing a suit, etc. Chapter IV and Chapter V deal with provisions relating to combined carriage and general provisions respectively. Part III of Chapter II of the Second Schedule is relevant for the purpose, of the case. Therefore, omitting what is not necessary, relevant rules are extracted as :

> **"5.** (1) Every carrier of cargo has the right to require the consignor to make out and hand over to him a document called as "air waybill"; every consignor has the right to require the carrier to accept this document.
>
> (2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carnage which shall, subject to the provisions of rule 9, be nonetheless governed by these rules.

> **6.** (1) The air waybill shall be made out by the consignor in the three original parts and be handed over with the cargo.
>
> (2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the cargo. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.
>
> (3) The carrier shall sign prior to the loading of the cargo on board the aircraft.
>
> (4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.
>
> (5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.
>
> **10.** (1) The consignor is responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the air waybill.
>
> (2) The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompletness of the particulars and statements furnished by the consignor."
>
> **12**. (1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the aerodrome of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the

air waybill, or by requiring it to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with rule 13. Nevertheless, if the consignee declines to accept the waybill or the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

13. ...

14. The consignor and the consignee can respectively enforce all the rights given to them by rules 12 and 13, each in his own name, whether he is acting in his sown interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

15. (1) Rules 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of rules 12, 13 and 14 can only be varied by express provision in the air waybill.

(3) Nothing in these rules prevents the issue of a negotiable air waybill.

16. (1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his servants or agents.

(2) *The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents."*

21. We also need to notice Rule 17, 18, 20, 29, 30 and 33 of Chapter III and V of the Second Schedule. These are :

"***17.*** *The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*

18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding sub-rule comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to

any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air for the purpose of loading delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

20. The carrier is not liable if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

29. (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court seized of the case.

30. (1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the Court seized of the case.

33. Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and

void. Nevertheless for the carriage of cargo arbitration clauses are allowed, subject to these rules, if the arbitration is to take place within one of the jurisdictions referred to in sub-rule (1) of rule 29."

22. The CP Act aims to protect the interests of the consumers and provide for speedy resolutions of their disputes with regard to defective goods or deficiency of service. The Statement of Objects and Reasons of the CP Act are as under:

"The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.

2. It seeks, inter alia, to promote and protect the rights of consumers such as –

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

(d) the right to be heard and to be assured that consumers interest will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitations of consumers; and

(f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided.

5. The Bills seeks to achieve the above objects."

23. The relevant provisions of the CP Act that are required to be noticed for resolving the issues before us are Sections 3 and 21. They are as under:

"3. Act not in derogation of any other laws. – The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

……

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

(a) to entertain –

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

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

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

It is to be noted that at the relevant time, the pecuniary jurisdiction was twenty lakh rupees for the National Commission.

Jurisdiction of the National Commission

24. It was rightly argued by learned counsel Sri Vinoo Bhagat that the primary question that arises for our consideration in this appeal is whether the CA Act and the three international conventions in it constitute all the law governing liabilities of international air carriers arising out of international carriage of passengers and goods by air or whether domestic law can be added or substituted for the provisions of the conventions. In a nutshell, the submission of the learned counsel for the appellant-carrier is that conventions, viz. Warsaw Convention, as amended at Hague in 1955 and the Montreal Convention of 1999 exclusively govern carrier liabilities and, therefore, a remedy under domestic law cannot be invoked.

The frame work for the CP Act was provided by a Resolution dated 09.04.1985 of the General Assembly of the United Nations Organization, which is commonly known as Consumer Protection Resolution No.39/248. India is a signatory to the said Resolution. The Act was enacted in view of the aforementioned Resolution of the General Assembly of the

United Nations. The preamble to the Act suggests that it is to provide better protection for the consumers and their interests. By this Act, the Legislature has constituted quasi-judicial Tribunals/Commissions as an alternative system of adjudicating consumer disputes.

Section 3 of the CP Act gives an additional remedy for deficiency of service and that remedy is not in derogation of any other remedy under any other law.

25. In *Proprietor, Jabalpur Tractors vs. Sedmal Jainrain and Anr.* 1995 Supp. (4) SCC 107, it is held:

"*The Consumer Protection Act is not in derogation of any law*."

26. In *Fair Air Engineers Pvt. Ltd. and Anr*. *Vs. N.K. Modi* (1996) 6 SCC 385, it is held:

"15. Accordingly, it must be held that the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words "in derogation of the provisions of any other law for the time being in force" would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available under Section 9 of the Code of Civil Procedure, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy."

27. In *State of Karnataka vs. Vishwa Bharathi House Building Co-operative Society and Others* (2003) 2 SCC 412, a three Judge Bench of this Court observed:

"16. ...in asmuch as the provisions of the said Act are in addition to the provisions of any other law for the time being in force and not in derogation thereof as is evident from Section 3 thereof."

28. In the case of *Secy., Thirumurugan Coop. Agricultural Credit Society v. Ma. Lalitha*, (2004) 1 SCC 305, this Court took the view:

"12**.** As per Section 3 of the Act, as already stated above, the provisions of the Act shall be in addition to and not in derogation of any other provisions of any other law for the time being in force. Having due regard to the scheme of the Act and purpose sought to be achieved to protect the interest of the consumers better, the provisions are to be interpreted broadly, positively and purposefully in the context of the present case to give meaning to additional/extended jurisdiction, particularly when Section 3 seeks to provide remedy under the Act in addition to other remedies provided under other Acts unless there is a clear bar."

29. This Court, in the case of *Kishore Lal v. Chairman, Employees' State Insurance Corpn.* (2007) 4 SCC 579, took the view:

"7. The definition of "consumer" in the CP Act is apparently wide enough and encompasses within its fold not only the goods but also the services, bought or hired, for consideration. Such consideration may be paid or promised or partly paid or partly promised under any system of deferredpayment and includes any beneficiary of such person other than the person who hires the service for consideration. The Act being a beneficial legislation,

aims to protect the interests of a consumer as understood in the business parlance. The important characteristics of goods and services under the Act are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. However, by virtue of the definition, the person who obtains goods for resale or for any commercial purpose is excluded, but the services hired for consideration even for commercial purposes are not excluded. The term "service" unambiguously indicates in the definition that the definition is not restrictive and includes within its ambit such services as well which are specified therein. However, a service hired or availed, which does not cost anything or can be said free of charge, or under a contract of personal service, is not included within the meaning of "service" for the purposes of the CP Act."

30. In *Skypak Couriers Ltd. v. Tata Chemicals Ltd.,* (2000) 5 SCC 294, this Court observed:

"2. With the industrial revolution and development in the international trade and commerce, there has been a substantial increase of business and trade, which resulted in a variety of consumer goods appearing in the market to cater to the needs of the consumers. The modern methods of advertisement in media, influence the mind of the consumers and notwithstanding the manufacturing defect or imperfection in the quality, a consumer is tempted to purchase the goods. There has been possibility of deficiency in the services rendered. For the welfare of such consumer and to protect the consumers from the exploitation to provide protection of the interest of the consumers, Parliament enacted the Consumer Protection Act, and the Act itself makes provision for the

establishment of Commissions for settlement of the consumer disputes and matters connected therewith. The Commissions, under the Act, are quasi-judicial bodies and they are supposed to provide speedy and simple redressal to consumer disputes and for that purpose, they have been empowered to give relief of a specified nature and in an appropriate way, to award compensation…"

31. This Court in the case of *Patel Roadways Limited v. Birla Yamaha Ltd.*, (2000) 4 SCC 91, has considered this question and has laid down that the Disputes Redressal Agency provided for in the Act will have the jurisdiction to entertain complaints in which the claim for loss or damage of goods entrusted to a carrier for transportation is in dispute.

32. In our view, the protection provided under the CP Act to consumers is in addition to the remedies available under any other Statute. It does not extinguish the remedies under another Statute but provides an additional or alternative remedy. In the instant case, at the relevant point of time, the value of the subject matter was more than Rs. 20 lakhs, by which the National Commission is conferred jurisdiction for any cause of action that arises under the Act. Further, we are not inclined to agree with the argument of Shri. Bhagat that exercising of jurisdiction was in contravention of International Law, as the Warsaw Convention and the Hague Protocol have been incorporated into the domestic law by the passage of the CA Act. Therefore, we do not find any legal infirmity in the National Commission exercising its jurisdiction, as the same can be considered a Court within the territory of a High Contracting Party for the purpose of Rule 29 of the Second Schedule to the CA Act and the Warsaw Convention. Before we conclude on this issue, we may usefully notice a three Judge Bench decision of this Court in the case of *Ethiopian Airlines* vs. *Ganesh Narain Saboo* (*Civil Appeal No.7037 of 2004*) which view is binding on us. It is held:

"67. Similarly, the Carriage by Air Act, 1972 explicitly

provides that its rules apply to carriage performed by the State or by legally constituted public bodies under Chapter 1, Section 2, Sub-section 1. Thus, it is clear that according to the Indian Law, Ethiopian Airlines can be subjected to suit under the Carriage Act, 1972. It may be pertinent to mention that the Carriage by Air Act, 1972 (69 of 1972) is an Act to give effect to the Convention for the unification of certain rules relating to international carriage by air signed at Warsaw on the 12th day of October, 1929 and to the said Convention as amended by the Hague Protocol on the 28th day of September, 1955 and to make provision for applying the rules contained in the said Convention in its original form and in the amended form (subject to exceptions, adaptations and modification) to non-international carriage by air and for matters connected therewith."

33. However, Shri. Vinoo Bhagat, learned counsel appearing for the appellant-carrier has placed reliance on the decisions of foreign courts to contend conventions exclusively govern carriers' liabilities. We do not wish to refer to all those decisions, since in our view, this issue is no more *res integra* in view of the decisions of this Court in *Ethiopian* Airlines, wherein this Court has observed:

"72. On careful analysis of the American, English and Indian cases, it is abundantly clear that the appellant Ethiopian Airlines must be held accountable for the contractual and commercial activities and obligations that it undertakes in India.

73. It may be pertinent to mention that the Parliament has recognized this fact while passing the Consumer Protection Act, 1986 and the Carriage by Air Act, 1972. Section 86 was itself, a modification and restriction of the principle of foreign sovereign immunity and thus, by limiting Section 86's applicability, the Parliament though these incorrect acts, further narrowed a party's ability to

successfully plead foreign sovereign immunity. In the modern era, where there is close interconnection between different countries as far as trade, commerce and business are concerned, the principle of sovereign immunity can no longer be absolute in the way that it much earlier was. Countries who participated in trade, commerce and business with different countries ought to be subjected to normal rules of the market. State owned entities would be able to operate with impunity, the rule of law would be degraded and international trade, commerce and business will come to a grinding halt. Therefore, we have no hesitation in coming to the conclusion that the appellant cannot claim sovereign immunity."

National Commission is a 'Court'?

34. Shri. Bhagat has cited several decisions of this Court in which this Court has taken the view that Consumer Forums are not Courts but are quasi-judicial bodies or authorities or agencies, in furtherance of his contention that only a Court in Mumbai has the jurisdiction to try a suit against the appellant-carrier and that the National Commission is not a Court. [See *Laxmi Engineering Works v. P.S.G. Industrial Institute,* (1995) 3 SCC 583; *Charan Singh v. Healing Touch Hospital,* (2000) 7 SCC 668; *State of Karnataka v. Vishwabharathi House Building Coop. Society,* (2003) 2 SCC 412]. This position has been fortified recently by a decision of a Constitution Bench of this Court in the case of *Union of India v. R. Gandhi, President, Madras Bar Association,* (2010) 11 SCC 1, where this Court has observed:

"38. The term "courts" refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the State for administration of justice that is for exercise of the judicial power of the State to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional

mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to civil courts, criminal courts and the High Courts. Tribunals can be either private tribunals (Arbitral Tribunals), or tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or tribunals authorised by the Constitution (Administrative Tribunals under Article 323-A and tribunals for other matters under Article 323-B) or statutory tribunals which are created under a statute (Motor Accidents Claims Tribunal, Debt Recovery Tribunals and Consumer Fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory tribunals have judicial and technical members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer Fora, Cyber Appellate Tribunal, etc.)

…….

45. Though both courts and tribunals exercise judicial power and discharge similar functions, there are certain well-recognised differences between courts and tribunals. They are:

(i) Courts are established by the State and are entrusted with the State's inherent judicial power for administration of justice in general. Tribunals are established under a statute to adjudicate upon disputes arising under the said statute, or disputes of a specified nature. Therefore, all courts are tribunals. But all tribunals are not courts.

(ii) Courts are exclusively manned by Judges. Tribunals can have a Judge as the sole member, or can have a combination of a judicial member and a technical member who is an "expert" in the field to which the tribunal relates.

Some highly specialised fact-finding tribunals may have only technical members, but they are rare and are exceptions.

(iii) While courts are governed by detailed statutory procedural rules, in particular the Code of Civil Procedure and the Evidence Act, requiring an elaborate procedure in decision making, tribunals generally regulate their own procedure applying the provisions of the Code of Civil Procedure only where it is required, and without being restricted by the strict rules of the Evidence Act."

35. In the case of *Bharat Bank Ltd. v. Employees*, 1950 SCR 459, this Court took the view that to be a court, the person or persons who constitute it, must be entrusted with judicial functions, that is, of deciding litigated questions according to law. This Court further observed that before a person or persons can be said to constitute a court, it must be held that they derive their powers from the State and are exercising the judicial powers of the State. In *State of Bombay v. Narottamdas Jethabhai*, 1951 SCR 51, this Court held that the word "Court" denoted a place where justice was judicially administered, having been vested the jurisdiction for this purpose by the State. In the case of *Brajnandan Sinha v. Jyoti Narain*, (1955) 2 SCR 955, it was held that in order to constitute a "Court" in the strict sense of the term, an essential condition is that the Court should have, apart from having some trappings of a judicial tribunal, power to give decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement. This Court, in *Ram Narain v. The Simla Banking and Industrial Co. Ltd.*, AIR 1956 SC 614, held that a Tribunal which exercised jurisdiction for executing a decree would be a "court" for the purpose of the Banking Companies Act.

36. While examining the Contempt of Courts Act, 1971, a Constitution Bench of this Court in *Baradakanta Mishra v.*

Registrar of Orissa High Court, (1974) 1 SCC 374*,* observed:

"68. What then is a court? It is

"an agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purposes of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorised to exercise its powers in due course of law at times and places previously determined by lawful authority." Isbill v. Stovall, Rex. Civ. App. 92 SW 2d 1057, 1070."…"

37. In *State of Tamil Nadu v. G.N. Venkataswamy*, (1994) 5 SCC 314, this Court observed that the primary function of a Court was to adjudicate disputes, while holding that a Collector constitutes a Revenue Court within the meaning of Entry 11-A of the List III of the Seventh Schedule of the Constitution. In *Canara Bank v. Nuclear Power Corpn. of India,* (1995) Supp 3 SCC 81, this Court observed:

"26. In our view, the word 'court' must be read in the context in which it is used in a statute. It is permissible, given the context, to read it as comprehending the courts of civil judicature and courts or some tribunals exercising curial, or judicial powers…"

This Court also quoted, with approval, the *Halsbury's Laws of England* and observed thus:

"29. In Halsbury's Laws of England (4th Edn., Vol. 10, paras 701 and 702), this is observed:

"701. Meaning of 'court'. Originally the term 'court' meant, among other things, the Sovereign's palace. It has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either directly or

indirectly from the Sovereign. All tribunals, however, are not courts, in the sense in which the term is here employed. Courts are tribunals which exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to their jurisdiction. Thus, arbitrators, committees of clubs and the like, although they may be tribunals exercising judicial functions, are not 'courts' in this sense of that term. On the other hand, a tribunal may be a court in the strict sense of the term even though the chief part of its duties is not judicial. Parliament is a court. Its duties are mainly deliberative and legislative; the judicial duties are only part of its functions. A coroner's court is a true court although its essential function is investigation.

702. What is a court in law. The question is whether the tribunal is a court, not whether it is a court of justice, for there are courts which are not courts of justice. In determining whether a tribunal is a judicial body the facts that it has been appointed by a non-judicial authority, that it has no power to administer an oath, that the chairman has a casting vote, and that third parties have power to intervene are immaterial, especially if the statute setting it up prescribes a penalty for making false statements; elements to be considered are (1) the requirement for a public hearing, subject to a power to exclude the public in a proper case, and (2) a provision that a member of the tribunal shall not take part in any decision in which he is personally interested, or unless he has been present throughout the proceedings.

A tribunal is not necessarily a court in the strict sense of exercising judicial power merely because (1) it gives a final decision; (2) it hears witnesses on oath; (3) two or more contending parties appear before it between whom it has to decide; (4) it gives decisions which affect the rights of

subjects; (5) there is an appeal to a court; and (6) it is a body to which a matter is referred by another body.

Many bodies are not courts even though they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality. Examples are the benchers of the Inns of Court when considering the conduct of one of their members, the disciplinary committee of the General Medical Council when considering questions affecting the conduct of a medical man, a trade union when exercising disciplinary jurisdiction over its members...."

30. These passages, from the earlier edition of Halsbury, were cited by this Court in Thakur Jugal Kishore Sinha v. Sitamarhi Central Coop. Bank Ltd. The question there was whether the provisions of the Contempt of Courts Act applied to a Registrar exercising powers under Section 48 of the Bihar and Orissa Cooperative Societies Act. It was held that the jurisdiction of the ordinary civil and revenue courts of the land was ousted in the case of disputes that fell under Section 48. A Registrar exercising powers under Section 48, therefore, discharged the duties which would otherwise have fallen on the ordinary civil and revenue courts. He had not merely the trappings of a court but in many respects he was given the same powers as were given to the ordinary civil courts of the land by the Code of Civil Procedure, including the power to summon and examine witnesses on oath, the power to order inspection of documents, to hear the parties after framing issues, to review his own order and to exercise the inherent jurisdiction of courts mentioned in Section 151. In adjudicating a dispute under Section 48 of the Bihar Act, the Registrar was held to be "to all intents and purposes a court discharging the same functions and duties in the same manner as a court of law is expected to do".

38. The aforesaid observation has been strongly relied upon by Shri. Jaideep Gupta in reply to the contention of Shri. Bhagat that the National Commission was not a Court, and therefore, lacked jurisdiction to decide the complaint filed by the opposite party. In *P. Sarathy v. State Bank of India*, 2000 (5) SCC 355, this Court took the view that the term "Court" in Section 14 of the Limitation Act, 1963, meant any authority or tribunal having the trappings of a court. It may also be relevant to notice that a Constitution Bench of this Court in the case of *Kihoto Hollohon v. Zachillhu*, (1992) Supp (2) SCC 651 held that all Tribunals may not be Courts, but all Courts are Tribunals.

39. Now let us look at the definition of the term "Court" as commonly understood. The Oxford Advanced Learner's Dictionary [8th Edition] defines it as *"the place where legal trials take place and where crimes, etc. are judged."* The Oxford Thesaurus of English [3rd Ed] gives the following synonyms: "court of law, law court, bench, bar, court of justice, judicature, tribunal, forum, chancery, assizes, courtroom". The Chamber's Dictionary [10th Ed.] has described a court as *"a body of person assembled to decide causes"*. In Stroud's Judicial Dictionary [5th Ed], the word "court" has been described as *"a place where justice is judicially ministered, and is derived"*, and is further observed, *"but such a matter involves a judicial act which may be brought up on certiorari"*.

40. The above dictionary meaning and decision of this Court in the case of *Canara Bank* (*Supra.*) and also the observations of the Constitution Bench decision of this Court in the case of *R. Gandhi* (*Supra.*) reveal that word "Court" must be understood in the context of a body that is constituted in order to settle disputes and decide rights and liabilities of the parties before it. "Courts" are those bodies that bring about resolutions to disputes between persons. As already mentioned, this Court has held that the Tribunal and Commissions do not fall under the definition of "Court". However, in some situations, the word "Court" may be used in a wide, generic sense and not in a

narrow and pedantic sense, and must, in those cases, be interpreted thus.

41. In *State of Karnataka v. Vishwabharathi House Building Coop. Society,* (2003) 2 SCC 412, this Court took the view that there is a legal fiction created in giving tribunals like the Consumer Forum the powers of a Court. It was held:

> **"57.** A bare perusal of Section 25 of the Act clearly shows that thereby a legal fiction has been created to the effect that an order made by District Forum/State Commission or National Commission will be deemed to be a decree or order made by a civil court in a suit. Legal fiction so created has a specific purpose i.e. for the purpose of execution of the order passed by the Forum or Commission. Only in the event the Forum/State Commission or the National Commission is unable to execute its order, the same may be sent to the civil court for its execution. The High Court, therefore was not correct to hold that in each and every case the order passed by the District Forum/State Commission/National Commission are required to be sent to the civil courts for execution thereof.
>
> ***58.*** *Furthermore, Section 27 of the Act also confers an additional power upon the Forum and the Commission to execute its order. The said provision is akin to Order 39 Rule 2-A of the Code of Civil Procedure or the provisions of the Contempt of Courts Act or Section 51 read with Order 21 Rule 37 of the Code of Civil Procedure. Section 25 should be read in conjunction with Section 27. A parliamentary statute indisputably can create a tribunal and might say that non-compliance with its order would be punishable by way of imprisonment or fine, which can be in addition to any other mode of recovery*."

42. The use of the word "Court" in Rule 29 of the Second

Schedule of the CA Act has been borrowed from the Warsaw Convention. We are of the view that the word "Court" has not been used in the strict sense in the Convention as has come to be in our procedural law. The word "Court" has been employed to mean a body that adjudicates a dispute arising under the provisions of the CP Act. The CP Act gives the District Forums, State Forums and National Commission the power to decide disputes of consumers. The jurisdiction, the power and procedure of these Forums are all clearly enumerated by the CP Act. Though, these Forums decide matters after following a summary procedure, their main function is still to decide disputes, which is the main function and purpose of a Court. We are of the view that for the purpose of the CA Act and the Warsaw Convention, the Consumer Forums can fall within the meaning of the expression "Court".

43. This view of ours is fortified by the decision of this Court in the case of *Patel Roadways Ltd. (supra)* where this Court has held that a complaint before the Consumer Forum is within the meaning of the term "suit" as employed by Section 9 of the Carriers Act, 1865. In other words, we are of the view that when it comes to legislations like the CP Act, there can be no restricted meaning given to the word "Court". Hence, we reject the argument of Shri. Bhagat that the National Commission is not a "Court" within the meaning of Rule 29 of the Second Schedule of the CA Act.

Deficiency of Service

44. Shri. Vinoo Bhagat, learned counsel appearing for the appellant-carrier, would contend that there was no deficiency of service on the part of the appellants. He would point out that the appellant-carrier had delivered the consignment to the address that was given by the consignor in the box with the title "*Consignee's Name and Address".* He would further state that the only party in the consignee box with a name and an address was that of M/s. Liwe Espanola S.A. He would assail the findings of the National Commission that there was a deficiency

of service on the part of the appellant-carrier for not having delivered the consignment at the correct address, and state that "BBSAE, MADRID, SPAIN" was not identifiable address to which any delivery of goods could be made. He would also state that there was no way of finding out that the consignment was to be made to a Bank. Shri. Bhagat would lay emphasis on the fact that it was the duty of the consignor to place the correct address and particulars while making the airway bill, by placing reliance on the Air Cargo Tariff Rules framed and notified by IATA. He states that the entire responsibility for the correct address of the consignee falls upon the consignor and there is no obligation on the part of the carrier or shipper to ensure that the address is correct. The carrier, Shri. Bhagat would submit, is only responsible to ensure the contents of the consignment and not the addressee. He would further submit that it would not be practical for the carrier to check the authenticity of the address in the consignee box for each and every consignment and that they would only check if there is an address or not.

45. The learned counsel, Shri. Bhagat would also contend that the consigner did not invoke the rights under the Warsaw Convention for the non-arrival of goods in a timely manner and as a result, was disentitled to later complaining about the lost consignment. He would then refer to Clause 12 of the airway bill and state that if the notice was not given by the consignor within a period of 120 days, then the claim would get extinguished. He would further contend that neither the consignee nor the consignor invoked their rights under Article 13(3) and Article 14 at any time. This fact sufficiently proves, according to the learned counsel, that the claim made is not genuine.

46. Before the National Commission, appellant-carrier had filed the affidavit of Mr. Daulat Kripalani, who was working as Manager of the appellant-carrier in India. In the affidavit, it is stated that the consignor must provide all the information of the consignee and further, the consignor did not give the address

of the consignee even when it is asked for and it was also not informed to them that the goods must be released after obtaining appropriate credit. It is the responsibility of the consignor to give full particulars of the consignee as provided in IATA Regulations. It is also stated that Barclays Bank has several offices in Madrid and the Bank did not receive any letters of credit (L/C) from Canara Bank, Bangalore. It is also stated that L/C was not attached to the airway bill and, therefore, there was no way of finding out that the consignment was addressed to the Bank. It is also stated that if the name and address of the Bank was not given in full, the custom authorities would not have released the goods. He also states that there was delay in approaching the air carrier after shipment of the goods, which would disentitle them from making any claim.

47. The appellant has also filed the affidavit of Khaled El Tameer, Asstt. Vice President, Insurance claims, who has also stated in the same lines on that of Mr. Daulat Kripalani. In his cross-examination, he has stated that it is the responsibility of the agent of the consignor to furnish all required documents and they would accept the Airway bill on the basis of the documents furnished by the agent.

48. The cargo agent/respondent No.2 has filed the affidavit of Mr. Anil Vazirani, who is the partner of the firm. He has stated that the airway bills are prepared as per the instructions of the consignor and the abbreviations used in the airway bills are universally known and in the dispute between the appellant-carrier and the consignor, it has no role to play and they are also not liable for any damages for any deficiency of service.

49. Mr. Rajendra Hinduja – partner of the consignor, has filed his affidavit. He has stated in his affidavit that the address of BBSAE has been given to notify the party, who is the consignee. The same stands for Barclays Bank, Madrid. It is also stated that since they did not receive the value of the consignment, they had made several oral enquires with the

appellant-carrier and since they did not get positive response, they made written correspondence in the year 1993.

50. All the witnesses, who had filed their affidavit by way of examination-in-chief, have been cross examined by the contesting parties.

51. The learned counsel Sri Vinoo Bhagat would contend that in the airway bill, the consignor had indicated the name of the consignee as M/s. LIWE ESPANOLA in the consignee box and, therefore, the consignor could not have expected the carrier to have delivered the consignment to BBSAE, Madrid, Spain. The airway bill is one of the documents produced along with the Memorandum of civil appeal. A perusal of the same would show that the agent of the consignor in the consignee's box specifically mentions the name of the consignee as BBSAE, Madrid and immediately thereafter, the name of M/s LIWE ESPANOLA is mentioned. It has come in the evidence of the consignor and his agent that BBSAE, Madrid is Barclays Bank, Madrid and 'SAE' is a Spanish abbreviation for incorporation like 'limited'. Therefore, the consignee is only Barclays Bank, Madrid. It is the stand of the appellant-carrier that BBSAE, Madrid is not the consignee and further, it was the responsibility of the consignor and his agent to have furnished the correct and accurate particulars of the consignee and since the name of M/s. LIWE ESPANOLA also finds a place in the consignee box, the consignment is delivered to the notified party and, therefore, it cannot be said that there was deficiency of service. We cannot agree. The consignor, through his agent, has stated that in the airway bill that is handed over to the appellant-carrier, in the consignee box, the name of BBSAE, Madrid is specifically mentioned. If, for any reason, the appellant-carrier was of the view that the name of the consignee is not forthcoming or if the particulars furnished were insufficient for effecting the delivery of the consignment, it was expected from the appellant-carrier to have made enquiries. In our view, at this belated stage, the appellant-carrier cannot shift the

burden by contending that it was expected from the consignor and his agent to have furnished the correct and proper particulars of the consignee in the airway bill. The appellant is an air line carrier of high repute and they effect transportation of goods to various parts of the world including Spain and, therefore, it can safely be presumed that the carriers were fully aware of the consignee's name, which was indicated in the consignee's box and they should have notified the notified party immediately after the arrival of the consignment. Since, that has not been done, the National Commission was justified in holding that there is deficiency of service on the part of the carrier in not effecting the delivery of goods to the consignee.

52. Learned counsel for the appellant-carrier has contended that by virtue of Articles 6, 10 and 16 of the Rules, the consignor is required to make the airway bill and they are only responsible for correctness of the airway bill and consequences of errors in it and the carrier is not required to check correctness of consignors documents. We have already noticed the relevant rules. Repetition of it may not be necessary. Rule 6 of the Rules envisages that the airway bill requires to be made by the consignor and handed over the same to the carrier with the cargo. Rule 10 stipulates that the consignor is responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the airway bill. Sub-clause (2) of Article 10 provides that the consignor shall indemnify the carrier against all damages suffered by him or to any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor. Rule 16 provides that the consignor should furnish all the information and attach it to the airway bill to meet the requirements of law enforcing agencies. In the present case, as we have already noticed that the consignor had furnished all the relevant information in the airway bill which would satisfy the requirements of both Rule 6 and 16 of the rules and, therefore, the consignor cannot be accused of not furnishing the correct

particulars and information in the airway bill which is handed over to the appellant-carrier with the cargo. In our view, the appellant-carrier cannot absolve its responsibilities by contending that it would be practically impossible to verify the correctness of all the airway bills which are furnished with the cargo. The appellant's contention that the name and address of the consignee was inadequate is difficult to accept. There is evidence on record to show that documents supporting the letter of credit was sent by the consignors using the self same name and address and there was no difficulty in the same being delivered to the consignee bank.

53. The learned counsel also submits that the consignor, having not invoked Article 14 of the Rules within a reasonable time, is disentitled to make any complaints before any forum, much less National Commission. We are not impressed with the arguments canvassed. Rule 14 confers the right on the consignor to make complaint to the carrier if the consignment has not reached its destination qua the consignee. In the evidence of the consignor, it is elicited that necessary oral enquiries were made with the carrier within a reasonable time, when the consignor did not receive the value of the goods from the consignee and since it did not receive any reasonable explanation, it had no other alternative but to correspond with the appellant-carrier by written correspondence. Though, the witnesses of the consignor are cross examined by the appellant-carrier, nothing worthwhile is elicited. Therefore, in the absence of any contrary evidence, the statement made by the consignor and its witness require to be accepted.

54. It is also contended that Clause 12 of the Conditions of Contract printed on the reverse of airway bill requires that the person entitled to delivery must make a complaint to the carrier in writing in the case of non delivery of the goods within 120 days from the date of the issue of the airway bill. If not done within the time stipulated, claim, if any, against the carrier extinguishes. Per contra, Shri Jaideep Gupta, learned senior

counsel, submits that under CP Act, the cause of action does not depend on any notice in writing being served on the carrier unlike in certain other Statutes. While considering this issue, the National Commission, in the impugned Judgment, has concluded:

> "In our view, this submission cannot be accepted. Firstly, Clause (12) only provides that the persons entitled to delivery must make a complaint to the carrier in writing, in case of non-delivery of the goods within 120 days from the date of issue of airway bill. There is no question of delivery of goods to the shipper/Complainant. Further, it cannot control the period of limitation provided under 'the Act'. Rule 29(2), upon which heavy reliance was placed by the Respondent, also nowhere provides that it should be filed within 120 days. On the contrary, Rule 29(2) specifically provides that questions of procedure shall be governed by the law of the Court seized of the case.
>
> In addition, Rule 30 of the second Schedule leaves no doubt that the right to damages shall be extinguished only if the action is not brought within two years as provided therein. It reads thus:
>
> > "30(1). The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
> >
> > (2) The method of calculating the period of limitation shall be determined by the law of the Court seized of the case."
>
> The Complainant entrusted the goods to the carrier on 25th August, 1992 and the goods reached Madrid on

3rd September, 1992. Admittedly, the complaint is filed within a period of 2 years.

Further, Rule 33 which is quoted above, upon which heavy reliance was placed by the learned Counsel Mr. Bhagat for Opposite Party No.1, in contending that this Commission would have no jurisdiction to decide the matter, specifically provides that any clause contained in the contract entered into before the damage occurred by which the parties purport to infringe the rules laid down by the schedule, whether by deciding the law to be applied, or by altering the rules as to the jurisdiction, shall be null and void'.

Hence, Clause 12 of the airway bill would not be of any ground for holding that petition filed by the Complainant is barred by period limitation (sic.)."

55. We are in total agreement with the conclusion reached by the National Commission. Therefore, we do not see any merit in the contention canvassed by the learned counsel for the appellant-carrier.

56. We conclude that the National Commission has jurisdiction to decide the dispute between the parties and it is a Court and that there was deficiency in service by the appellant-carrier.

57. In view of the above discussion, we do not see any merit in this appeal. Accordingly, it is dismissed. Parties are directed to bear their own costs.

D.G. Appeal dismissed.

STATE OF U.P. & ORS.

v.

M/S MOHAN MEAKIN BREWERIES LTD. & ANR.

(Civil Appeal Nos. 4708-4709 of 2002)

SEPTEMBER 23, 2011

[R. V. RAVEENDRAN AND P. SATHASIVAM, JJ.]

Uttar Pradesh Excise Act, 1910:

s.29(e)(i) – Beer – Excisablity of – Stage when the beer manufactured is exigible to duty – Held: When the fermentation process of wort is completed, it becomes an alcoholic liquor for human consumption and there is no legal impediment for subjecting beer to excise duty at that stage – The State has legislative competence to levy excise duty on beer either after the completion of the process of fermentation and filtration, or after fermentation – Excise laws – Liquor.

s.28A – Imposition of additional duty – Excess manufacturing wastage – Basis for determination – Held: The base measurement is taken in the fermentation vessel and 9% standard allowance is provided to cover losses on account of evaporation, sullage and other contingencies within the Brewery – Uttar Pradesh Brewery Rules 1961 – r.53.

Constitution of India, 1950:

Seventh Schedule, List II, Entry 51 – Held: Entry 51 should be read not only as authorizing the imposition of an excise duty, but also as authorizing a provision which prevents evasion of excise duty – To ensure that there is no evasion of excise duty in regard to manufacture of beer, the State is entitled to make a provision to prevent evasion of excise duty, though it is leviable at the stage of issue from the brewery – Excise – Liquor.

LIQUOR:

Beer – Process of Brewing – Discussed – Excise laws.

The instant appeals were filed by the State and the Breweries. The appeals by the State related to imposition of duty and additional duty on excess wastage in the brewery. The appeals by the Breweries related to imposition of duty and additional duty on excess bottling wastage.

By impugned order, the High Court had directed the state government to decide the revision afresh "after calculating the stock of beer for the purpose of original Rule 53 of UP Brewery Rules 1961 (Para 912 of UP Excise Manual as it then existed) and section 28-A of the UP Excise Act, when after filtration the same has assumed the shape as a finished product which is normally consumed by human beings as beverage or drink". It also held that the point at which the liquor manufactured by the brewery is exigible to duty is at the stage, when the beer is capable of being consumed by human beings as a beverage comes into existence and the deficiency should be worked out with reference to measurement at such stage. The High Court rejected the procedure adopted by the appellants that the process of manufacture is complete and the liquor becomes exigible to duty when the wort along with the yeast is received in the fermenting vessels and ferments and that is the stage of ascertaining excess manufacturing wastage (excess deficiency).

The stand of the Brewery was that the wastage allowance was to be given, not with reference to the quantity in the fermentation tank, but with reference to the quantity in the storage/bottling tanks (after completion of fermentation and filtration process) when the manufacturing process is complete and only bottling

remains; that the measurement should be taken only when the manufacture is complete and not when it is still in the process of manufacture; and the manufacture process is completed not when the wort is in the fermentation tank but only when the filtration process is finished.

The questions which arose for consideration in the instant appeals were: At what stage does the beer manufactured is exigible to duty; and whether the procedure adopted by the appellants for ascertaining excess manufacturing wastage (excess deficiency) is proper.

Disposing of the appeals, the Court

HELD: 1. The process of brewing beer involves malting, mashing, boiling, fermentation, separation of yeast from the beer, ageing and finishing. The fermented alcoholic liquor that can be identified as 'beer' comes into existence on completion of the process of fermentation. Ageing is carried out only in the manufacture of certain types of beer, by storing beer in storage tanks for certain period. Filtration removes the remaining yeast (the major portion settles as sediment in the fermentation vats and is removed as sullage) and then packed into barrels, bottles or cans. The filtration, ageing and finishing are processes to remove impurities, improve the clarity, taste and increase shelf life. [Para 13] [121-C-E]

R.C. Jall Parsi vs. Union of India **AIR 1962 SC 1281: 1962 Suppl. SCR 436;** *State of U.P. vs. Delhi Cloth Mills* **1991 (1) SCC 454: 1990 (2) Suppl. SCR 168 – referred to.**

Encyclopedia Britannica (15th Edition, Vol.14, Page 739); Wikipedia (http://en.wikipedia. org/wiki/Beer) – referred to.

Re: Question No. (i)

2. The words 'received in the bottling tank' obviously referred to beer being received in any container or vessel for storage, after fermentation and filtration. It may however be noted that the said observation that beer is exigible to excise duty only when it passes through the fine filter press would apply only to the standard types of beer which is sold in bottles and cans. Beer is also supplied in casks and barrels, taken directly from fermentation vessels without undergoing any filtration or further processing, known as Draught (or Draft) beer. Such beer is unpasteurized and unfiltered (or even if filtered, only in a limited manner and not fine filtered like beer intended to be sold in bottles or cans). Para 29 of Excise Manual (Vol.V Chapter XI) notes that uncarbonated top fermentation beer, which include draught beer are racked directly from the fermenting vessel. Thus when the fermentation process of wort is completed, it becomes an alcoholic liquor for human consumption and there is no legal impediment for subjecting beer to excise duty at that stage. Therefore, the State has legislative competence to levy excise duty on beer either after the completion of the process of fermentation and filtration, or after fermentation. Section 29 (e)(i) of the U.P. Excise Act, 1910 makes it clear that in the case of beer manufactured in a brewery, excise duty may be levied, by a rate charged upon the quantity produced or issued from the brewery or issued from a warehouse. This means that in respect of beer that undergoes the process of filtration, the exigibility to excise duty will occur either at the end of filtration process when it is received in storage/bottling tanks or when it is issued from the brewery. In regard to draught beer drawn directly from fermentation vessels, without further processing or filtration, the exigibility to excise duty will occur either at the end of fermentation process

or when it is issued from the brewery. [Paras 22, 23] [133-A-H]

Synthetics and Chemicals Ltd & Ors. vs. State of U.P. & Ors. **1990 (1) SCC 109: 1989 (1) Suppl. SCR 623;** *State of U.P. vs. Modi Distillery & Ors*. **1995 (5) SCC 753: 1995 (3) Suppl. SCR 119;** *Government of Haryana vs. Haryana Breweries Ltd. & Anr.* **2002 (4) SCC 547: 2002 (1) SCR 942 – relied on.**

Question No.(ii)

3.1. Entry 51 of List II of Seventh Schedule of the Constitution of India should be read not only as authorizing the imposition of an excise duty, but also as authorizing a provision which prevents evasion of excise duty. To ensure that there is no evasion of excise duty in regard to any beer manufactured, the State is entitled to make a provision to prevent evasion of excise duty, though it is leviable at the stage of issue from the brewery. The beer brewing process shows that once the wort ferments, it becomes consumable, though the manufacturing process to have a finished product may in some cases require filtration, aging carbonization etc. To ensure that there is no evasion of excise duty by diversion of beer (excisable article) before it becomes a finished product, section 28A of the Act has been enacted and that is implemented by Rule 53 of the Brewery Rules, and Rule 7 of the Bottling Rules. The Excise Inspector in-charge is required to take physical stock of the beer in hand in the brewery periodically (once a quarter prior to the amendment of 1975 and once in a month from July 1975) by dip and gravity of the quantities in the fermentation vessels. Recourse to section 28A of the Act will be held only when there is abnormal deficiency or shortage in the actual quantity in the brewery when compared to the quantity mentioned in the stock account, that is more than 9%, which would

show evasion of excise duty. The standard procedure of levying excise duty is not on the quantity of excisable article in the fermentation vessels. The standard procedure is to levy excise duty when the beer is removed from the brewery. The State was thus collecting excise duty in the usual course with reference to the beer after the entire manufacturing process was completed when it is removed from the brewery. It resorted to section 28A, Rule 53 of Brewery Rules and Rule 7 of Bottling Rules and levied double the amount of excise duty (excise duty plus equal amount as additional duty) only in those months when the periodic examination showed excessive manufacturing 'wastage'. The procedure adopted was the most logical process to ensure that excisable articles were not clandestinely removed and to ensure that there is no evasion of excise duty having regard to the brewing procedure. If the actual stock assessed is less than the stock as per Stock Account and the difference is less than 9%, the difference was ignored. Only if the difference exceeded 9%, the quantity in excess of 9% was treated as the excess wastage and excise duty and an equal amount as additional duty was charged in regard to such excess. For this purpose necessarily the quantity in the fermentation vessels had to be considered. If the quantity in the bottling tanks are to be taken as the basis, then there will be no way of finding out whether there was any siphoning off from the fermentation vessel or during filtration process. Fermented wort is beer and it could be removed from fermenting vessels or during storage or filtration. Therefore, the base measurement is taken in the fermentation vessel and 9% standard allowance is provided to cover losses on account of sullage etc. [Paras 26, 28, 29] [134-B; 136-A-D; 137-C-H; 138-A-B]

3.2. The Act provides that levy of excise duty on beer can not only be with reference to the quantity produced

and issued from a brewery, but can also be by calculating the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe. This means the excise duty on the beer manufactured can be levied not only with reference to the actual quantity issued or removed, but can also be by a rate charged in accordance with a scale of equivalent, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort prescribed by the State Government. The said alternative method of levying excise duty does not depend upon the actual quantity manufactured or issued. It is with reference to the deemed quantity manufactured rather than the actual quantity manufactured. Such a procedure has been in vogue in England and it is permissible in India. Rule 42 of Chapter XI of the Excise Manual (Vol. 5) gives a detailed description of the attenuation method of charging duty on beer. Therefore there is nothing wrong in adopting the procedure prescribed in section 28A and Rule 53 of Brewery Rules to determine the excess manufacturing wastage. [paras 30, 31] [138-C-E; 143-C]

3.3. When manufacturing process is complete and the beer has reached storage/bottling tanks, there is no question of any manufacturing loss. The allowance of 9% is made to cover loss due to evaporation, sullage and other contingencies within the brewery. 9% is allowed as loss in quantity because the quantity in fermentation tank is measured and taken as the base and thereafter the sullage/yeast heads are removed as sediment in the fermentation vessels or by the filtration process and there will also be certain amount of evaporation during the process of filtration, racking and storage etc. If the quantity measured *after the fermentation and filtration processes* should be the base figure, for purpose of allowance to cover loss on account of sullage, evaporation etc., there will be no need for granting any

allowance because once it have passed the filtration stage the sullage and other impurities has been removed and the beer is ready for being filled in barrels, casks or bottles. The 9% allowance is for the wastages occurring during the stages of fermentation and filtration and not in regard to the stages between storage after filtration and removal. The Brewery has virtually mixed up the issue relating to the question as to when beer is exigible to excise duty with the question as to the quantity on which the allowance of 9% should be granted. A combined reading of rules 37 and 53 of Breweries Rules, with or without section 28A make it clear that the allowance of 9% as losses in the brewery (10% as losses in the course of manufacture in the brewery prior to 1975) is with reference to the quantity in the fermentation tank and not with reference to the quantity of beer in the storage/bottling tanks after filtration. A large allowance up to 9% of the total stock of beer has been provided towards wastage, only to cover the loss occurring from fermentation stage to post-filtration stage, as the quantity has been calculated with reference to the fermentation vats and there will be considerable wastage due to sullage and evaporation. Rules 37 and 53 of the Breweries Rules (paras 896 and 912 of the Excise Manual) also proceeded on that basis that the measurement would be with reference to the quantities in the fermentation vessels taken by dip and gravity method. If the quantity measured in the storage/bottling tanks (after filtration) should form the basis, there was no occasion or need for making a huge allowance of 9% for sullage, evaporation and other contingences, as there would be no sullage, evaporation or other wastages after that stage (that is completion of manufacture) and the allowance under Section 28A of the Act will become redundant, except for the small percentage provided for wastage during bottling and storage. [Paras 32-34, 36] [142-D-H; 143-A-D-H; 144-A, D-E; 146-D]

3.4. When the quantity of the liquid in the fermentation vessels were measured, on account of fermentation, the liquid was already in the process of conversion into an 'alcoholic liquor for human consumption', though had not become a finished product of beer. Therefore, the principles in *Baldev Singh* and *A. Sanyasi Rao*, will apply and not the decision in *Modi Distillery*. Therefore we hold that there is no infirmity in the method adopted by the excise department to arrive at the excess wastage or in making a demand for excise duty and additional duty in regard to such excess wastage. [para 37] [147-E-F]

Baldeo Singh vs. CIT **1961 (1) SCR 482;** *Union of India vs. A. Sanyasi Rao and others* **1996 (3) SCC 465: 1996 (2) SCR 570 – relied on.**

State of U.P. vs. Modi Distillery & Ors. **1995 (5) SCC 753: 1995 (3) Suppl. SCR 119 – held inapplicable.**

4. In the appeals relating to demands made upon the breweries for duty on excess wastage in bottling and storage of beer, the appellant breweries were holding bottling licences in form No.FL3 to bottle beer, governed by the U.P. Bottling of Foreign Liquor Rules, 1969. Rule 6 provides that every licence granted in Form No. FL3 shall be subject to the conditions enumerated therein. Rule 7 enumerates the additional special conditions applicable to bottling of India made liquor in bond under FL3 licence. Rule 53 of Brewery Rules made in 1961 (para 912 of the Excise manual) before the amendment on 19.7.1975 provided for allowance of a deficiency not exceeding 10% to cover losses in bulk due to evaporation, sullage and other contingencies within the brewery. At that time a separate licence for bottling was not contemplated. The Bottling Rules made in 1969 provided for an allowance of one percent loss in bottling and storage. On 19.7.1975, Rule 53 (para 912 of Excise

manual) was substituted and the allowance to cover losses due to evaporation, sullage and other contingencies within the brewery was reduced to 9% in view of the provision in the Bottling Rules providing for an allowance of one percent for losses in bottling and storage. Section 28A was inserted by U.P. Act 9 of 1978 (with a provision that the section shall be deemed always to have been inserted) providing for an allowance to a total extent of 10% in regard to losses within the brewery and the losses in bottling and storage. It is not in dispute that the process of brewing beer and the process of bottling beer are considered to be distinct and separate processes governed respectively by the Brewery Rules and Bottling Rules. The operations connected with bottling are required to be conducted in a separate premises under a different licence. The process of bottling begins with the transfer of bulk beer from the brewery for bottling. Sub-section (2) of section 28A refers to an allowance to an extent of 10% not only in regard to losses within the brewery but also to cover losses in bottling and storage. Rule 53 of the Brewery Rules and Rule 7(11) of the Bottling Rules when read conjointly show that the said rules are supplementary to each other and together implement section 28A of the Act. At all events, the validity of neither Rule 53 of Brewery Rules nor Rule 7(11) of Bottling Rules is under challenge. The brewery having obtained the bottling licence subject to the special conditions which include the condition in Rule 7(11) of the Bottling Rules, cannot ignore the said Rule and contend that the allowance for losses in bottling could be more than one percent, that is upto ten per cent. In view of that, there is no merit in the contention of the breweries that they are entitled to allowance of ten per cent towards losses in bottling and storage after the excisable article has left the Brewery. [Paras 39, 40, 42, 43] [148-B; 150-B-C; 151-H; 152-A-H; 153-A]

*Mohan Meakin Ltd. v. Excise & Taxation Commissioner, **H.P.*** **1997 (2) SCC 193: 1996 (9) Suppl. SCR 258 – relied on.**

Case Law Reference:

1962 Suppl. SCR 436	**referred to**	**Para 16**
1989 (1) Suppl. SCR 623	**relied on**	**Paras 17, 21**
1990 (2) Suppl. SCR 168	**referred to**	**Para 18**
1996 (9) Suppl. SCR 258	**relied on**	**Para 19, 22**
2002 (1) SCR 942	**relied on**	**Para 20, 21, 31**
1995 (3) Suppl. SCR 119	**referred to**	**Para 21**
1961 (1) SCR 482	**relied on**	**Para 26**
1996 (2) SCR 570	**relied on**	**Para 27**
1995 (3) Suppl. SCR 119	**held inapplicable**	**Para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4708-4709 of 2002.

From the Judgment and Order dated 15.03.2002 of the High Court of Judicature at Allahabad in C.M.W.P. Nos. 3968 and 4043 of 1978.

Dinesh Dwivedi, H.N. Salve, Salman Khurshid, Rakesh Kumar Khanna, Ravi Prakash Mehrotra, Garvesh Kabra, Dr. Rashmi Khanna, Surya Kant, Suruchi Aggarwal, Riteesh Singh, Jhanvi Woraha, Pranav Vyas and Faizy Ahmad Syed for the appearing parties.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN J. 1. Civil Appeal Nos.4708-4709 of 2002 are filed by the State of Uttar Pradesh aggrieved by the common order dated 15.3.2002 of the Allahabad High

Court allowing CMWP No.3968 of 1978 and CMWP No.4043 of 1978 filed by two Breweries. Civil Appeal Nos.4710, 4711, 4712 and 4713 of 2002 are filed by the Breweries aggrieved by the said common order dated 15.3.2002, dismissing their writ petitions – CMWP Nos.1375 of 1978, 3690 of 1979, 4136/1978 and 4157/1978. The appeals by the state relate to imposition of duty and additional duty on excess wastage in the brewery. The appeals by the Breweries relate to imposition of duty and additional duty on excess bottling wastage.

Civil Appeal No.4708 of 2002

2. The first respondent (for short the 'Brewery') held a Brewery Licence issued under section 18(c) of the Uttar Pradesh Excise Act, 1910 ('Act' for short) in Form-B1 and a Bottling Licence for bottling liquor for sale issued under section 17(1)(d) of the Act in Form FL-3. The Brewery was carrying on the manufacturing of beer and bottling of beer in bond, under the said Licences.

3. The Excise Inspector in-charge of the Brewery maintains a Register of manufacture and issue of beer in Form B-16. The Excise Inspector is required to examine the accounts of the brewery and take stock of the beer in hand in the brewery, on the last working day of every calendar month (prior to 19.7.1975, such examination was required to be done at the end of each quarter) after all the issues for that day are made. If he found that the actual quantity of beer in stock in the brewery was less than the quantity shown in the stock account, but the deficiency did not exceed 9%, he had to disregard the same as allowance upto 9% was permitted to cover the losses due to evaporation, sullage and other contingencies. But where the deficiency exceeded 9%, he was required to enquire into the cause and submit a report of the result to the Excise Commissioner in that behalf. The Excise Inspector in-charge, was accordingly sending reports to the Excise Commissioner whenever there was excess wastage in the case of the first respondent brewery. The Excise Commissioner issued show-cause notice giving

opportunity to the Brewery to explain the excess wastage. After considering the explanation, the Excise Commissioner found that there was no satisfactory explanation and made ten orders between 26/28.6.1966 and 24.11.1973 in regard to excess 'manufacturing wastage' during the period September, 1963 to March, 1973, and levied and demanded in all `81,94,310/- as excise duty and an equal amount as additional duty in regard to the deficiency in excess of 9% of the total stock of beer (10% prior to 19.7.1975). The said orders were challenged by the first respondent by filing a revision before the state government. The state government by order dated 12.4.1978 dismissed the revision petition and upheld the demands by the Excise Commissioner.

4. The first respondent challenged the orders of the Excise Commissioner and the state government in Civil Misc. Writ Petition No.3968 of 1978. A Division Bench of the High Court allowed the said writ petition with other connected petitions by a common order dated 15.3.2002. It quashed the revision order dated 12.4.1978 and directed the state government to decide the revision afresh "after calculating the stock of beer for the purpose of original Rule 53 of UP Brewery Rules 1961 (Para 912 of UP Excise Manual as it then existed) and section 28-A of the UP Excise Act, when after filtration the same has assumed the shape as a finished product which is normally consumed by human beings as beverage or drink". In short the High Court has held that the point at which the liquor manufactured by the brewery was exigible to duty was at the stage, when the beer is capable of being consumed by human beings as a beverage, comes into existence and the deficiency should be worked out with reference to measurement at such stage. The High Court rejected the contention of the appellants that as soon as wort along with yeast is received in the fermenting vessels and ferments, the process of manufacture is complete. Feeling aggrieved by the decision of the High Court, the appellant has filed this appeal.

Contention of Parties

5. The State contends that the liquor becomes exigible to duty when the wort (processed extract of malt) along with yeast is received in the fermenting vessels and ferments. It is contended that as the wort is placed in the fermentation tanks and the yeast is added to it, fermentation starts immediately with the conversion of sugar into alcohol. After the addition of yeast when alcohol is first formed, the liquid in the fermentation tank becomes alcoholic liquor for human consumption. It is pointed out that Entry 51 of List II of Seventh Schedule uses the words "alcoholic liquor for human consumption" and not "alcoholic liquor fit for human consumption" and therefore, beer is 'manufactured' when the fermenting agents are added to the wort and fermentation process commences. The State contended that excise duty is leviable on the manufacture and production of goods; and that the stage at which it should be imposed, the manner of collection thereof and the rate at which it is to be imposed, are matters within the discretion of the State. It is lastly submitted that the power to impose a tax or duty implicitly carries with it the power to provide against evasion thereof. It is submitted that what is in issue is not levy of excise duty, but the validity of measures introduced to identify the unauthorised or illegal diversion of beer resulting in evasion of excise duty.

6. The case of the state government as put forth in the counter affidavit to the writ petition is extracted thus: Wort is passed into the fermentation vat and fermenting yeast are added to the wort by a simultaneous process. As soon as the wort along with yeast is received in the fermenting vessels or fermenting vat, it ferments and process of manufacture of beer is complete. It is gauged to find out its quantity and this quantity is entered in the resister in Form B-4. In the said register in Form-B4 the dip and gravity of the wort is taken. As fermentation starts simultaneously the quantity determined by dip and gravity is taken to be beer produced. On the register in Form B-4 the Brewers put in their initials. It is denied that

process of manufacture of beer ends when sullage and yeast calls are removed by filtration. In fact quantity of yeast and sullage filtered out may vary from one filtration to another in different process. Even after filter beer contains both some yeast and sullage and petitioner cannot say that he is only entitled to pay excise duty on such quantity after excluding all such yeast and sullage. The filtration is only a process to make it more marketable in this competitive business but could not be part of manufacture. The event of excisable article going into human consumption has no connection with the taxable event in the case of excise duty and excise duty is imposed at the stage of manufacture of goods and not at the stage of excisable article going into human consumption.

7. The Brewery contended that the stage for levy and realisation of excise duty on beer was the stage of issue of beer from the brewery/bottling bonded warehouse after complying with the statutory provisions and regulations prescribed for bottling and issue for sale. It was submitted that no excise duty could be imposed prior to the stage of occurrence of the excisable event, namely the issue of beer from the brewery/ bottling bonded warehouse for sale and human consumption. Alternatively, it was submitted that beer manufactured was exigible to duty at the time or stage when the finished product (beer) is received in the storage/bottling tanks, after filtration and not at any earlier stage of manufacturing process. It is submitted that the system of collection of excise duty on beer, does not permit levy or realisation of any amount by way of excise duty or fine on the quantity of beer which is wasted in the manufacturing process before it become exigible to excise duty. It is contended that the legislative competence to levy excise duty under Entry 51(a) of List II of Seventh Schedule to Constitution of India is with reference to 'alcoholic liquors for human consumption'. As the wort solution cannot be described as alcoholic liquor for human consumption at the stage of fermentation and filtration, the state government cannot levy any excise duty or additional duty equal to excise duty, in regard to

wastage which occurs with reference a material which is not 'alcoholic liquor for human consumption'. It is contended that the levy of excise duty/additional duty by the Excise Commissioner was on the deficiency, that is, the difference between the quantities of wort and finished product (beer), which comprises of the scum, yeast cells brought on top of fermenting wort, carbon-di-oxide evolved, sullage etc., settled at the bottom of vats which impurities are to be eliminated before beer could be said to be manufactured or could be described as an alcoholic liquor for human consumption. It is contended that the Excise authorities had calculated the deficiency in the stock of beer in a wrong manner; and that while taking stock of beer in the brewery, for the purpose of calculating the allowance the authorities have taken the product at an intermediate stage in the process of manufacture instead of taking stock of the finished product.

8. The relevant contentions of the Brewery in the writ petition are extracted below :

(i) The process of manufacturing beer ends when the sullage and yeast cells are removed by filtration and fermentation ceases and the manufactured bulk beer is ready to be transferred : (a) for bottling in bond; and (b) to casks for sale and human consumption as draught beer. [Vide para 8 of the WP].

(ii) The method adopted by the Excise department in working out the deficiency in stock is erroneous. What was required under paragraph 912 of Excise Manual was to compare the stock of manufactured beer as mentioned in the stock account of beer and the actual stock of beer giving allowance for the quantity issued. What has been done in the instant case is to assume certain quantity as part of the stock account of beer which was not beer and was undergoing the process of manufacture into beer. Similarly the quantity of beer issued from the Brewery has not been taken in its entirety to be the quantity of beer issued. The quantity issued has been

equated with the quantity actually bottled with the result that the quantity of beer which has been wasted in the process of bottling has been treated to be part of the stock of beer in the beer account. [Vide para 61]

(iii) If the quantity of beer which is actually issued for bottling from the brewery is taken into account in its entirety for purposes of the stock account, the percentage of deficiency between the stock account of beer and the actual quantity of beer found on physical verification will be below 10% [Vide para 63].

(iv) What is being subjected to the levy of penalty or penal duty before becoming a manufactured saleable article is the deficiency between the wort and the finished beer for sale, comprising of scum and yeast cells brought on top of fermenting wort, carbon dioxide evolved, sullage etc. settled at the bottom of vats which impurities have to be eliminated etc. before beer could become saleable. Thus what has not come to exist as such saleable goods cannot be termed as excisable article. [Vide para 93(b)]"

Questions for consideration

9. On the contentions urged, the following two questions arise for our consideration:

(i) At what stage does the beer manufactured is exigible to duty?

(ii) Whether the procedure adopted by the appellants for ascertaining excess manufacturing wastage (excess deficiency) is proper?

To appreciate these issues and find answers to the questions, it is necessary to refer to the process of manufacture of beer, the relevant provisions of the UP Excise Act, 1910 (For short 'the Act') and the relevant Brewery Rules.

Process of manufacture of Beer

10. Encyclopaedia Britannica (15th Edition, Vol.14, Page 739) describes the stages of brewing process thus :

> "Beer production involves malting, milling, mashing, extract separation, hop addition and boiling, removal of hops and precipitates, cooling and aeration, fermentation, separation of yeast from young beer, aging, maturing, and packaging. The object of the entire process is to convert grain starches to sugar, extract it with water, and then ferment it with yeast to produce the alcoholic, lightly carbonated beverage."

As the description of the brewing process given in Encyclopaedia Britannica is detailed and very lengthy, we have opted for the following shorter and simpler description of the brewing process given in Wikipedia (http://en.wikipedia. org/ wiki/Beer) which is in consonance with what is stated in Encyclopaedia Britannica :

> "The process of making beer is known as brewing. A dedicated building for the making of beer is called a brewery……The purpose of brewing is to convert the starch source into a sugary liquid called wort and to convert the wort into the alcoholic beverage known as beer in a fermentation process effected by yeast.
>
> The first step, where the wort is prepared by mixing the starch source (normally malted barley) with hot water, is known as "mashing". Hot water (known as "liquor" in brewing terms) is mixed with crushed malt or malts (known as "grist") in a mash tun. The mashing process takes around 1 to 2 hours, during which the starches are converted to sugars, and then the sweet wort is drained off the grains. The grains are now washed in a process known as "sparging". This washing allows the brewer to gather as much of the fermentable liquid from the grains as possible. The process of filtering the spent grain from

> the wort and sparge water is called *wort separation*. The traditional process for wort separation is lautering, in which the grain bed itself serves as the filter medium. Some modern breweries prefer the use of filter frames which allow a more finely ground grist. Most modern breweries use a continuous sparge, collecting the original wort and the sparge water together. However, it is possible to collect a second or even third wash with the not quite spent grains as separate batches. Each run would produce a weaker wort and thus a weaker beer. This process is known as second (and third) runnings.
>
> The sweet wort collected from sparging is put into a kettle, or "copper", (so called because these vessels were traditionally made from copper) and boiled, usually for about one hour. During boiling, water in the wort evaporates, but the sugars and other components of the wort remain; this allows more efficient use of the starch sources in the beer. Boiling also destroys any remaining enzymes left over from the mashing stage. Hops are added during boiling as a source of bitterness, flavour and aroma. Hops may be added at more than one point during the boil. The longer the hops are boiled, the more bitterness they contribute, but the less hop flavour and aroma remains in the beer.
>
> After boiling, the hopped wort is now cooled, ready for the yeast. In some breweries, the hopped wort may pass through a hopback, which is a small vat filled with hops, to add aromatic hop flavouring and to act as a filter; but usually the hopped wort is simply cooled for the fermenter, where the yeast is added. During fermentation, the wort becomes beer in a process which requires a week to months depending on the type of yeast and strength of the beer. In addition to producing alcohol, fine particulate matter suspended in the wort settles during fermentation. Once fermentation is complete, the yeast also settles,

leaving the beer clear.

Fermentation is sometimes carried out in two stages, primary and secondary. Once most of the alcohol has been produced during primary fermentation, the beer is transferred to a new vessel and allowed a period of secondary fermentation. Secondary fermentation is used when the beer requires long storage before packageing or greater clarity. When the beer has fermented, it is packaged either into casks for cask ale or kegs, aluminium cans, or bottles for other sorts of beer."

11. We may next extract the definition of beer, stages of manufacture of beer, and the fermentation process described in Chapter XI (Brewing) from UP Excise Manual (Volume-V) :

"**Beer defined** – The term 'beer' as used in the Indian Excise Law, refers to 'fermented, undistilled liquors, of which malt is the primary base, and are flavoured with a wholesome bitter usually hops'. Beer therefore includes ale, beer, black beer, porter, stout, etc., and the precise manufacture of these products is termed "brewing".

Lager beers – The beers mentioned above are prepared by what is known as a 'top fermentation process; the yeasts employed are designated 'top yeasts and the products 'top fermentation beers'. In contradistinction to the above, lager beers are prepared by employing 'bottom yeasts' and the process is termed 'bottom fermentation'.

Barley – The fermenting raw material commonly used in production of beers are (a) Barley, (b) Barley Malt (or Malt), (c) other unmalted cereals such as maize or rice, which are employed as grits, broken rice or flakes and maize starch, (d) sugars derived almost exclusively from sugarcane and maize starch, such as, cane sugar, invert, etc. The latter two viz,. (c) and (d) are known as 'malt adjuncts' as they partially replace the malt.

Manufacture of beer may be considered under the following five stages :

(a) Preparation of the malt from Barley.

(b) Infusion of the ground malt or 'grist' and straining the resultant extract or wort.

(c) Boiling the wort with hops or other bitters, straining of the hops and cooling.

(d) Fermenting the wort.

(e) Settling, Racking, cellar treatment and bottling.

Fermentation

Unlike Whisky fermentation, fermentation of beer is conducted in England by employing top fermentation yeast and the different systems only differ in the flocculation and attenuating power of the yeast employed, while in bottom fermentation breweries producing larger beers. The yeast is generally mixed with a small quantity of wort at 65 F and poured into the incoming wort, or if the yeast required in vogorating, it is allowed to come into active fermentation before addition to the fermenting vessel. Yeast food, if any is needed is in a few hours is at its height as can be seen by the maximum temperature reached and is allowed to continue for 5 to 8 days.

The following description of the practice in India is of interest:

Pitching of the wort – The fermentation vats usually have a capacity of 3,000 gallons, which is equivalent to 140 bushels of malt (having a sugar content of 40 per cent). The cooled hopped wort from the malt is mixed at this stage with 300 lb. of sugar and ½ lb. of ammonium sulphate followed by 60 lb. of yeast in suspension

(containing 85 per cent moisture) and allowed to ferment for 5-6 days. The peak of the fermentation is reached in 36 hours. At the end of the fermentation, the vats are slowly aerated by 'Sterilized air'. Fermentation of beer is conducted by employing top fermentation yeast. This and the atmosphere of CO on the top of the vat prevent any bacteria gaining access to the beer. The fermentation is carried on until the gravity of the wort falls down to 1.042, when the wort is run off into fining vessels so as to settle and clarify. Throughout the fermenting stage the temperature of the wort is regulated by coils of piping called at temperature through which cold water is passed.

Fermentation of lager beers. – Bottom fermentation processes used for lager beer differ from top fermentation adopted for ales in that the temperature ranges between 41 degree Fahrenheit and 56 degree Fahrenheit, while the yeast settles as a firm black cover at the bottom of the fermenting vessel. The primary fermentation also lasts for 7 to days at the higher temperature or 12 to 14 days at lower temperatures as the rate of fermentation is considerably slower than in top fermentation systems. Bottom fermentation beer is usually lagered or stored for periods varying from 1 to 9 months (generally 6 to 8 weeks) after this primary fermentation during which slow changes called 'maturation' occur and this gives the name to the beer. Fermentation in the storage stage is due to primary yeasts carried down with the beer from the fermenting vessel.

Gasing, Racking and Bottling – Although lager beer is ultimately filtered before racking into casks, clarification is an essential function of the storage.

Uncarbonated top fermentation beers, which include the bulk of British draught ales are either racked directly from the fermenting vessel or settling back to which they are run down from Fermenting vessels. The settling back provides

a means of further clarification by sedimentation during 2 to 12 hours. This is also used for addition of primings, colourings and sometimes finings though these are sometimes added to individual casks. The beer loses carbon dioxide and gets aerated. Dry hops are also sometime added to the settling backs. Racking in cylinders and counter pressure racking is also followed."

12. The first respondent describes (in Annexure-I to the writ petition) the process of manufacturing beer in its brewery thus:

"**The Process of Manufacturing of Beer** – Coarsely crushed barley malt termed "grist" added with cooked maize and rice clakes is boiled at a specific temperature in treated water in the vessel called mashtun by which the starches present in the grain are converted into sugars. The extract from the grain called wort is drawn into another vessel called 'copper' to which hops flowers and sugar is added and boiled with the purpose of sterilizing the wort, separating wastable proteins in the form of precipitate, dissolving bittering constitutents of hops and imparting aromatic flavour of hops flowers. The spent hops are separated from the boiled wort which is cooled and passed into fermentation vats.

Brewers yeast is "pitched" to initiate fermentation. The fermentation is carried on at low temperature. Lot of frothing takes place, the yeast cells multiply and bring up dirty heads with resins of hops etc., at the top which are cleared out, the convertible sugars are decomposed into alcohol and carbon dioxide gas; the hanging particles in the wort settled down with coagulated albuminous substances and yeast cells during the process of fermentation which is carried on for 8 to 10 days.

The fermented wort is racked into settling tanks or storage tanks leaving the sullage or sludge at the bottom of fermentation vats. At this stage also (i.e. in storage vats)

some yeast cells are present in the fermented wort and secondary fermentation takes place besides some residuary particles in the bulk of fermented wort settling at the bottom of the storage vats.

To eliminate secondary fermentation and haze from this, it is passed through filter machines in which 100 to 150 filter sheets are fixed. The filterate is transferred to bottling tanks for bottling beer in a separate bonded warehouse, which is carried on under the supervision of the officer-in-charge of the warehouse."

13. It is thus evident that the process of brewing beer involves malting, mashing, boiling, fermentation, separation of yeast from the beer, ageing and finishing. The fermented alcoholic liquor that can be identified as 'beer' comes into existence on completion of the process of fermentation. Ageing is carried out only in the manufacture of certain types of beer, by storing beer in storage tanks for certain period. Filtration removes the remaining yeast (the major portion settles as sediment in the fermentation vats and is removed as sullage) and then packed into barrels, bottles or cans. The filtration, ageing and finishing are processes to remove impurities, improve the clarity, taste and increase shelf life.

Relevant provisions of the Act and the Rules

14. The relevant provisions of the UP Excise Act, 1910 are extracted below :

"Section 3 (3a). "Excise duty" and "countervailing duty" means any such excise duty or countervailing duty, as the case may be, as is mentioned Entry 51 of List II in the Seventh Schedule to the Constitution;

Section 3 (10). "Beer" includes ale, stout, porter and all other fermented liquor made from malt;

Section 3 (22a). "Excisable article" means - (a) any

alcoholic liquor for human consumption; or (b). any intoxicating drug;

Section 28 Duty on excisable articles-(1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government shall direct, may be imposed, either generally or for any specified local area, on any excisable article-

(a) imported in accordance with the provisions of Section 12 (1); or

(b) exported in accordance with the provisions of Section 13; or

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted under Section 17; or

(e) manufactured in any distillery established or any distillery or brewery licensed, under Section 18:

x x x x x x

Section 28A - Imposition of additional duty in certain cases - (1) Where the quantity of spirit or beer in a brewery is found, on examination by such officer of the Excise Department as may be authorised by the Excise Commissioner in this behalf to exceed the quantity in hand as shown in the stock account, the brewery shall be liable to pay duty on such excess at the ordinary rates fixed under Section 28.

(2) Where the quantity of spirit or beer is less than that shown in the stock account on such examination and deficiency exceeds ten per cent; (allowance to that extent being made to cover losses due to evaporation, sullage and other contingencies within the brewery, and also to cover loss in bottling and storage) the Excise

Commissioner shall levy an additional duty at the rate of one hundred per cent of ordinary rates of duty in respect of such deficit as exceeds ten per cent over and above the ordinary rates of duty."

Section 29. Manner in which duty may be levied - Subject to Such rules, as the Excise Commissioner may prescribe to regulate to the time, place and manner of payment, such duty may be levied in one or more of the following ways as the State Government may by notification direct:

(a) to (d) ...(omitted as not relevant)

(e) in the case of spirit or beer manufactured in any distillery established or any distillery or brewery licensed under Section 18 -

(i) by a rate charged upon the quantity produced or issued from the distillery or brewery, as the case may be, or issued from a warehouse established or licensed , under Section 18 (d);

(ii) by a rate charged in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe :

Provided that, where payment is made upon issued of an excisable article for sale from a warehouse established or licensed under Section 18(d), it shall be at the rate of duty which is in force on that article on the date when it is issued from the warehouse."

15. Rule 53 of the UP Brewery Rules, 1961 (Paragraph 912 of the Excise Manual) as it stood prior to substitution of the rule on 19.7.1975 provided for quarterly examination of stock and read as follows:

"912. **Quarterly Examination of Stock.** - The accounts of a brewery and the stock of beer in hand in the brewery shall be examined by the Assistant Excise commissioner once a quarter. If the quantity of the beer in stock in the brewery on such examination be found to exceed the quantity shown as in hand in the stock account, the brewer shall be liable to pay duty on such excess at double the rate prescribed for ordinary issue. If the quantity be found less than that shown in the stock account, the cause of the deficiency shall be inquired into and the result reported to the Excise Commissioner, who may direct the levy of a fee not exceeding double the amount represented by the duty on such deficiency. Provided that any deficiency not exceeding 10. per cent, shall be disregarded, allowance to the extent being made to cover loss in bulk due to evaporation, sullage and other contingencies within the brewery. This allowance Shall be calculated upon the amount represented by the actual ascertained balance in hand at the date of the last stock taking, together with the total quantity since manufactured or received, as shown in column 2 and 3 of the register of manufacture and issue (form B-16).

Rule 53 of the Brewery Rules (para 912 of the Excise Manual) as substituted on 19.7.1975 reads as under:

"912. On the last working day of every calendar month after all the issues for that day are made, the Officer-in-charge shall examine the accounts of brewery and take the stock of beer in hand in the brewery. if the quantity of the beer in stock in the brewery on such examination be found to exceed the quantity shown as in hand in the stock account the brewer shall be liable to pay duty on such excess at the rate prescribed for ordinary issue if the quantity be found less than that shown in the stock account and such deficiency does not exceed nine per cent of the total stock of beer in the month the same may be disregarded allowances to that extent being made to cover losses due

to evaporation, sullage and other contingencies within the brewery. But if the deficiency in stock be found to exceed nine per cent the cause shall be enquired into and the result reported to the Excise Commissioner who may direct the levy of duty on such deficiency as may be found in excess of nine percent at the rate prescribed for ordinary issue. This nine per cent free allowance shall be calculated up on the quantity represented by the actual ascertained balances in hand at the close of the last stock taking together with the total quantity since manufactured or received, as shown in columns 2 and 3 of the register of manufacture and issue (Form B-1).

Rule 37 of the Brewery Rules (para 896 of the Excise Manual) reads thus:

"896. **Worts to be drawn off in the order of production:** All worts shall be removed successively, and in the customary order of brewing to the under back, coppers, coolers and fermenting vessels, and shall not be removed from the last named vessel until an account has been taken by the officer incharge or until after the expiry of twenty four hours from the time at which the worts are collected in these vessels."

Rule 41 of the Brewery Rules (para 900 of Excise Manual) deals with issue of beer and is extracted below:

"900. **Beer not to be issued until duty paid or bond executed** – [Rule 41]. No beer shall be removed from a brewery until the duty imposed under section 28 of the UP Excise Act, 1910 (Act No.IV of 1910) has been paid or until a bond under section 19 of the Act in Form B-7 or B-8 has been executed by the brewer for export of beer outside the State, direct from the brewery.

Legal position enunciated by this Court

16. We may next refer to the decisions of this Court bearing

on the issue in *R.C. Jall Parsi vs. Union of India* [AIR 1962 SC 1281], this court held :

"Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, *the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience.* Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act."

(emphasis supplied)

17. In *Synthetics and Chemicals Ltd. vs. State of U.P*. [1990 (1) SCC 109], this Court held that the expression "alcoholic liquor for human consumption" must be understood in its common and normal sense. The expression "consumption" must also be understood in the sense of direct physical intake by human beings and not utilisation in some other forms for the ultimate benefit of human consumption and the expression is intended to mean "liquor which as it is, could be consumed, in the sense of capable of being taken by the human beings as such as a beverage or drink".

18. In *State of U.P. vs. Delhi Cloth Mills* [1991 (1) SCC 454], this Court dealing with section 28 of UP Excise Act, 1910 considered the question whether the excise authorities were entitled to levy excise duty on the wastage of liquor (military rum)

in transit and held that the levy of differential duty (that is charging up the duty on the report of excess wastage) did not cease to be an excise duty even if it was levied on declaration of excess wastage. The taxable event was still the production or manufacture. This Court observed:

> "A duty of excise under Section 28 is primarily levied upon a manufacturer or producer in respect of the excisable commodity manufactured or produced irrespective of its sale. Firstly, it is a duty upon excisable goods, not upon sale or proceeds of sale of the goods. It is related to production or manufacture of excisable goods. The taxable event is the production or manufacture of the liquor. Secondly, as was held in *A. B. Abdulkadir v. The State of* Kerala - AIR1962SC922, an excise duty imposed on the manufacture and production of excisable goods docs not cease to be so merely because the duly is levied at a stage subsequent to manufacture or production. That was a case on Central Excise, but the principle is equally applicable here. It does not cease to be excise duty because it is collected at the stage of issue of the liquor out of the distillery or at the subsequent stage of declaration of excess wastage. Legislative competence under entry 51 of List II on levy of excise duty relates only to goods manufactured or produced in the State as was held in *Bimal Chandra Banerjee v. State of Madhya Pradesh* - 1970 (2) SCC 467. In the instant case there is no dispute that the military rum exported was produced in the State of U.P*. In State of Mysore and Ors. v. M/s D. Cawasji & Co.* - 1970 (3) SCC 710, which was on Mysore Excise Act, it was held that the excise duty must be closely related to production or manufacture of excisable goods and it did not matter if the levy was made not at the moment of production or manufacture but at a later stage and even if it was collected from retailer. The differential duty in the instant case, therefore, did not cease to be an excise duty even it was levied on the exporter after declaration of

> excess wastage. The taxable event is still the production or manufacture…….
>
> ……Rules 636 and 814 are also of regulatory character and they are precautionary against perpetration of fraud on the excise revenue of the exporting state. If out of the quantity of military rum in a consignment, a part of portion is claimed to have been wastage in transit and to that extent did not result in export, the State would, in the absence of reasonable explanation, have reason to presume that the same have been disposed of otherwise than by export and impose on it the differential excise duty. A statute has to be construed in light of the mischief it was designed to remedy. There is no dispute that excise duty is a single point duty and may be levied at one of the points mentioned in Section 28."

19. In *Mohan Meakin Ltd. vs. Excise & Taxation Commissioner, H.P.* [1997 (2) SCC 193], this Court examined the question as to when beer is exigible to excise duty under the Punjab Excise Act, 1914 and Punjab Breweries Rules 1932. This Court held that Beer would mean fermented liquor from malt, when it is potable or in consumable condition as beverage. The state of levying excise duty upon alcoholic liquor arises when excisable article is brought to the stage of human consumption with the requisite alcoholic strength thereof and it is only the final product which is relevant. In that case, the levy of excise duty at the stage when the manufacturing of the beer was at wort stage was challenged. This Court posed the question: Whether the levy of excise duty, on beer when it was in the process of manufacture is correct? This Court answered the question thus :

> "The levy of excise duty is on alcoholic liquor for human consumption, manufacture or production. At what stage beer is exigible to duty is the question. The process of manufacture of beer is described as under:

The first stage brewing process is the feeding of Malt and adjuncts into a vessel known as Mash Tun. There it is mixed with hot water and maintained at certain temperature. The objective of this process is to convert the starches of the malt into fermentable sugar.

The extract is drawn from the Mash Tun and boiled with the addition of hops for one to two hours after which it is contrifuged, cooled and received in the receiving wats. At this stage, it is called "Wort" and contains only fermentable sugars and no alcohol. After this it is transferred to the fermentation tanks where Yeast is added and primary fermentation is carried out at controlled temperature. After attenuation (Diminution of density of "Wort" resulting from its fermentation) is reached for fermented wort is centrifuged and transferred to the storage vats for secondary fermentation. After secondary fermentation is over in the storage vats, it is filtered twice-first through the rough filter press and then through the fine filter press and received in the bottling tanks. It is in bottling tanks that the loss of the Carbon Dioxide Gas is made up and bulk beer is drawn for bottling. It is filed into the bottles and then last process of pasteurisation is carried out to make it ready for packing and marketing. *Till the liquor is removed from the vats and undergoes the fermentation process as mentioned above the presence of alcohol is nil.*

Excisable article would mean any alcoholic liquor for human consumption or any intoxicating drug. The levy or impost of excise duty would be only on alcoholic liquor for human consumption or for being produced in the brewery. Beer would mean fermented liquor from malt, when it is potable or in consumable condition as beverage. It is seen

that the levy is in terms of entry 51 of List II of the Seventh Schedule which envisages that duties of excise on the goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India.

Thus, the final product of the beer is relevant excisable article exigible to duty under Section 31 of the Act *when it passes through fine filter press* and received in the bottling tank. The question is : at what stage the duty is liable to be paid? Section 23 specifically envisages that until the payment of duty is made or bond is executed in that behalf as per the procedure and acceptance by the Financial Commissioner, the finished product, namely, the beer in this case, shall not be removed from the place at which finished product was stored either in a warehouse within factory premises or precinct or permitted place of usage. Under these circumstances, the point at which excise duty is exigible to duty is the time when the finished product, i.e., bear was received in bottling tank or the finished product is removed from the place of storage or warehouse etc."

(emphasis supplied)

20. In *Government of Haryana vs. Haryana Brewery Ltd*. [2002 (4) SCC 547], this Court held :

"We agree with the contention of Mr. Divan, and this is also not disputed by Mr. Anand, that the State *has jurisdiction to levy excise duty only on beer after it has been brewed and has become fit for human consumption.* This is the settled position as laid down by this Court in *Mohan Meakin and Modi Distillery* cases. The only question which, to our mind, really arises for consideration is how to determine the quantity of beer which is manufactured on which the excise duty is to be levied. Section 32 gives an answer to this question. The first part of the Section

states that subject to the rules which may be made by the Financial Commissioner, Excise Duty is to be levied, *inter alia,* on the excisable article manufactured in or issued from a distillery, brewery or warehouse. *A reading of this Section leaves no manner of doubt that the stage at which excise duty can be levied is only after the process of manufacture has been completed and in fact, it is to be levied when it is issued from the distillery, brewery or warehouse."*

(emphasis supplied)

Re: Question No. (i)

21. The High Court has held that the point at which the liquor manufactured by the brewery is exigible to excise duty is the stage when the finished product (beer) capable of being consumed by human beings as a beverage or drink, comes into existence that is, after the process of fermentation and filtration. In *Synthetics and Chemicals Ltd & Ors. vs. State of U.P. & Ors.* – 1990 (1) SCC 109 and *State of U.P. vs. Modi Distillery & Ors*. - 1995 (5) SCC 753, this Court held that having regard to Entry 51 of List II of Seventh Schedule to the Constitution, the State would be authorized to impose excise duty on alcoholic liquor for human consumption which meant that the liquor, as itself, was consumable in the sense that it was capable of being taken by human beings as such as a beverage or drink. This Court in *Government of Haryana vs. Haryana Breweries Ltd. & Anr..* – 2002 (4) SCC 547, held that State has jurisdiction to levy excise duty on beer only after it has been brewed and has become fit for human consumption; and having regard to section 32 of the Punjab Excise Act, 1914, the stage at which excise duty could be levied on beer was after the process of manufacture was complete and when it is issued from the brewery or warehouse.

22. This Court also reiterated the said position in *Mohan Meakin Ltd. vs. Excise & Taxation Commissioner, H.P.* -

1997 (2) SCC 193 but further observed that beer would be exigible to duty when it passes through the fine filter press (after fermentation) and is received in the bottling tank. The words 'received in the bottling tank' obviously referred to beer being received in any container or vessel for storage, after fermentation and filtration. It may however be noted that the said observation that beer is exigible to excise duty only when it passes through the fine filter press would apply only to the standard types of beer which is sold in bottles and cans. Beer is also supplied in casks and barrels, taken directly from fermentation vessels without undergoing any filtration or further processing, known as Draught (or Draft) beer. Such beer is unpasteurized and unfiltered (or even if filtered, only in a limited manner and not fine filtered like beer intended to be sold in bottles or cans). Para 29 of Excise Manual (Vol.V Chapter XI) notes that uncarbonated top fermentation beer, which include draught beer are racked directly from the fermenting vessel. Thus when the fermentation process of wort is completed, it becomes an alcoholic liquor for human consumption and there is no legal impediment for subjecting beer to excise duty at that stage. Therefore, the State has legislative competence to levy excise duty on beer either after the completion of the process of fermentation and filtration, or after fermentation.

23. Section 29 (e)(i) of the Act makes it clear that in the case of beer manufactured in a brewery, excise duty may be levied, by a rate charged upon the quantity produced or issued from the brewery or issued from a warehouse. This means that in respect of beer that undergoes the process of filtration, the exigibility to excise duty will occur either at the end of filtration process when it is received in storage/bottling tanks or when it is issued from the brewery. In regard to draught beer drawn directly from fermentation vessels, without further processing or filtration, the exigibility to excise duty will occur either at the end of fermentation process or when it is issued from the brewery.

Re: Question No.(ii)

24. The High Court rejected the Brewery's contention that only such beer which comes to the 'bottling tank' after filtration, can be treated as 'manufactured beer' and exigible to excise duty and wastage allowance could be given only with reference to such beer which has become a finished product. But the High Court allowed the writ petition of the Brewery and directed that validity of the demand should be decided afresh, "*after calculating the stock of beer for the purpose of original Rule 53 of UP Brewery Rules, 1961 (Para 912 of UP Excise Manual as it then existed) and section 28A of UP Excise Act, when after filtration the same assumes the shape as a finished product which is normally consumed by human beings as* a *beverage or drink*". The real question arising for consideration in this case is not about the stage at which beer is exigible to excise duty, but whether the procedure adopted by the appellant for ascertaining the excess wastage (or shortage in quantity) and levying duty and additional duty thereon, is legal and valid.

25. The contention which ultimately found favour with the High Court, was based on legislative competence. The brewery contended that section 28A provided for levy of 'excise duty' and an equal amount as additional duty on 'excess wastage' or shortage in quantity manufactured; that the legislative competence to levy excise duty is derived from Entry 51 of List II of Seventh Schedule to the Constitution : "Duties of excise on …….(a) alcoholic liquors for human consumption"; that therefore, if excise duty or additional duty is to be levied under section 28A, the article that could be subjected to duty should be 'an alcoholic liquor for human consumption'; that the term 'alcoholic liquor for human consumption' means a liquor which could be taken by a human being 'as it is' without the need for any further process; and that in regard to beer, that stage is reached only after fermentation and filtration processes are completed. It was submitted that before filtration, the product-in-process was not an alcoholic liquor for human consumption and therefore there was no legislative competence to levy

excise duty or additional duty on such product-in-process.

26. This contention ignores the fact that Entry 51 should be read not only as authorizing the imposition of an excise duty, but also as authorizing a provision which prevents evasion of excise duty. This Court in *Baldeo Singh vs. CIT* – 1961 (1) SCR 482, held as under :

> "……Under Entry 54 a law could of course be passed imposing a tax on a person on his own income. It is not disputed that under that entry a law could also be passed to prevent a person from evading the tax payable on his own income. As is well known the *legislative entries have to be read in a very wide manner and so as to include all subsidiary and ancillary matters. So Entry 54 should be read not only as authorizing the imposition of a tax but also as authorizing an enactment which prevents the tax imposed being evaded.* If it were not to be so read, then the admitted power to tax a person on his own income might often be made infructuous by ingenious contrivances. Experience has shown that attempts to evade the tax are often made."
>
> (*emphasis supplied*)

27. In this context, we may also consider the decision of this Court in *Union of India vs. A. Sanyasi Rao and others* – 1996 (3) SCC 465, this Court considered the constitutionality of the provisions for presumptive tax in sections 44-AC and 206-C of the Income Tax Act, 1961 for collecting tax on profits and gains from trading in alcoholic liquor for human consumption (and other goods specified therein) at the stage of purchase on a presumptive basis. The respondents therein contended that the said sections lacked legislative competence as income tax was a tax on income, while the levy under section 44-AC was one on purchase when no income had occurred and that the tax was on a hypothetical income and not real income. This Court held that the object in enacting sections 44-AC and

206-C was to enable the Revenue to collect the legitimate dues of the State from the persons carrying on particular trades, in view of the peculiar difficulties experienced in the past and the measure was so enacted to check evasion of substantial revenue due to the state. Trade or business, results in or produce income, which can be brought to tax. In order to prevent evasion of tax legitimately due on such 'income', section 44-AC and section 206-C were enacted, so as to facilitate the collection of tax on that income which is bound to arise or accrue, at the very inception itself or at an anterior stage and therefore one cannot contend that the aforesaid statutory provisions lacked legislative competence. After all, statutory provisions obliging to pay 'advance tax' were not new and sections 44-AC and 206-C were similar. The standard by which the amount of tax was measured, being the purchase price, would not in any way alter the nature and basis of the levy viz., that the tax imposed was a tax on income and it could not be labelled as a tax on purchase of goods. *The charge for the levy of the income that accrued or arose is laid by the charging sections viz., sections 5 to 9 and not by virtue of section 44-AC or section 206-C. The fact that the income was levied at a flat rate or at an earlier stage will not in any way alter the nature or character of the levy since such matters are completely in the realm of legislative wisdom.* What is brought to tax, though levied with reference to the purchase price and at an earlier point is nonetheless income liable to be taxed under the Income Tax Act. This Court referring to the argument about absence of legislative competence to levy tax before accrual of income, referred to Entry 82 of List I of Seventh Schedule ("Taxes on income other than agricultural income") and held as under :

> "…the word 'income occurring in Entry 82 in List I of the Seventh Schedule should be construed liberally and in a very wide manner and the power to legislate will take in all incidental and ancillary matters including the authorization to make provision to prevent evasion of tax, in any suitable manner."

28. To ensure that there is no evasion of excise duty in regard to any beer manufactured, the State is entitled to make a provision to prevent evasion of excise duty being evaded, though it is leviable at the stage of issue from the brewery. The beer brewing process shows once the wort ferments, it becomes consumable, though the manufacturing process to have a finished product may in some cases require filtration, aging carbonization etc. To ensure that there is no evasion of excise duty by diversion of beer (excisable article) before it becomes a finished product, section 28A of the Act has been enacted and that is implemented by Rule 53 of the Brewery Rules, and Rule 7 of the Bottling Rules. The Excise Inspector in-charge is required to take physical stock of the beer in hand in the brewery periodically (once a quarter prior to the amendment of 1975 and once in a month from July 1975) by dip and gravity of the quantities in the fermentation vessels. We may illustrate the method adopted to ascertain whether there is any excess manufacturing wastage (or illegal siphoning of beer) before it reaches the bottling tanks :

a.	The opening balance (actual quantity)	1000 Litres
b.	Quantity brewed during the month under survey	2600 Litres
c.	Total stock of beer (a + b) in the brewery	3600 Litres
d.	Quantity of beer issued during the month	2600 Litres
e.	Balance quantity in hand as per stock account (c – d)	1000 Litres
f.	Actual balance found on physical examination	600 Litres
g.	Wastage in manufacture (difference between quantity shown in stock account and actual quantity in	

	the brewery)	400 Litres
h.	Wastage allowable at 9%* of the total stock of beer in the month(3600 litres) under Rule 53 of Brewery	324 Litres

*(9% is the allowance towards losses due to evaporation, sullage and other contingencies within the brewery).

i.	Excess wastage chargeable to duty & addl. duty (g + h)	76 Litres

29. It should be noted that recourse to section 28A of the Act will be held only when there is abnormal deficiency or shortage in the actual quantity in the brewery when compared to the quantity mentioned in the stock account, that is more than 9%, which would show evasion of excise duty. The standard procedure of levying excise duty is not on the quantity of excisable article in the fermentation vessels. The standard procedure is to levy excise duty when the beer is removed from the brewery. The State was thus collecting excise duty in the usual course with reference to the beer after the entire manufacturing process was completed when it is removed from the brewery. It resorted to section 28A, Rule 53 of Brewery Rules and Rule 7 of Bottling Rules and levied double the amount of excise duty (excise duty plus equal amount as additional duty) only in those months when the periodic examination showed excessive manufacturing 'wastage'. The procedure adopted was the most logical process to ensure that excisable articles were not clandestinely removed and to ensure that there is no evasion of excise duty having regard to the brewing procedure. If the actual stock assessed is less than the stock as per Stock Account and the difference is less than 9%, the difference was ignored. Only if the difference exceeded 9%, the quantity in excess of 9% was treated as the excess wastage and excise duty and an equal amount as additional duty was charged in regard to such excess. For this purpose necessarily the quantity in the fermentation vessels had to be considered. If the quantity in the bottling tanks are to be taken as the basis, then there will be no way of finding out whether there was any

siphoning off from the fermentation vessel or during filtration process. Fermented wort is beer and it could be removed from fermenting vessels or during storage or filtration. Therefore, the base measurement is taken in the fermentation vessel and 9% standard allowance is provided to cover losses on account of sullage etc.

30. The Act provides that levy of excise duty on beer can not only be with reference to the quantity produced and issued from a brewery, but can also be by calculating the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe. This means the excise duty on the beer manufactured can be levied not only with reference to the actual quantity issued or removed, but can also be by a rate charged in accordance with a scale of equivalent, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort prescribed by the State Government. The said alternative method of levying excise duty does not depend upon the actual quantity manufactured or issued. It is with reference to the deemed quantity manufactured rather than the actual quantity manufactured. Such a procedure has been in vogue in England and it is permissible in India. Rule 42 of Chapter XI of the Excise Manual (Vol. 5) gives a detailed description of the attenuation method of charging duty on beer and it is extracted below:

> "42. *The attenuation method of charging duty on beer*. – In the United Kingdom, the duty is levied on beer in proportion to the original gravity of the wort. Really speaking, the Excise control of breweries is much less stringent than in the case of distilleries. No excise locks are used. The constant presence of an officer is only considered necessary in the case of every large breweries working continuously. The safety of the revenue depends on notices of all essential operations which are required to be given to the Excise. The length of notice to be given depends on the importance of the particular operation and

on the facility with which the local officer can attend. One officer is, in general, in charge of a group of the smaller breweries.

A brewer must give timely notice of –

(1) his attention to brew;

(2) the nature and amount of materials to be used;

(3) the time at which he expects his mash-tun to be drained (this is to enable the officer to take a dip of the drained grains which must lie for two hours after draining or until the officer arrives).

(4) his intention to mix the products of one or more brewings;

(5) any modification in his routine methods of brewing;

(6) any alterations he proposes to make in the position etc., of his brewing vessel;

(7) Finally and most important of all, the brewer is required to give notice to the officer of his intention to 'collect beer', ie., he must intimate as closely as possible the time when the wort will be ready for pitching with yeast. When the wort is collected for fermentation the brewer must forthwith take the specific gravity with his saccharometer and also the dip, in order that the density and gallonage may be recorded in case the officer does not attend. In cases where the officer attends before fermentation has materially affected the gravity he is able to verify these figures and above all to see that they have been recorded properly by the brewer.

In order that his control may be effective, the officer must time his visits to the brewery so as to arrive when

fermentation has not advanced too far for check and so that the brewer has had reasonable time to make his entries of gravity and gallonage. If having had reasonable time, the brewer has failed to make his entry this omission is treated as a serious excise offence.

It may be asked why stress is not laid on the necessity for the attendance of the officer at the time of pitching the wort. This, bowever, is generally impracticable seeing that usually brewers 'collect' at the same hour and that the presence of the officer at more than one brewery is impossible. This being so, his visits must be unexpected, the responsibility for honest declaration of gravity and dip being imposed on the brewer. The brewer's records, if confirmed by the officer, are thus the basis on which the duty is levied."

31. This Court in *Haryana Brewery Ltd.* (supra) recognized the alternative method of calculating the quantity of beer manufactured to be valid. This Court held:

"The proviso to Section 32 uses the expression "provided that duty may be levied....." Clause (b) of the proviso state that the calculation of the *beer manufactured* would be according to such scale or equivalents calculated on the quantity of materials used or by the degree of attenuation of the wash or wort. The opening part of Clause (b) of the proviso indicates as to how the beer manufactured is to be determined. The proviso is only a manner of computing the end-product with reference tot he raw material which has been used in the input. The tax is on the end-product and not on the raw material. What this proviso read with Rule 35 indicates that in order to determine what is the quantity of beer manufactured which is fit for human consumption, after all the processes have been gone through, you seen what is the quantity of raw material which has been utilised for the manufacture of beer and in the

process of manufacturing give an allowance for wastage of 7 per cent. After doing this, you determine the quantity of beer manufactured. An example which has been given is that a 1000 kgs. Of malt should ordinary yield 6500 litres of beer. By giving an allowance of wastage which must occur during the process of the manufacture of the end-product and limiting that allowance to 7 per cent, the quantity of beer manufactured on which excise duty would be levied would be 6500 litres less 7 per cent.

14. It appears to us that the proviso to Section 32 read with Rule 35 does nothing more than to give a rough and ready method of calculating the quantum of beer which should have been manufactured in the normal process which is calculated on the basis of the raw material used. The idea, perhaps, is that full quantity of beer which is manufactured is accounted for. It will be seen that registers are maintained by the manufacturer and the figures are taken from there. From the records of the manufacturer, excise authorities will be able to ascertain the quantum of raw material used. It is open to the excise authorities to accept the figure indicated in the records of the manufacturer of the total quantity of beer manufactured. Duty can be levied on this and this would be inconsonance with the first part of Section 32. It is, perhaps, only to cross-check whether the figure which is indicated in the books of the manufacturer is correct that a formula can be used for determining the amount of beer which could or should or must have been manufactured. This is by taking into account the quantity of raw material used, the quantity which is in the process and as entered in the brewing book and from there giving an allowance of 7 per cent for wastage. It appears to us that the allowance of 7 per cent has to be in arriving at the figure of the manufactured beer as loss of quantity during the process of manufacture. It cannot be that on the figure of manufactured beer, arrived at on the basis of the books of the respondent, an

allowance of 7 per cent has then to be given. If the figure taken for the purpose of calculating the excise duty is only of the end-product, viz., the beer produced, and not the quantity of raw material used in the manufacture of beer during which loss of some quantity as wastage would have occurred, there cannot be a deduction of any sum or proportion as wastage from the quantity of end-product in order to arrive at the quantity. The excisable product is the quantity of beer produced and not the quantity produced, and thus excisable, minus 7 per cent."

Therefore there is nothing wrong in adopting the procedure prescribed in section 28A and Rule 53 of Brewery Rules to determine the excess manufacturing wastage.

32. The Brewery wants the wastage allowance to be given, not with reference to the quantity in the fermentation tank, but with reference to the quantity in the storage/bottling tanks (after completion of fermentation and filtration process) when the manufacturing process is complete and only bottling remains. The argument of the respondent is that the measurement should be taken only when the manufacture is complete and not when it is still in the process of manufacture; and the manufacture process is completed not when the wort is in the fermentation tank but only when the filtration process is finished. But this contention ignores the fact that when manufacturing process is complete and the beer has reached storage/bottling tanks, there is no question of any manufacturing loss. The allowance of 9% is made to cover loss due to evaporation, sullage and other contingencies within the brewery. 9% is allowed as loss in quantity because the quantity in fermentation tank is measured and taken as the base and thereafter the sullage/ yeast heads are removed as sediment in the fermentation vessels or by the filtration process and there will also be certain amount of evaporation during the process of filtration, racking and storage etc. In fact, the Brewery specifically admits this position in Annexure-I to the writ petition while describing the

process of manufacturing beer :

> "From the above brief description of manufacturing process, it will be observed that the deficiency between the quantity of wort to the point when beer is ready for bottling, occurs because of elimination of impurities" viz., yeast cells and dirty heads brought up in fermentation at top, evaporation taking place; carbon dioxide evolved out; and sullage settled at the bottom. The quantity of these impurities accounting for the said deficiency in the process of manufacture cannot be taken as beer and excisable article for purposes of levy of duty. For culmination of these impurities and other contingencies mentioned of in rule 912, an allowance of 10% is fixed."

33. If the quantity measured *after the fermentation and filtration processes* should be the base figure, for purpose of allowance to cover loss on account of sullage, evaporation etc., there will be no need for granting any allowance because once it have passed the filtration stage the sullage and other impurities has been removed and the beer is ready for being filled in barrels, casks or bottles. The 9% allowance is for the wastages occurring during the stages of fermentation and filtration and not in regard to the stages between storage after filtration and removal. The Brewery has virtually mixed up the issue relating to the question as to when beer is exigible to excise duty with the question as to the quantity on which the allowance of 9% should be granted. As noticed above, a combined reading of rules 37 and 53 of Breweries Rules, with or without section 28A make it clear that the allowance of 9% as losses in the brewery (10% as losses in the course of manufacture in the brewery prior to 1975) is with reference to the quantity in the fermentation tank and not with reference to the quantity of beer in the storage/bottling tanks after filtration.

34. We may now consider the contention on behalf of brewery that they are entitled to allowance upto 9% towards such wastage from the quantity measured in the storage/

bottling tanks after fermentation and filtration. We extract below the contention of the Brewery in this behalf from its writ petition:

> "(X) That section 28A(2) in so far as it purports to provide for permissible wastage could operate only from the stage the State Government became competent to impose excise duty/additional duty and till beer is brought to such a stage that it is rendered fit for human consumption, the State Legislature has no legislative competence to levy excise duty/additional duty and hence the State Legislature cannot take into consideration for the purposes of levy of excise duty/additional duty any wastage prior to the stage when the liquor/beer becomes fit for human consumption."

A large allowance up to 9% of the total stock of beer has been provided towards wastage, only to cover the loss occurring from fermentation stage to post-filtration stage, as the quantity has been calculated with reference to the fermentation vats and there will be considerable wastage due to sullage and evaporation. Rules 37 and 53 of the Breweries Rules (paras 896 and 912 of the Excise Manual) also proceeded on that basis that the measurement would be with reference to the quantities in the fermentation vessels taken by dip and gravity method.

35. In fact, the brewery describes the nature of these losses in the brewery in Annexure I to the writ petition (in the connected WP No.1375/1978) as under:

"MANUFACTURING LOSSES

(i) Varying constituents of Malt viz. percentage of proteins etc. produced sludge or sullage in more or less quantity. Thus sullage to be removed will have differing percentages.

(ii) Depending on the process – top and bottom

fermentation etc. there may be more or less of scum and dirty heads containing yeast cells to be removed, thus losses will be variable at this stage.

(iii) The removal of solids is continuously carried on at different stages in the manufacturing process. With frequency of the centrifugal machines or the Filtration Plants having to be opened depending upon the quantity and turbidity of the fermented wort or green beer to be cleared off to be sparklingly clear, the losses will be more or less. With the banking of import of quality filter sheets, the indigenously made filter sheets have to be used which are to be more frequently changed then the imported ones. There are losses in absorption in filter sheets and leakage at ends of plates.

(iv) Some quantity of fermenting wort is lost in removal of scum and dirty heads and in removal of sullage from the bottom of the tanks.

(v) Every time the fermenting or fermented wort or green beer is transferred by means of pipes, what is left over in pipes has to be drained off, water and steam is run in pipes to sterilize them, so that there may be no contamination to spoil beer.

The varying losses at each stage in the manufacturing process are natural and unavoidable. With the above mentioned variable losses, accidental, off chance occurrence or those losses which are incidental to the process of manufacture are provided for in rule 912 under "Contingencies".

The contingent losses, a few of which are given below, make the losses in manufacturing process vary and erratic.

(a) Due to failure of electricity and refrigeration, there may be brisk fermentation and wild bacterial

infection, which may make it sour to be turned into vinegar, or if more spoilt, may have to be destroyed.

(b) By sudden leakage of brine coiled pipes, the fermenting wort may be mixed up with brine which becomes unpalatable and has to be destroyed.

(c) With haziness persisting after filtration once, it may have to be treated with approved chemicals and refiltered.

(d) Bursting of transfer pipes, leakage of valves etc."

36. If the quantity measured in the storage/bottling tanks (after filtration) should form the basis, there was no occasion or need for making a huge allowance of 9% for sullage, evaporation and other contingences, as there would be no sullage, evaporation or other wastages after that stage (that is completion of manufacture) and the allowance under Section 28A of the Act will become redundant, except for the small percentage provided for wastage during bottling and storage.

37. The Brewery placed strong reliance upon the decision of this Court in *State of U.P. vs. Modi Distillery & Ors*. - 1995 (5) SCC 753. In that decision, this Court was considering the validity of demand for excise duty on the wastage of high strength spirit (80% to 85%) during transportation in containers from distillery to warehouse (referred to as 'Group B' cases). This Court held :

"In other words, ethyl alcohol (95 per cent) was not an alcoholic liquor for human consumption but could be used as a raw material or input, after processing and substantial dilution in the production of whiskey, gin, country liquor etc. In the light of experience and development, it was necessary to state that 'intoxicating liquor' meant only that liquor which was consumable by human beings as it was.

What the State seeks to levy excise duty upon in the Group

> 'B' cases is the wastage of liquor after distillation, but before dilution; and, in the Group 'D' cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption."

The said decision will not assist the first respondent – brewery as that was a case of levy of excise duty on raw materials or inputs which were still in process. That matter related to distilled alcohol and not fermented beer. The wastage considered by this Court was all with reference to alcohol that had not been diluted and therefore was not 'alcoholic liquor for human consumption'. This Court held that the State is not empowered to levy duty on the raw material or inputs that is in the process of being made into an alcoholic liquor for human consumption. The position is different here. When the quantity of the liquid in the fermentation vessels were measured, on account of fermentation, the liquid was already in the process of conversion into an 'alcoholic liquor for human consumption', though had not become a finished product of beer. Therefore, the principles in *Baldev Singh* and *A. Sanyasi Rao*, will apply and not the decision in *Modi Distillery*. Therefore we hold that there is no infirmity in the method adopted by the excise department to arrive at the excess wastage or in making a demand for excise duty and additional duty in regard to such excess wastage.

Re : CA No.4709 of 2002 :

38. The question arising in this appeal is the same as in CA No.4708 of 2002 and the facts are also similar to the facts of CA Nos.4708 of 2002. The only difference in facts is that the demand in this case related to the period 3.6.1970 to 5.9.1972 and the amount of duty/additional duty that was

demanded was Rs.1,40,596.89. For the reasons stated in CA No.4708/2002, this appeal is also allowed.

Re : CA Nos.4710, 4711, 4712, 4713 of 2002

39. All these four appeals relate to demands made upon the breweries for duty on excess wastage in bottling and storage of beer. The first appellant brewery has described the process of bottling of beer thus (in Annexure P2 to the writ petition – WP No.1375/1978):

> "Before carbonated beer is conveyed to the automatic bottling machine through pipes, the whole line is cleaned and sterilized to ensure that there are no wild bacteria which may spoil the beer passed through these pipes.
>
> Bottles which are cleaned and sterilized in Automatic Bottle Washing Plant, are fed by conveyors to the beer bottling machine. While the bottles are filled, some quantity of beer is spilt by foaming which takes place and with pressure of Co2 gas bottles burst in the process of bottling. The beer which is spilt is mixed with broken glass pieces, oil etc. on the conveyor belts. It is contaminated and has to go waste.
>
> To increase the shelf life of beer, the filled bottles are placed in pasteurization tanks and the water in which these bottles are immersed is gradually raised to temperature of 65O and after keeping these bottles for a fixed time in hot water, these are cooled down.
>
> With the expansion of Co2 gas during this process some bottles burst and the beer contained therein gets mixed up with water.
>
> Leaky bottles are also taken out from the pasteurization tanks, which are decanted for reprocessing of their contents. Some wastage occurs in the process of decanting.

After pasteurization of filled bottles, capsuling, labeling and packing is done, in which some bottles break. During the process of bottling what goes waste in spilling as mentioned above, in unavoidable. It does not exist in the form of goods for sale and human consumption. Thus being not an excisable article is not leviable with duty."

The Breweries have also described the various instances of bottling wastages in the writ petition as under :

"BOTTLING WASTAGES

The wastages occur at different stages in bottling process as under:

(a) Loss of beer in transfer pipe from Bottling Tank to bottling machine, which has to be washed away to sterilize pipes before bottling operations are began every day.

(b) There being pressure of CO2 gas in beer there is loss by bursting of bottles in filling and capping machines. With the pressure of gas foaming takes place and there is spillage of beer between the bottling and capping machines. The spilt beer cannot be recovered as it gets mixed up with oil on the conveyor belts and is contaminated.

(c) There are some breakages on conveyors between capping machine and pasteurization tanks.

(d) During pasteurization the filled bottles are immersed in water and the temperature of water is gradually raised to about 65°C after keeping for a fixed time, it is gradually colled, with the expansion of gas the bottles burst to a varying percentage depending on the varying quality of bottles from mould to mould and batch to batch and beer is mixed with water in the tanks.

(e) Some breakages do occur in capsuling, labelling and packing of filled bottles.

(f) Sometimes rebottling may have to be done and loss on this account may occur.

40. The appellant breweries are holding bottling licences in form No.FL3 to bottle beer, governed by the U.P. Bottling of Foreign Liquor Rules, 1969 ('Bottling Rules' for short). Rule 6 provides that every licence granted in Form No. FL3 shall be subject to the conditions enumerated therein. Rule 7 enumerates the additional special conditions applicable to bottling of India made liquor in bond under FL3 licence. Sub-rules (10) and (11) of Rule 7 are relevant for our purpose and they are extracted below :

"7. Following additional special conditions will be applicable to bottling of Indian Made Foreign liquor in bond under F.I.-3 licence:

(1) to (9) x x x x x omitted as not relevant

(10) On the last working, day of every calendar month, after all the transactions for that day are made, the Excise Inspector Incharge shall take the stock of unbottled and bottled spirit 3rd beer/stored in the bottling warehouse, enter into the prescribed registers and ascertain the wastage of spirit in the bottling operations and storage in the bonded warehouse.

(11) (a) An allowance up to one per cent may be made on the total quantity of spirit and beer stored during a month for actual loss in bottling and storage. The licensee shall be responsible for the payment of duty on wastage in excess of one per cent,

(b) when the wastage does not exceed the prescribed limit, no action need be taken by the Excise Inspector Incharge but if an excess is found at the time of monthly stock taking

the Excise Inspector shall submit a statement to the Collector by the fifth day of the month in Form F.L.B. 10 showing the quantity of actual wastage and the duty to be paid by the licensee on the excess wastage. On receipt of the statement the Collector shall recover the duty from the licensee at the full rate of duty leviable on Indian made foreign spirit and beer."

41. The appellants contended that section 28A provides for an allowance of 10% to cover losses due to evaporation, sullage and other contingencies within the brewery and also to cover losses in bottling and storage. Rule 53 of the Brewery Rules as amended on 19.7.1975 (Rule 912 of the Excise Manual) provides for an allowance of 9% of the total stock of beer in the month to cover losses due to evaporation, sullage and other contingencies within the brewery. Rule 7(11)(a) of the Bottling Rules provides for an allowance up to one per cent of the total stock of spirit during a month, for actual loss in bottling and storage. The appellants submitted that section 28A did not make such a division of 10% allowance, into 9% for loss in the brewery and one percent for loss in bottling; and that therefore it is impermissible to divide the wastage under two separate heads of 9% wastage to cover losses due to evaporation, sullage and other contingencies within the brewery under rule 53 of the Brewery Rules, (para 912 of U.P. Excise Manual) and only one percent for losses in bottling and storage under the Bottling Rules. According to them the wastage in bottling can itself go to an extent of 10%. At all events, if the total wastage due to evaporation, sullage and other contingencies in the brewery and the total wastage in bottling and storage, together did not exceed 10%, no duty or additional duty could be levied on the assumption that the losses in bottling and storage was restricted only to one percent, as such division would be contrary to section 28A of the Act.

42. Rule 53 of Brewery Rules made in 1961 (para 912 of the Excise manual) before the amendment on 19.7.1975

provided for allowance of a deficiency not exceeding 10% to cover losses in bulk due to evaporation, sullage and other contingencies within the brewery. At that time a separate licence for bottling was not contemplated. The Bottling Rules made in 1969 provided for an allowance of one percent loss in bottling and storage. On 19.7.1975, Rule 53 (para 912 of Excise manual) was substituted and the allowance to cover losses due to evaporation, sullage and other contingencies within the brewery was reduced to 9% in view of the provision in the Bottling Rules providing for an allowance of one percent for losses in bottling and storage. Section 28A was inserted by U.P. Act 9 of 1978 (with a provision that the section shall be deemed always to have been inserted) providing for an allowance to a total extent of 10% in regard to losses within the brewery and the losses in bottling and storage. It is not in dispute that the process of brewing beer and the process of bottling beer are considered to be distinct and separate processes governed respectively by the Brewery Rules and Bottling Rules. The operations connected with bottling are required to be conducted in a separate premises under a different licence. The process of bottling begins with the transfer of bulk beer from the brewery for bottling. Sub-section (2) of section 28A refers to an allowance to an extent of 10% not only in regard to losses within the brewery but also to cover losses in bottling and storage. As noticed above, Rule 53 of the Brewery Rules and Rule 7(11) of the Bottling Rules when read conjointly show that the said rules are supplementary to each other and together implement section 28A of the Act. At all events, the validity of neither Rule 53 of Brewery Rules nor Rule 7(11) of Bottling Rules is under challenge. Be that as it may.

43. The brewery having obtained the bottling licence subject to the special conditions which include the condition in Rule 7(11) of the Bottling Rules, cannot ignore the said Rule and contend that the allowance for losses in bottling could be more than one percent, that is upto ten per cent. In view of the above there is no merit in the contention of the breweries that

they are entitled to allowance of ten per cent towards losses in bottling and storage after the excisable article has left the Brewery. The appeals are therefore liable to be dismissed.

Conclusion :

44. CA Nos.4708-4709/2002 are allowed and the order of the High Court in Civil Misc. WP Nos.3968/1978 and 4043/2008 are set aside and the said writ petitions are dismissed.

45. CA Nos.4710, 4711, 4712 & 4713/2002 are dismissed affirming the decision of the High Court dismissing C.M. W.P. Nos.1375/1978, 3690/1979, 4136/1978 and 4157/1978, though for reasons, somewhat different from the reasoning of the High Court.

D.G. Appeals disposed of.

M/S THERMAX LTD. & ORS.
v.
K.M. JOHNY & ORS.
(Criminal Appeal No. 1868 of 2011)

SEPTEMBER 27, 2011

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

Code of Criminal Procedure, 1973: s.156(3) – Investigation in cognizable offence – Complaint before crime branch u/ss.405, 406, 420 r/w s.34, IPC alleging non-payment of dues by appellant-company – Cognizance of offence not taken by crime branch – Application u/s.156(3) – Magistrate issued direction for investigation – Criminal proceedings initiated – High Court refused to interfere – On appeal, held: Three complaints containing similar allegations were investigated previously and all were closed as the alleged claim was found to be of civil nature – In those circumstances, it did not lie for complainant to have approached the Magistrate again with the same subject complaint – Inasmuch as the dispute arose out of a contract and a constituted remedy was only before a civil court, the Magistrate ought to have appreciated that complainant was attempting to use the machinery of the criminal courts for exerting unjust, undue and unwarranted pressure on the appellants – Apart from the fact that the complaint lacked necessary ingredients of ss.405, 406, 420 r/w s.34 IPC, no specific allegation was made against any person – Complaint was filed in 2002 when the alleged disputes pertained to the period from 1993-1995 – Courts below ought to have appreciated that complainant was trying to circumvent the jurisdiction of the civil courts which estopped him from proceeding on account of the law of limitation – In view of the infirmities and in the light of s.482, High Court ought to have quashed those proceedings to safeguard the rights of the appellants – Complaint quashed

– Penal Code, 1860 – ss.405, 406, 420 r/w s.34 – Contract – Delay/laches.

On 26.05.1995, the appellant-company placed a purchase order on respondent no.1 for designing and manufacturing stationary storage tanks. It also placed two purchase orders for the supply of consumables and other accessories to said tanks. On 20.6.1995, respondent no.1 informed the appellant-company about their inability to procure the requisite material and requested it to supply the same and to deduct the material cost from the final bill. Respondent no.1 was provided the material by the appellant-company. However, respondent no.1 failed to carry out the work as per the schedule. The appellant-company cancelled the order placed w.e.f. from 26.5.1995 i.e. from the date when the order was placed.

Respondent no.1 filed three complaints with crime branch, one in 2000 and two in 2001 alleging that they had carried out several fabrication job works for the appellant-company and huge amount was outstanding till date despite several requests. The Crime Branch did not take any cognizance. Respondent no.1 made a complaint before the Magistrate. By order dated 30.5.2002, the Magistrate issued a direction under Section 156(3), Cr.P.C. and referred the same to Crime Branch (respondent no.2) for investigation. Pursuant to the same, respondent no.2 registered an offence and initiated proceedings thereunder against the appellant-company. The appellant-company moved the High Court for quashing and setting aside the order dated 30.5.2002. The High Court remitted the matter to Magistrate for reconsideration of entire prayer and to decide the case afresh. Pursuant to the same, the appellant-company filed an application under Section 91, Cr.P.C. praying for direction to the Assistant Commissioner of Police, Crime

Branch to produce all the records and proceedings of the complaint. The Magistrate called for a report under Section 156(2) from respondent no.2. Aggrieved appellant-company filed writ petition before the High Court which was dismissed.

The question which arose for consideration in the instant appeal was whether the ingredients of Sections 405, 420 read with Section 34 were made out from the complaint; whether the Magistrate was justified in calling for a report under Section 156(3), Cr.P.C. from the Crime Branch; and whether the High Court was justified in confirming the action of the Magistrate and thereby failed to exercise its power and jurisdiction under Section 482, Cr.P.C.

Allowing the appeal, the Court

HELD: 1. For proceedings under Section 156(3), Cr.P.C., the complaint must have disclosed relevant material ingredients of Sections 405, 406, 420 read with Section 34, IPC. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay in order to avoid the period of limitation, it cannot be resorted to a criminal proceeding. It is seen from the materials placed that three complaints containing similar allegations were investigated previously and all were closed as the alleged claim was found to be of civil nature. In those circumstances, it did not lie for respondent no.1-the complainant to approach the Magistrate with the same subject complaint. Inasmuch as the dispute arose out of a contract and a constituted remedy is only before a civil court, the Magistrate ought to have appreciated that respondent No.1 was attempting to use the machinery of the criminal courts for private gains and for exerting unjust, undue and unwarranted pressure on the

appellants in order to fulfill his illegal demands and extract undeserving monetary gains from them. [Paras 16, 17] [181-C-H]

Suresh v. Mahadevappa Shivappa Danannava & Anr. **(2005) 3 SCC 670: 2005 (2) SCR 131;** *Madhavrao Jiwajirao Scindia & Ors. v. Sambhajirao Chandrojirao Angre & Ors.* **(1988) 1 SCC 692: 1988 (2) SCR 930;** *Alpic Finance Ltd. v. P. Sadasivan & Anr.* **(2001) 3 SCC 513: 2001 (1) SCR 1059;** *Nagawwa v. Veeranna Shivalingappa Konjalgi* **(1976) 3 SCC 736: 1976 Suppl. SCR 123;** *State of Haryana v. Bhajan Lal* **1992 Supp (1) SCC 335: 1990 (3) Suppl. SCR 259;** *Anil Mahajan v. Bhor Industries Ltd. & Anr.* **(2005) 10 SCC 228;** *S.K. Alagh v. State of Uttar Pradesh & Ors.* **(2008) 5 SCC 662: 2008 (2) SCR 1088;** *Maharashtra State Electricity Distribution Company Limited & Anr. v. Datar Switchgear Limited & Ors.* **(2010) 10 SCC 479: 2010 (12) SCR 551 – relied on.**

2. The courts below failed to appreciate that Ex. 61 was a reply filed by the Crime Branch-II and Ex. 63 was the statement of the official which categorically stated that the complaint preferred by respondent No.1 was civil in nature. Even if it is accepted that the records were destroyed and notwithstanding such destruction, it was a matter of record that the complaint preferred by respondent No.1 was indeed investigated and categorized as civil in nature. This aspect was not considered either by the Magistrate or by the High Court. [Para 18] [182-A-B]

3. It is settled law that the essential ingredients for an offence under Section 420, IPC is that there has to be dishonest intention to deceive another person. No such dishonest intention can be seen or even inferred from the allegations in the complaint inasmuch as the entire dispute pertained to contractual obligations between the parties. Since the very ingredients of Section 420 were not attracted, the prosecution initiated is wholly

untenable. Even assuming that allegations in the complaint do make out a dispute, still it ought to be considered that the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Inasmuch as there are number of documents to show that appellant-Company had acted in terms of the agreement and in a bona fide manner, it cannot be said that the act of the appellant-Company amounted to a breach of contract. [Para 19] [182-C-F]

4. Though respondent No.1 had roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with appellant-Company by initiating the criminal prosecution, it was pointed out that appellant nos. 2 to 8 were the Ex-Chairperson, Ex-Directors and Senior Managerial Personnel of appellant No.1-Company, who did not have any personal role in the allegations and claims of respondent No.1. There was also no specific allegation with regard to their role. Apart from the fact that the complaint lacked necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. There was no specific allegation made against any person but the members of the Board and senior executives were joined as the persons looking after the management and business of the appellant-Company. The offence alleged in the criminal complaint filed by respondent no.1 is under Sections 405 and 420 IPC whereunder no specific liability is imposed on the officers of the company, if the alleged offence is by the Company. In the absence of specific details about the same, no person other than appellant no.1-Company can be prosecuted under the alleged complaint. The courts below failed to appreciate an

important aspect that the complaint came to be filed in the year 2002 when the alleged disputes pertained to the period from 1993-1995. The courts below ought to have appreciated that respondent no.1 was trying to circumvent the jurisdiction of the civil courts which estopped him from proceeding on account of the law of limitation. Respondent no.1 had previously filed three complaints which were concluded after exhaustive enquiry with the respective police authorities. Pursuant to the first complaint with the Crime Branch-II, Pune, the appellants were summoned and exhaustive enquiry was conducted by the Crime Branch-II and after recording the statements and perusal of documents and after undertaking an extensive interrogation, the Crime Branch-II closed the case. The said closure of the case was informed to respondent No.1 by the police authorities. The materials placed further showed that notwithstanding the first complaint which was closed by the Crime Branch-II, another complaint on the same facts, was filed by respondent No.1 at the Bhosari Police Station. The appellant and its officers attended the Bhosari Police Station, thereafter the said complaint was also closed after the facts were placed before the officers of the Bhosari Police Station. Apart from these complaints, respondent No.1 once again filed a third complaint at the Commissioner's Office, Crime Branch, Pune. The officers of appellant-Company appeared before the Crime Branch, who after perusing the documents and the written statements of appellant No.1, informed the appellants that the matter was closed. [Para 20-26] [182-G-H; 183-A-H; 184-A-G]

5. At the stage of issuance of direction to the police for submission of report under Section 156(3), Cr.P.C., the accused has no role and need not be heard. However, in view of specific direction of the High Court disposing of the cases by remitting the matter back to the Magistrate

for reconsideration of the entire prayer as made by the complainant and to pass fresh orders, after giving adequate opportunity of hearing to both the sides, and decide afresh the application seeking direction under Section 156(3) by giving cogent reasons for coming to such conclusion, the procedure adopted by the Magistrate cannot be faulted with. Though the appellant Company/accused has no right to be heard at this stage in view of the direction of the High Court, no exception be taken to the order of the Magistrate hearing the complainant and the appellant Company/accused even at the stage of calling for a report under Section 156(3) of the Code. [Para 28] [185-B-E]

6. The entire analysis of the complaints and the ingredients of Sections 405, 406, 420 read with Section 34 IPC clearly showed that there was inordinate delay and laches, the complaint itself was inherently improbable contained the flavour of civil nature and taking note of the closure of earlier three complaints that too after thorough investigation by the police, the Magistrate committed a grave error in calling for a report under Section 156(3), Cr.P.C. from the Crime Branch, Pune. In view of those infirmities and in the light of Section 482 of the Code, the High Court ought to have quashed those proceedings to safeguard the rights of the appellants. The complaint filed by respondent no.1 is quashed. [Para 29] [185-F-H; 186-A-B]

Case Law Reference:

2005 (2) SCR 131	referred to	Para 10
1988 (2) SCR 930	referred to	Para 11
2001 (1) SCR 1059	referred to	Para 12
1976 Suppl. SCR 123	referred to	Paras 12, 13
1990 (3) Suppl. SCR 259	referred to	Para 12

(2005) 10 SCC 228	**referred to**	**Para 13**
2008 (2) SCR 1088	**referred to**	**Para 14**
2010 (12) SCR 551	**referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1868 of 2011.

From the Judgment and Order dated 11.01.2008 of the High Court of Bombay in Criminal Writ Petition No. 1622 of 2007.

Dr. A.M. Singhvi and C.S. Vaidyanathan, Kavin Gulati, Shrikant Doijode, Jaiveer Shergill, S.K. Jain, Brij Kishor Sah and Shivaji M. Jadhav for the Appellants.

Shankar Chillarge, AG, KTS Tulsi, Susmita Lal, Maheen Pradhan, Ravinder Singh, Asha Gopalan Nair and Pratik Bombarde for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 11.01.2008 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 1622 of 2007 wherein the Division Bench of the High Court dismissed the writ petition filed by the appellants herein as misconceived.

3. **Brief Facts:**

(a) M/s Thermax Ltd.–the appellant-Company, is a Public Limited Company having its registered office at Chinchwad, Pune and is engaged in the field of energy and environment management. Mr. K.M. Johny-the original complainant, Respondent No. 1 herein, is the proprietor of M/s Rini Engineers and M/s Sherly Engineers, which are small-scale

industries undertaking fabrication job work for the appellant Company for the past several years.

(b) On 26.05.1995, the appellant-Company placed three Purchase Orders on Respondent No.1 being Order No. 260062 for designing and manufacturing two numbers of stationary L.P.G. Storage Tanks and Order Nos. 260063 and 260064 were for the supply of consumables and other accessories to the said Tanks. On 01.06.1995, M/s Unique Engineering Services, the Consultants of the appellant Company addressed a letter specifying that they had assessed the companies of the Respondent No. 1 and in their opinion even though they have not made any static bullets and have made quite a few mobile L.P.G. Tanks, however, they were capable of manufacturing the same, but needed design help.

(c) On 20.06.1995, Respondent No. 1 informed the appellant-Company their inability to procure the material (steel) and requested to supply the same and to deduct the material cost from the final bill. On 04.08.1995, the Respondent No. 1 was provided with the necessary steel of the technical specification. On 06.08.1995, an Engineer of the appellant-Company visited the company of the Respondent No. 1 and submitted a report stating that Respondent No. 1 had carried out certain work using the material purchased from the appellant-Company. It was also pointed out in the report that Respondent No. 1 agreed that they would send the material to M/s Bureau Veritas for checking. The report also stated that Respondent No. 1 had not ordered for consumables and no rectification and drawings had been carried out.

(d) By letter dated 10.08.1995, the Consultants informed the appellant-Company that there was no progress in the work status for the last 45 days and it was observed that Respondent No. 1 was not interested in executing the assignment. In pursuance of the same, a meeting was held between the officials of both the Companies and the Respondent No. 1 agreed to complete the job by all means by 22.09.1995. Since

Respondent No. 1 failed to carry out the work as per the Schedule, the appellant-Company, vide letter dated 13.09.1995 cancelled the order placed and it was made effective from 26.05.1995 i.e., from the date when the order was placed.

(e) On 06.05.2000, Respondent No. 1 filed a complaint with the Crime Branch, Pune alleging that they had carried out several fabrication job works for the appellant-Company and huge amount of Rs. 91,95,054/- was outstanding till date despite several requests. In the said complaint, it was further alleged that the appellant-Company also placed Purchase Order being No. 240307 dated 22.03.1993 for Rs. 8,00,000/- for fabrication and erection of Tower Support Structural etc., for the Mehasana District Taluka Sanstha (Gujarat) Project and also represented that they will hire the machinery of the Respondent No. 1 for the said job at the rate of Rs. 2,400/- per day and believing the same the Respondent No. 1 allegedly purchased brand new machinery worth Rs. 5,80,000/- specially for the said project and dispatched the same to the Mehasana site. Respondent No. 1 completed the said job according to schedule and to the satisfaction of the appellant-Company and also carried out additional work at the site as per their request. It was alleged that balance outstanding for the said work of Rs.2,47,570/- was still receivable from the appellant-Company. An amount of Rs.58,32,000/- towards hiring charges for the machinery is yet to be paid by the appellant-Company. Therefore, a total sum of Rs.68,79,750/- became due from the appellant-Company to respondent No.1 and the same was not paid till date. Since the Crime Branch did not take any cognizance, the said complaint was filed in the Court of Judicial Magistrate, First Class, Pimpri being RCC No. 12 of 2002 and by order dated 30.05.2002, the Judicial Magistrate issued a direction under Section 156(3) of the Code of Criminal Procedure, 1973 (in short 'the Code') and referred the same to Crime Branch, Pune, Respondent No. 2 herein, for investigation. Pursuant to the same, Respondent No. 2 registered an offence being C.R. No. 91/2002 and initiated

proceedings thereunder against the appellant-Company.

(f) Aggrieved by the said order, the appellant-Company filed two separate Criminal Writ Petitions being Nos. 209 and 443 of 2003 before the Bombay High Court for quashing and setting aside the order dated 30.05.2002 passed by the Judicial Magistrate, First Class, Pimpri. Vide order dated 10.06.2003, the High Court set aside the order dated 30.05.2002 and remitted the matter back to the Judicial Magistrate for reconsideration of the entire prayer and to decide the case afresh, after giving adequate opportunity of hearing to both the sides. Pursuant to the same, the appellant Company preferred an application dated 16.07.2003 under Section 91 of the Code before the Judicial Magistrate praying that the Assistant Commissioner of Police, Crime Branch, Pune City be directed to produce all the records and proceedings of the complaint dated 06.05.2000. After hearing the respective parties, the Judicial Magistrate, vide order dated 11.08.2003 rejected the said application.

(g) Aggrieved by the same, the appellant-Company preferred Criminal Application No. 3666 of 2003 before the High Court. The High Court, vide order dated 18.10.2006, issued rule and interim relief by directing the Assistant Commissioner of Police, Crime Branch-II, Pune city to produce the documents within six weeks in the Court of Judicial Magistrate, Pimpri. Pursuant to the said direction, Shri S.B Oahal, Inspector of Police, submitted a reply dated 12.03.2007 stating that the records and proceedings in respect of Crime Register No. 11 of 2000 were destroyed. Pursuant to the same, the Judicial Magistrate, vide order dated 20.08.2007, called for a report under Section 156(3) of the Code from the Respondent No. 2.

(h) Being aggrieved, the appellant-Company preferred Criminal Writ Petition being No. 1622 of 2007 before the High Court. The High Court, vide order dated 11.01.2008, dismissed the writ petition as misconceived on the ground that the

Magistrate has adhered to the directions and has given reasons for coming to his conclusion. Aggrieved by the said decision, the appellant-Company has preferred this appeal before this Court by way of special leave petition.

4. Heard Dr. A.M. Singhvi and Mr. C.S. Vaidyanathan, learned senior counsel for the appellant-Company and Mr. K.T.S. Tulsi, learned senior counsel for the respondent No.1.

Contentions:

5. Dr. A.M. Singhvi, learned senior counsel for the appellant/accused, after taking us through all the earlier complaints including the last complaint and earlier orders closing those complaints, the order of the Judicial Magistrate, First Class, Pimpri dated 20.08.2007 in Criminal Case No. 12 of 2002 and the impugned order of the High Court dated 11.01.2008, at the outset, submitted that the courts below ought to have considered that the dispute arose out of a contract and a constituted remedy is only before a civil court. He further contended that similar claim on earlier occasions were indeed investigated and finally categorized as civil in nature, while such is the position, the direction of the Magistrate calling for a report under Section 156(3) of the Code from the Crime Branch, Pune is not sustainable. He further submitted that the High Court ought to have intervened and quashed the same. According to him, the complaint and the allegations made therein do not disclose any offence and, therefore, the direction under Section 156(3) of the Code is untenable. He further pointed out that the essential ingredients for an offence under Sections 405 and 420 of the Indian Penal Code, 1860 (in short 'IPC') have not been made out, no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. In any event, according to him, in view of long delay, namely, filing of the complaint in the year 2002 with reference to the alleged disputes which pertain to the period from 1993-1995, that is, after nine years, cannot be maintained as it amounts to abuse

of process of law. He finally submitted that roping in of appellant Nos. 2-8 in the alleged offence on the hidden principle of vicarious liability is untenable. Mr. C.S. Vaidyanathan, learned senior counsel for the appellant also reiterated the same contentions.

6. On the other hand, Mr. K.T.S. Tulsi, learned senior counsel for the Respondent No. 1/complainant submitted that interference by the court at the stage of passing orders under Section 156 (3) of the Code is not warranted. He further pointed out that the accused has no right to address at this stage and the High Court is right in refusing to entertain the petition filed under Section 482 of the Code.

Discussion:

7. In order to understand the rival contentions, it is useful to refer the complaint of the Respondent No. 1 dated 30.05.2002 which was made before the Judicial Magistrate, First Class, Pimpri in Regular Criminal Case No. 12 of 2002. Respondent No. 1 herein is the complainant and all the appellants herein have been shown as accused. The said criminal complaint was made for the offences under Sections 420, 406 read with 34 IPC. The complaint proceeds that complainant is the Proprietor of M/s Rini Engineers and M/s Sherly Engineers which are small-scale industries doing fabrication job work for various industries, namely, TELCO, Ion Exchange Ltd., etc. The following averments in the complaint are relevant for our consideration:

> "(a) The complainant has been doing the said business in Maharashtra since last more than 27 years. The accused No. 1 is a company and accused No. 2 is the Chairperson of the Accused No. 1. Accused No. 3 was the Managing Director and the Accused Nos. 4 to 15 was doing service as Manager of Accused No. 1 at the relevant time. The Accused No. 1 has its office at the above address. The Accused Nos. 2 to 15 were looking after the management

and business of Accused No. 1.

(b) The complainant was doing fabrication job work for the Accused for several years. The accused placed purchase order No. 260062 dated 24.04.1995 of Rs. 3,20,000/- for designing and manufacturing two numbers stationary LPG Storage Tanks. The complainant has been granted the necessary licenses by the Explosives Department for manufacturing LPG Storage Tanks and LPG Storage Tankers. The said job is a specialized job and requires Best quality material as it involves high risks. At the relevant time, the required material was not available in the market. Therefore, the complainant requested the Accused for the supply of material for the said order and to debit the material cost from the final bill. The accused initially agreed for the same. However, subsequently insisted for payment before delivery of material. Therefore, complainant paid Rs. 1,14,098/- by pay order dated 31.07.1995 drawn on the Sadguru Jangli Maharaj Bank, Chinchwad. The Company issued material after receipt of pay order, vide excise gate Pass No. 1328 and 175713 dated 04.08.1995. The complainant received the material and was surprised to see that the accused had supplied scrap material for the manufacturing of LPG Storage Tanks and same was useless for the job. The complainant immediately contacted the accused and informed about the same. The complainant requested the accused to take the scrap material back and issue genuine material. However, accused refused to do so, the complaint has spent the amount of Rs. 60,000/- for drawing and approval etc. and Rs. 1,14,098/- by pay order for the material to the accused. Thus, the accused have cheated the complainant and there by caused wrongful loss to the complainant.

(c) The accused placed Purchase Order No. 240307 dated 22.03.1993 for Rs. 8,00,000/- for the fabrication and erection of Tower Support Structural etc. for the Mehasana

(Gujarat) Project. The accused also represented that they will hire the machinery of the complainant for the said job at the rate of Rs. 2,400/- per day. Believing the same, the complainant purchased brand new machinery of Rs. 5,80,000/- specially for the said project and dispatched the same to Mehasana site. The complainant has completed the said job according to schedule and to the satisfaction of the accused. The complainant also carried out additional work at the site as per the request of the accused. The balance outstanding for the said work is Rs. 2,47,570/- and is still receivable from the accused. The amount towards the hiring charges for the machinery is Rs. 58,32,000/- is yet to be paid by the accused. The accused have not returned the machinery of the complainant till the date and have been using the same for their other jobs also. Thus the accused owe the complainant Rs. 68,79,750/- and the same is not paid till the date.

(d) The complainant states that he has carried out several fabrication job for the accused and huge amount of Rs. 91,95,054 is outstanding from the accused till the date. In spite of several requests of the complainant, since the accused are very influential, no body has taken cognizance of the complaints of the complainant. The complainant has also filed complaint dated 15.09.1998 with Pimpri Police Station against the accused but all in vain.

(e) Thereafter the complainant filed complaint dated 06.05.2000 with Crime Branch, Pune against the accused, however, till the date police have not taken any cognizance of the same in spite of the positive opinion of the police prosecutor attached to the Officer Commissioner of Police, Pune. The accused are very influential and the complainant has no other option but to file the present complaint in Hon'ble Court.

(f) The complainant is filing herewith all the relevant documents in support of this complaint and submits that the present case warrants detailed investigation under Section 156(3) of Cr.P.C. There is a separate cell of economic offences at Crime Branch, Pune and it is necessary to send the present complaint to Crime Branch, Pune for investigation under Section 156(3) of Cr.P.C The complainant therefore prays that:-

(i)The complaint be sent to Crime Branch, Pune for investigation u/s 156(3) of Cr.P.C. and;

(ii) After receipt of the report of investigation, the accused be dealt with severally according to law and punished as per provision of law."

8. For our purpose, we are concerned with Sections 405, 406, 420 and 34 IPC which read thus:

"**405. Criminal breach of trust.-** Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

406. Punishment for criminal breach of trust.- Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part

of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

34. Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

9. Now, we have to find out whether the ingredients of Sections 405, 420 read with Section 34 have been made out from the complaint and whether the Magistrate is justified in calling for a report under Section 156(3) of the Code from the Crime Branch, Pune. Simultaneously, we have to see whether the High Court is justified in confirming the action of the Magistrate and failed to exercise its power and jurisdiction under Section 482 of the Code.

10. Before considering the validity or acceptability of the complaint and the consequential action taken by the Judicial Magistrate under Section 156(3) of the Code, let us advert to various decisions on this aspect. In *Suresh vs. Mahadevappa Shivappa Danannava & Anr.,* (2005) 3 SCC 670, this Court, on the ground of delay/laches in filing the complaint and the dispute relates to civil nature finding absence of ingredients of alleged offence of cheating under Section 420 IPC, set aside the order of the Magistrate and that of the High Court. In that case, the alleged agreement to sell was executed on 25.12.1988. A legal notice was issued to the appellant therein on 11.07.1996 calling upon him to execute the sale deed in respect of the premises in question. Thus, the complaint was submitted after a gap of 7½ years of splendid silence from the date of the alleged agreement to sell i.e. 25.12.1988. The appellant therein responded to the legal notice dated 11.07.1996 by his reply dated 18.07.1996 through his lawyer

specifically denying the alleged agreement and the payment of Rs 1,25,000/- as advance. Nothing was heard thereafter and the complainant after keeping quiet for nearly 3 years filed private complaint under Section 200 of the Code before the IVth Additional CMM, Bangalore on 17.05.1999. The Magistrate, on the same date, directed his office to register the case as PCR and referred the same to the local police for investigation and to submit a report as per Section 156(3) of the Code. A charge-sheet was filed on 04.08.2000 by the police against the appellant-Accused No. 1 only for offence under Section 420 IPC. The Magistrate took cognizance of the alleged offence under Section 190(1)(b) of the Code and issued summons to the accused-appellant therein. Aggrieved by the aforesaid process order dated 04.08.2000 passed by the Magistrate, the appellant-accused preferred the criminal revision which was dismissed by the High Court. The order of the High Court was under challenge in that appeal. It was contended that as per the averments in the complaint, even as per the police report, no offence is made out against Accused Nos. 2-4 therein. Despite this, the Magistrate issued process against Accused Nos. 2-4 as well which clearly shows the non-application of mind by the Magistrate. It was further pointed out that a perusal of the complaint would only reveal that the allegations as contained in the complaint are of civil nature and do not prima facie disclose commission of alleged criminal offence under Section 420 IPC. After finding that inasmuch as the police has given a clean chit to Accused Nos. 2-4, this Court concluded that the Magistrate ought not to have taken cognizance of the alleged offence against Accused No.1 and that the complaint has been made to harass him to come to terms by resorting to criminal process. Regarding the delay, this Court pointed out that the complaint was filed on 17.05.1999, after a lapse of 10½ years and, therefore, the private complaint filed by respondent No.1 therein is not at all maintainable at this distance of time. It was further observed that it is also not clearly proved that to hold a person guilty of cheating, it is necessary to show that he had a fraudulent or dishonest intention at the time of making the

promise and finding that the order of the Magistrate and of the High Court requiring Accused No.1/appellant therein to face trial would not be in the interest of justice, set aside the order of the High Court and of the Magistrate. It is clear that in view of inordinate delay and laches on the part of the complainant and of the fact that the complaint does not disclose any ingredients of Section 420 IPC and also of the fact that at the most it is the dispute of civil nature, this Court quashed the orders of the Magistrate and the High Court.

11. In *Madhavrao Jiwajirao Scindia & Ors. vs. Sambhajirao Chandrojirao Angre & Ors.* (1988) 1 SCC 692, this Court, after pointing out the grounds on which the criminal proceedings be quashed under Section 482 of the Code at preliminary stage by the High Court highlighted that a case of breach of trust is both a civil wrong and a criminal offence. While elaborating the same, this Court further held that there would be certain situations where it would predominantly be a civil wrong and may or may not amount to criminal offence. Based on the materials in that case, the Court concluded that the case is one of that type where, if at all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting.

12. In *Alpic Finance Ltd. vs. P. Sadasivan & Anr.* (2001) 3 SCC 513, this Court highlighted the grounds on which criminal proceedings are to be quashed under Section 482 of the Code and noted the ingredients of Section 420 IPC. In that case, the appellant was a registered company having its head office at Mumbai. It was a non-banking financial institution functioning under the regulations of Reserve Bank of India. It was carrying on business, inter alia, of leasing and hire purchase. The first respondent therein was the Chairman and founder-trustee of a trust by name “Visveswaraya Education Trust”. The second respondent was wife of the first respondent, and was also a Trustee. The Trust runs a dental college by name Rajiv Gandhi Dental College. The respondents therein entered into an

agreement with the appellant-Company therein whereby the appellant agreed to finance the purchase of 100 hydraulically-operated dental chairs. The total cost of the chairs was around Rs.92,50,000/-. The appellant-Company agreed to finance the respondents for the purchase of these chairs through a lease agreement and as per the agreement, the respondents were liable to pay rentals quarterly. The respondents agreed to pay quarterly a sum of Rs 7,50,000/- for the first year; Rs 12,50,000/- for the second year; Rs 8,00,000/- for the third year and Rs 6,25,000/- for the fourth year. As per the agreement, the appellant-Company, the lessors would have sole and exclusive right, title and interest in the dental chairs supplied till the entire hire-purchase amount was paid. In accordance with the agreement, the appellant made payments to M/s United Medico Dental Equipments and they delivered the dental chairs to the respondents. The appellant-Company alleged that the respondents were not regular in making the payments and committed default in payment of the instalments and that the bank had dishonoured certain cheques issued by the respondents. The appellant-Company also alleged that on physical verification, certain chairs were found missing from the premises of the respondents and thus they have committed cheating and caused misappropriation of the property belonging to the appellant. The appellant- Company filed a private complaint under Section 200 of the Code before the Chief Metropolitan Magistrate, Bangalore alleging that the respondents had committed offences under Sections 420, 406 and 423 read with Section 120-B IPC. In that proceeding, the appellant-Company moved an application under Section 93 of the Code to issue a search warrant to seize the property in dispute and also to hand over these items to the complainant. The Magistrate took cognizance of the alleged complaint and issued summons to the respondents and passed an order on the application filed under Section 93 of the Code to have a search at the premises of the respondents and to take possession of the properties involved in the case. These proceedings were challenged by the respondents under

Section 482 of the Code before the learned Single Judge of the Karnataka High Court at Bangalore. The learned Single Judge was pleased to quash the entire proceedings and directed the appellant-Company to return all the properties seized by the police pursuant to the warrant issued by the Magistrate. Thus, the order of the Magistrate taking cognizance and issuing process to the respondents as well as the order of search and the direction for restoration of the property to the appellant Company were set aside. Aggrieved by the same, the appellant-Company preferred appeal before this Court. It was contended on behalf of the appellant that the learned Single Judge has seriously erred in quashing the proceedings under Section 482 of the Code. It was further contended that the allegations in the complaint clearly made out offences punishable under Sections 420, 406, 423, 424 read with Section 120-B IPC. On behalf of the respondents, it was contended that the complaint was filed only to harass the respondents and it was motivated by mala fide intention. It was further argued that the entire transaction was of civil nature and that the respondents have made a substantial payment as per the hire-purchase agreement and the default, if any, was not wilful and there was no element of misappropriation or cheating. The respondents also denied having removed any of the items of the disputed property clandestinely to defeat the interest of the appellant. After considering the power under Section 482 of the Code and adverting to series of decisions including *Nagawwa vs. Veeranna Shivalingappa Konjalgi,* (1976) 3 SCC 736 and *State of Haryana vs. Bhajan Lal,* 1992 Supp (1) SCC 335, this Court concluded thus:

> **"7.** In a few cases, the question arose whether a criminal prosecution could be permitted when the dispute between the parties is of predominantly civil nature and the appropriate remedy would be a civil suit. In one case reported in Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre this Court held that if the allegations in the complaint are both of a civil wrong and a criminal

offence, there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. That was a case relating to a trust. There were three trustees including the settlor. A large house constituted part of the trust property. The respondent and the complainant were acting as Secretary and Manager of the Trust and the house owned by the Trust was in the possession of a tenant. The tenant vacated the building and the allegation in the complaint was that two officers of the Trust, in conspiracy with one of the trustees and his wife, created documents showing tenancy in respect of that house in favour of the wife of the trustee. Another trustee filed a criminal complaint alleging that there was commission of the offence under Sections 406, 467 read with Sections 34 and 120-B of the Indian Penal Code. The accused persons challenged the proceedings before the High Court under Section 482 of the Code of Criminal Procedure and the High Court quashed the proceedings in respect of two of the accused persons. It was under those circumstances that this Court observed: (SCC Headnote)

> "Though a case of breach of trust may be both a civil wrong and a criminal offence but there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. The present case is one of that type where, if at all, the facts may constitute a civil wrong and the ingredients of the criminal offences are wanting. Having regard to the relevant documents including the trust deed as also the correspondence following the creation of the tenancy, the submissions advanced on behalf of the parties, the natural relationship between the settlor and the trustee as mother and son and the fall out in their relationship and the fact that the wife of the co-trustee was no more interested in the tenancy,

> it must be held that the criminal case should not be continued."

> 10…….. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property. It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception."

After finding so, this Court concluded that the learned Judge of the High Court was perfectly justified in quashing the

proceedings and disinclined to interfere in such matters dismissed the appeal.

13. In *Anil Mahajan vs. Bhor Industries Ltd. & Anr.,* (2005) 10 SCC 228, again, a three-Judge Bench of this Court considered the issuance of process by a Magistrate for an offence under Sections 415, 418 and 420 IPC. This Court also analysed the difference between breach of contract and cheating. The appellant therein was the accused in a complaint filed against him by the respondent-Company for offence under Sections 415, 418 and 420 IPC. Based on the averments in the complaint, the Magistrate, by order dated 25.06.2001, issued the process against the accused. The order of the Magistrate notices that the complainant has filed the documents on record in which the accused promised to pay the amount but has not paid with the intent to deceive the complainant and, therefore, the complainant has made out a case to issue process against the accused under Sections 415, 418 and 420 IPC. The said order of the Magistrate was challenged before the Court of Sessions. The learned Additional Sessions Judge, Pune by order dated 19.10.2001, set aside the order of the Magistrate issuing process. The order of the learned Additional Sessions Judge was set aside by the High Court. This Court, in paragraphs 8 & 9 of the judgment, observed as under:

> **"8.** The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay……."
>
> **"9.** In *Alpic Finance Ltd. v. P. Sadasivan,* (2001) 3 SCC 513, this Court was considering a case where the

> complainant had alleged that the accused was not regular in making payment and committed default in payment of instalments and the bank had dishonoured certain cheques issued by him. Further allegation of the complainant was that on physical verification certain chairs were found missing from the premises of the accused and thus it was alleged that the accused committed cheating and caused misappropriation of the property belonging to the complainant. Noticing the decision in the case of *Nagawwa v. Veeranna Shivalingappa Konjalgi,* (1976) 3 SCC 736, wherein it was held that the Magistrate while issuing process should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused, and the circumstances under which the process issued by the Magistrate could be quashed, the contours of the powers of the High Court under Section 482 CrPC were laid down and it was held: (SCC p. 520, paras 10-11)
>
> "10. The facts in the present case have to be appreciated in the light of the various decisions of this Court. When somebody suffers injury to his person, property or reputation, he may have remedies both under civil and criminal law. The injury alleged may form the basis of civil claim and may also constitute the ingredients of some crime punishable under criminal law. When there is dispute between the parties arising out of a transaction involving passing of valuable properties between them, the aggrieved person may have a right to sue for damages or compensation and at the same time, law permits the victim to proceed against the wrongdoer for having committed an offence of criminal breach of trust or cheating. *Here the main offence alleged by the appellant is that the respondents committed the offence under Section 420 IPC and the case of the appellant is*

that the respondents have cheated him and thereby dishonestly induced him to deliver property. To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. It must also be shown that there existed a fraudulent and dishonest intention at the time of commission of the offence. There is no allegation that the respondents made any wilful misrepresentation. Even according to the appellant, the parties entered into a valid lease agreement and the grievance of the appellant is that the respondents failed to discharge their contractual obligations. *In the complaint, there is no allegation that there was fraud or dishonest inducement on the part of the respondents and thereby the respondents parted with the property.* It is trite law and common sense that an honest man entering into a contract is deemed to represent that he has the present intention of carrying it out but if, having accepted the pecuniary advantage involved in the transaction, he fails to pay his debt, he does not necessarily evade the debt by deception.

11. Moreover, the appellant has no case that the respondents obtained the article by any fraudulent inducement or by wilful misrepresentation. We are told that the respondents, though committed default in paying some instalments, have paid substantial amount towards the consideration."

(Emphasis supplied)

By applying the above principles, this Court examined the complaint and concluded that it is clear from its substance that present is a simple case of civil disputes between the parties. This Court further held that the requisite averments so as to

make out a case of cheating are absolutely absent. It further held that the principles laid down in *Alpic Finance Ltd.'s case* (supra) were rightly applied by the learned Additional Sessions Judge and it cannot be said that the ratio of the said decision was wrongly applied and on due consideration, the learned Additional Sessions Judge had rightly set aside the order of the Magistrate issuing process to the appellant. After holding so, this Court set aside the impugned judgment of the High Court and restored that of the Additional Sessions Judge.

14. In *S.K. Alagh vs. State of Uttar Pradesh & Ors.,* (2008) 5 SCC 662, this Court considered the ingredients of Sections 405 and 406 IPC - Criminal breach of trust and vicarious liability. In the said decision, after finding that the complaint petition did not disclose necessary ingredients of criminal breach of trust as mentioned in Section 405 IPC and also pointing out the ingredients of offence under Section 406 IPC, interfered with the order passed by the High Court.

15. In *Maharashtra State Electricity Distribution Company Limited & Anr. vs. Datar Switchgear Limited & Ors.,* (2010) 10 SCC 479, after perusal of the complaint, allegations therein, role of the directors mentioned therein and applicability of Section 34 IPC, this Court in paragraph 35 concluded as under:

"35. It is manifest that common intention refers to a prior concert or meeting of minds, and though it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop on the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a prearranged plan. Therefore, in order to attract Section 34 IPC, the complaint must, prima facie, reflect a common prior concert or planning amongst all the accused."

After saying so, verifying the complaint, this Court concluded that the complaint does not indicate the existence of any

prearranged plan whereby Appellant No. 2 had, in collusion with the other accused decided to fabricate the document in question and adduce it in evidence before the Arbitral Tribunal. This Court further concluded that there is not even a whisper in the complaint indicating any participation of Appellant No.2 in the acts constituting the offence, and that being the case, concluded that Section 34 IPC is not attracted. After saying so, allowed the appeal in relation to Appellant No.2 and quashed the order of the Magistrate taking cognizance against appellant No.2 in Complaint No. 476 of 2004.

16. The principles enunciated from the above-quoted decisions clearly show that for proceedings under Section 156(3) of the Code, the complaint must disclose relevant material ingredients of Sections 405, 406, 420 read with Section 34 IPC. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay and in order to avoid the period of limitation, it cannot be resorted to a criminal proceeding.

17. Dr. A.M. Singhvi, learned senior counsel for the appellant/accused contended that not only material facts were suppressed from the Magistrate but the previous three complaints to various police authorities and their closure reports were kept away from the Magistrate so as to mislead the Court. It is seen from the materials placed that three complaints containing similar allegations have been investigated previously and all were closed as the alleged claim was found to be of civil nature. In those circumstances, it did not lie for Respondent No.1-the complainant to approach the Magistrate with the same subject Complaint. Inasmuch as the dispute arose out of a contract and a constituted remedy is only before a Civil Court, the Magistrate ought to have appreciated that Respondent No.1 was attempting to use the machinery of the criminal courts for private gains and for exerting unjust, undue and unwarranted pressure on the appellants in order to fulfill his illegal demands and extract undeserving monetary gains from them.

18. The Courts below failed to appreciate that Ex. 61 is a reply filed by the Crime Branch-II and Ex. 63 is the statement of Shri V.B. Kadam, which categorically stated that the complaint preferred by Respondent No.1 registered at Crime Register No. 11/2000 was filed as being civil in nature. Even if we accept that the records were destroyed and notwithstanding such destruction, it was a matter of record that the complaint preferred by Respondent No.1 was indeed investigated and categorized as civil in nature. This aspect has not been considered either by the Magistrate or by the High Court.

19. It is settled law that the essential ingredients for an offence under Section 420, which we have already extracted, is that there has to be dishonest intention to deceive another person. We have already quoted the relevant allegations in the complaint and perusal of the same clearly shows that no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. Since the very ingredients of Section 420 are not attracted, the prosecution initiated is wholly untenable. Even if we admit that allegations in the complaint do make out a dispute, still it ought to be considered that the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Inasmuch as there are number of documents to show that appellant-Company had acted in terms of the agreement and in a bona fide manner, it cannot be said that the act of the appellant-Company amounts to a breach of contract.

20. Though Respondent No.1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with appellant-Company by initiating the criminal prosecution, it is pointed out that appellant Nos. 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial Personnel of appellant No.1-Company, who do not have any personal role

in the allegations and claims of Respondent No.1. There is also no specific allegation with regard to their role.

21. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company.

22. It is useful to demonstrate certain examples, namely, Section 141 of the Negotiable Instruments Act, 1881 which specifically provides that if the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Likewise, Section 32 of the Industrial Disputes Act, 1947 provides that where a person committing an offence under this Act is a company, or other body corporate, or an association of persons, every director, manager, secretary, agent or other officer or person concerned with the management thereof shall, unless he proves that the offence was committed without his knowledge or consent, be deemed to be guilty of such offence. We have already noted that the offence alleged in the criminal complaint filed by respondent No.1 is under Sections 405 and 420 IPC whereunder no specific liability is imposed on the officers of the company, if the alleged offence is by the Company. In the absence of specific details about the same, no person other than appellant No.1-Company can be prosecuted under the alleged complaint.

23. The Courts below failed to appreciate an important aspect that the complaint came to be filed in the year 2002 when the alleged disputes pertain to the period from 1993-

1995. As rightly pointed out, the Courts below ought to have appreciated that respondent No.1 was trying to circumvent the jurisdiction of the Civil Courts which estopped him from proceeding on account of the law of limitation.

24. We have already pointed out that respondent No.1 had previously filed three complaints which were concluded after exhaustive enquiry with the respective police authorities. The first complaint was on 06.05.2000 being Javak No. 974/2000 with the Crime Branch-II, Pune which registered the same in its Criminal Register No. 11/2000. Pursuant thereto, the appellants were summoned and exhaustive enquiry was conducted by the Crime Branch-II and after recording the statements and perusal of documents and after undertaking an extensive interrogation, the Crime Branch-II closed the case. The said closure of the case was informed to respondent No.1 by the police authorities by their letter dated 28.07.2000.

25. The materials placed further show that notwithstanding the complaint dated 06.05.2000 which was closed by the Crime Branch-II, another complaint on the same facts, was filed by respondent No.1 at the Bhosari Police Station being Javak No. 3142/2001. It is pointed out that the appellant and its officers attended the Bhosari Police Station, thereafter the said complaint was also closed after the facts were placed before the officers of the Bhosari Police Station.

26. Apart from these complaints, respondent No.1 once again filed a third complaint at the Commissioner's Office, Crime Branch, Pune being Javak No. 100/2001. The officers of appellant-Company appeared before the Crime Branch, who after perusing the documents and the written statements of appellant No.1, informed the appellants that the matter was closed.

27. It is the grievance of the appellants that without disclosing these material facts and suppressing the fact that the complainant had previously filed three different complaints

to various police authorities and that the said complaints were closed on being classified as civil disputes, the complainant had filed the aforesaid criminal complaint before the Magistrate being RCC No. 12 of 2002.

28. Mr. K.T.S. Tulsi, learned senior counsel for respondent No.1 has pointed out that at this stage, namely, issuance of direction to the police for submission of report under Section 156(3) of the Code, the accused has no role and need not be heard. The said contention is undoubtedly in consonance with the procedure prescribed. However, in view of specific direction of the Division Bench of the High Court by a common order dated 10.06.2003, disposing off the cases by remitting the matter back to the Magistrate for reconsideration of the entire prayer as made by the complainant and to pass fresh orders, after giving adequate opportunity of hearing to both the sides, and decide afresh the application seeking direction under Section 156(3) by giving cogent reasons for coming to such conclusion, the procedure adopted by the Magistrate cannot be faulted with. Though the appellant Company/accused has no right to be heard at this stage in view of the direction of the High Court, no exception be taken to the order of the Magistrate hearing the Complainant and the appellant Company/accused even at the stage of calling for a report under Section 156(3) of the Code.

29. The entire analysis of the complaints with reference to the principles enunciated above and the ingredients of Sections 405, 406, 420 read with Section 34 IPC clearly show that there was inordinate delay and laches, the complaint itself is inherently improbable contains the flavour of civil nature and taking note of the closure of earlier three complaints that too after thorough investigation by the police, we are of the view that the Magistrate committed a grave error in calling for a report under Section 156(3) of the Code from the Crime Branch, Pune. In view of those infirmities and in the light of Section 482 of the Code, the High Court ought to have quashed

those proceedings to safeguard the rights of the appellants. For these reasons, the order passed by the Judicial Magistrate First Class, Pimpri in CC No. 12 of 2002 on 20.08.2007 and the judgment of the High Court dated 11.01.2008 in Criminal Writ Petition No. 1622 of 2007 are set aside. The complaint filed by Respondent No.1 herein is quashed.

30. For the reasons stated above, the appeal is allowed.

D.G. Appeal allowed.

DNYANESHWAR RANGANATH BHANDARE & ANR.
v.
SADHU DADU SHETTIGAR (SHETTY) & ANR.
(Civil Appeal Nos. 8400-8401 of 2011)

SEPTEMBER 30, 2011

[R.V. RAVEENDRAN AND A.K. PATNAIK, JJ.]

Constitution of India, 1950:

Article 136 – Interference by Supreme Court – Suit for possession of premises by landlord alleging that the respondents were gratuitous licencees regarding one room and unauthorized encroachers in respect of the second room, decreed – Suit for permanent injunction by respondents that they were tenants – Trial court held that respondents continued in occupation as licencee and not as tenant – First appellate court holding that the appellants failed to prove that the respondents were gratuitous licensees or that they had encroached upon one room, decreed the suit for injunction by the first respondent – High Court upheld the order in second appeals – On appeal, held: Burden was on the respondents to establish that they were tenants and not licensees but the first appellate court wrongly placed the burden upon the appellants – None of the documents produced or relied upon by respondents evidenced tenancy or payment of rent – First appellate court failed to record any finding that respondents were tenants – Documents produced by the respondents which merely showed their possession were wrongly interpreted to hold that the appellants failed to prove that respondents were gratuitous tenants – High Court did not interfere on the ground that no question of law was involved – It failed to notice that the inferences and legal effect from proved facts is a question of law and the inferences drawn by the first appellate court were wholly unwarranted – Thus, the judgment of the first appellate court and the High

Court are unsustainable and the findings of the trial court that respondents are gratuitous licencees was correct and justified – Decree for possession of the suit portions granted by the trial court is restored.

Article 136 – Jurisdiction under – Exercise of – Interference with findings of facts – When warranted – Stated.

Appellant No. 1 and 2 are the sons of 'L'. It is the case of the appellants' that their mother was staying alone in the suit premises. In the year 1985, second respondent was engaged as a servant to look after 'L' and was allowed to reside in one of the room as a licensee without any rent. Next year 'L' died and second respondent was allowed to continue as a licencee for some time. However, she did not vacate the room and first respondent with whom second respondent was having a live-in relationship, forcibly occupied the other room and claimed himself to be tenant of the two rooms. First respondent filed a suit for permanent injunction asserting himself to be the tenant of the suit premises whereas the appellants filed suit for possession of the suit premises contenting that the respondents were gratuitous licencees regarding one room and unauthorized encroachers in respect of the second room. The trial court decreed both the suits holding that the appellants are the owners and they have established that second respondent was their licencee. Aggrieved, respondent No. 1 and 2 filed an appeal against the decree for possession and respondent no. 1 filed an appeal against the dismissal of his suit for injunction. The first appellate court holding that the appellants failed to prove that the respondents were gratuitous licensees or that they had encroached upon one room dismissed the suit for possession by appellants and decreed the suit for injunction by the first respondent. The appellants filed second appeals. The High Court dismissed the same

holding that the finding of fact by the lower appellate court that the respondents were not gratuitous licensees did not call for interference and no substantial question of law arose for consideration. Therefore, the appellants filed the instant appeals.

Allowing the appeal, the Court

HELD: 1.1 Normally this Court will not, in exercise of jurisdiction under Article 136 of the Constitution of India, interfere with finding of facts recorded by the first appellate court, which were not disturbed by the High Court in second appeal. But what should happen if the first appellate court reverses the findings of fact recorded by the trial court by placing the burden of proof wrongly on the plaintiffs and then holding that the plaintiffs did not discharge such burden; or if its decision is based on evidence which is irrelevant or inadmissible; or if its decision discards material and relevant evidence, or is based on surmises and conjectures; or if it bases its decision on wrong inferences drawn about the legal effect of the documents exhibited; and if grave injustice occurs in such a case on account of High Court missing the real substantial question of law arising in the appeal and erroneously proceeds on the basis that the matter does not involve any question of law and summarily dismisses the second appeal filed by the appellant? In this context the legal effect of proved facts and documents is a question of law. In such cases, if the circumstances so warranted, this court may interfere in an appeal by special leave under Article 136. [Para 9] [199-D-H]

Dhanna Mal vs. Rai Bahadur Lala Moti Sagar **AIR 1927 P.C. 102 and** *Gujarat Ginning & Manufacturing Co. Ltd. vs. Motilal Hirabhai Spinning & Manuacturing Co. Ltd*. **AIR 1936 PC 77 – relied on.**

1.2 Two suits were tried together. In both the suits (suit for possession filed by the appellants, and suit for permanent injunction filed by the first respondent), the trial court framed issues placing the burden on both the plaintiff and defendants. The appellants were required to prove whether the suit portions were given to second respondent as a gratuitous licensee. The respondents were required to prove that they were in occupation from 1982 as tenants, initially by paying Rs.25/- per month as rent up to 1988 and thereafter at the rate of Rs.60/- per month. These issues were proper as it was evident from the pleadings that respondents were in possession of suit rooms, and appellants claimed that the respondents were licencees and respondents claimed that they were tenants, but admitted that there was no document evidencing tenancy/lease or payment of rent. The entire evidence was analysed in detail by the trial court, leading to the findings that the respondents were in occupation of the suit portions as gratuitous licensees and the respondents failed to prove that they were tenants paying rent. In appeals filed by the respondents, the court wrongly shifted the entire burden of proof on the appellants and held that the appellants had failed to prove that respondents were gratuitous licensees and consequently dismissed the suit for possession filed by the appellants. Admittedly there was no lease deed or tenancy agreement to evidence the tenancy; nor were there any receipts for payment of any rent. The first appellant had given evidence on oath that respondents were gratuitous licensees and they had never paid any rent or other charges and his evidence was corroborated by a neighbour (PW2). In the circumstances, the burden was on the occupants (respondents) to establish that they were tenants and not licensees. But the first appellate court chose to wrongly place the burden upon the appellants. The first appellate court failed to record any finding that the respondents were the tenants. The

documents produced by the respondents which merely showed their possession were wrongly interpreted to hold that the appellants failed to prove that respondents were gratuitous tenants. [Para 10] [200-B-H; 201-A]

1.3 'L' was an old lady. The second appellant who was staying with his aged mother in 1985, was obviously not able to look after her. In the beginning of 1986, he left for place 'V' in connection with his employment. 'L' was all alone from then till her death in November, 1986. The evidence of first appellant (PW1) is to the effect that the second respondent was appointed as a servant to look after his mother in the year 1985 and was permitted to stay in a portion of the premises free of rent, corroborated by the evidence of the neighbour (PW2) and the fact that there is absolutely no evidence of tenancy, that when his mother 'L' died, second respondent sought permission to continue living in a portion of the property till she got some alternative accommodation, and that the appellant agreeing for the same, particularly as that also solved the problem of someone looking after the property as care taker, becomes very probable. His evidence is not shaken in cross-examination. There is nothing to disbelieve the evidence of PW1 and PW2. [Para 12] [201-F-H; 202-A]

1.4 None of the owners was staying at place 'V' and according to appellants second respondent continued to stay in a portion of said Premises as a gratuitous licencee even after November 1986 and the first respondent was also living with her. Admittedly, there was no lease deed or tenancy agreement between the parties. No rent receipts are produced by the defendants. There was no document evidencing the tenancy or evidencing payment of any rent to the owners of the property, the trial court also placed the burden upon the defendants to prove that they were residing in the premises as tenants. The trial court believed the evidence

of PW1 supported by the evidence of the neighbour (PW2), that 'L' was ailing and to look after her to look after the house, 'L' had engaged the second respondent as a maid servant and given her a place to stay free of cost as licencee and that the first respondent was also staying with her and neither of them had ever paid any rent to appellants or 'L'. [Para 14] [202-F-H; 203-A-B]

1.5 The trial court considered the documentary evidence: Assessment Register extracts; Tax paid receipts; Bank cash deposit challan counter foils; Electoral roll for 1991; Notices through counsel dated 9.10.1992 and 15.6.1993 with acknowledgments, produced by the respondents to establish that they were the tenants. The trial court held that the said documents established the claim of tenancy by the respondents and consequently, held that respondents failed to prove that they were in occupation of the premises from February 1982 as tenants on a rent of Rs.25 per month from 1982 and Rs.60 per month from 1988. The court however, held that there was no evidence to show that 'S' broke open the lock of 10' x 10' room and occupied it illegally. The court held that as the evidence showed that respondents were living as husband and wife and rejected the claim of the appellants that first respondent had forcibly occupied the premises, particularly as the appellants had not lodged any complaint in regard to such illegal occupation. The fact that the respondents were in possession of the B & C schedule properties was not in dispute and therefore, the evidence that was required was evidence to show tenancy and not possession. The trial court found that the tax receipts were issued in the name of the owners and the fact that first respondent had produced some tax receipts merely showed that the owner had sent the tax through respondents for payment as they were not staying at place 'V'. In regard to remittances to the Bank, he found that stray remittances

of Rs.300, Rs.60 and Rs.300 did not prove that they were paid towards the rent, or that the said payments were made with the knowledge and consent of the appellants. In regard to the other documents, the trial court held that all documents showed that the respondents were in possession but did not establish any tenancy. [Para 15] [203-C-H; 204-A-B]

1.6 On the very same material (that is Assessment Register extracts, tax paid receipts, bank cash deposit challans, Electoral Roll and notices), the first appellate court came to the conclusion that the case of appellants (in the pleadings and evidence), that second respondent was inducted as a licencee was not believable. Though the first appellate court does not anywhere record a finding that the respondents had established that they were the tenants, but concluded that the appellants failed to give a proper explanation in regard to the documents produced by the respondents and therefore, their suit should be dismissed. [Para 16] [204-C-D]

1.7 None of the documents produced or relied upon by respondents evidenced tenancy or payment of rent. The documents no doubt established that respondents were in possession of a portion of the said premises, but that fact was never in dispute. It should be noted that though respondents submitted that they occupied the suit portions in 1982, they did not prove occupation of the suit portions from 1982. The first appellate court erroneously held that the appellants had failed to offer satisfactory explanation regarding the documents relied upon by the respondents and held that therefore, the suit should be dismissed. The first appellate court did not record any finding that these documents produced by respondents established a tenancy. In fact, there is no finding in the entire judgment that the respondents had proved that they were the tenants. The documents relied

upon by respondents do not establish a tenancy. The trial court found that none of these documents established tenancy. The appellants had explained all documents relied upon by the respondents by demonstrating that they only prove occupation (which was not disputed) but not tenancy. When there was nothing more to explain, the first appellate court held that appellants failed to explain those documents and consequently failed to establish that respondents were licencees. The first appellate court inferred from documents which disclosed mere occupation of a portion of the house and documents which showed some payments which cannot be linked to rent, that appellants *failed to prove* that the occupation by respondents was as gratuitous licensees. It did not however, infer from the documents that there is a tenancy. The entire reasoning is therefore, unsound. In spite of the said legal lacunae, the High Court did not interfere on the ground that no question of law was involved. It failed to notice that the inferences and legal effect from proved facts is a question of law and the inferences drawn by the first appellate court were wholly unwarranted. The fact that was proved was possession of suit portions which was not in dispute, but not tenancy in regard to the suit portions, which was in dispute. In the absence of any documentary evidence showing the tenancy or payment of rent, the evidence of PWs.1 and 2 is more trustworthy and probable than the uncorroborated interested evidence of DW1. (The evidence of DWs. 2 and 3 does not have any bearing on the issue of tenancy claimed by respondents). Therefore, the judgments of the first appellate court and the High Court are unsustainable and the finding of the trial court that respondents are gratuitous licencees was correct and justified. The judgment of the High Court and the first appellate court is set aside and the decree for possession of the suit

portions granted by the trial court is restored. [Para 27 & 28] [208-G-H; 209-A-H; 210-A-B]

Dhanna Mal vs. Rai Bahadur Lala Moti Sagar **AIR 1927 P.C. 102;** *Gujarat Ginning & Manufacturing Co. Ltd. vs. Motilal Hirabhai Spinning & Manuacturing Co. Ltd*. **AIR 1936 PC 77 – referred to.**

Case Law Reference:

AIR 1927 PC 102	**Referred to**	**Para 9**
AIR 1936 PC 77	**Referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8400-8401 of 2011.

From the Judgment and Order dated 07.10.2008 of the High Court of Bombay in SA No. 298 and 299 of 2008.

Prasanth P. and T. Harish Kumar for the Appellants.

Pravin Satale and Rajiv Shankar Dvivedi for the Respondents.

The Judgment of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted. Parties will be referred by their ranks in the first matter arising from the suit for possession in RCS No.278/1993.

2. The case of appellants is as under : The appellants are brothers and are the owners of premises No.289 (New No.424) Gandhi Chowk, Vita (described in schedule 'A' to the plaint and referred to as the 'said property'). Two rooms in the said property, one measuring 10' 6" x 22' and the other measuring 10' x 10' (described the schedules B and C to the plaint and together referred to as the "suit portions") are the subject matter of the dispute. The said property originally belonged to Ranganath Bhandare, who was living in the said property with

his wife Laxmibai (mother of the appellants), two sons (appellants 1 and 2) and a daughter. After the death of Ranganath Bhandare, the daughter got married in 1984 and started living separately. Appellant No.2 got married in 1985 and shifted to Sangli in connection with his employment in the beginning of 1986. Appellant No.1 was away at Pune in connection with his employment. Thus appellants' mother Laxmibai who was aged and suffering from several complaints was staying alone in the said property from the middle of 1986. The second respondent (Chhaya) was engaged in or about the year 1985 as a servant to look after Laxmibai and was allowed to reside in one room as a licencee without any rent. In November 1986, Laxmibai died. The second respondent requested the appellant for some time to vacate the room stating that she would leave as soon as she got some alternative accommodation. As second respondent had looked after their mother and their property, the appellants agreed for her continuing as licencee for some time. She did not however vacate. Taking advantage of the fact that the owners were not around, she and the first respondent (Sadhu) with whom she had a 'living-in-relationship', broke open the door of another room (10' x 10') and occupied it. Further, first respondent started asserting that he is the tenant of the suit portions (two rooms) and filed RCS 114/1993 on the file of the Civil Judge, Junior Division, Vita, against the first appellant, seeking a permanent injunction. In these circumstances, the appellants filed RCS No.278/1993 for possession of the suit portions, contending that respondents were gratuitous licencees regarding one room and unauthorized encroachers in respect of second room. They also sought damages/mesne profits for wrongful occupation.

3. The suit was resisted by the respondents on the ground that the first respondent (second defendant) was the husband of second respondent (first defendant); that they were in occupation of the suit premises as tenants on a monthly rent of '25 from February 1982; that the rent was increased to '60/

- per month from 1988; that the appellants illegally disconnected the electricity supply to the suit portions on 25.8.1991 and tried to forcibly evict the respondents; that the first respondent had therefore lodged a complaint under section 24(4) of the Bombay Rents Hotel, and Lodging House Rates Control Act, 1947 ('Rent Act' for short) and filed an application for fixation of standard rent under section 11 of the Rent Act. They also alleged that the appellants prevented them from carrying out repairs to the premises which was in a dilapidated condition and were threatening to evict them from the premises. Therefore, the first respondent filed a suit for permanent injunction in RCS No.114/1993 to restrain the first appellant from dispossessing him from the premises without due process of law.

4. The suit for permanent injunction (RCS No.114/1993) filed by first respondent was resisted by the first appellant. The averments in the plaint and written statement in the suit for injunction were the same as the averments in the written statement and plaint respectively in the suit for possession filed by appellants.

5. Both suits were tried together. The trial court decreed both the suits by a common judgment dated 17.7.2002. The trial court held that the appellants are the owners and they have established that second respondent (first defendant) was their licencee. The trial court after exhaustive consideration of the evidence held that the respondents had failed to prove that they were residing in the suit premises as tenants from February, 1982 on a monthly rent of Rs. 25 or that they were paying the rent at the rate of Rs. 60/- per month from the year 1988. The trial court also held that the second respondent was in possession of the two rooms as a licencee with the permission of Lakshmibai and had continued in occupation as gratuitous licencee and was not a tenant; and that the first respondent had not trespassed or forcibly occupied the second room but was residing in the suit portions with the licensee (second

respondent) as her husband. As the respondents were licensees and the licence had been revoked, the trial court held that the appellants were entitled to possession of the suit portions. Consequently, RCS No.278/1993 for possession filed by the appellants was decreed and the respondents were directed to deliver vacant possession of the suit portions within sixty days. The trail court also directed a separate enquiry regarding damages and mesne profits. As the claim for tenancy was rejected, but as respondents were in occupation of two rooms, the trial court decreed RCS No.114/1993 filed by first respondent in part, and directed that the appellants shall not evict the first respondent otherwise than in accordance with law. As the trial court has granted a decree for possession simultaneously, the decree in RCS No.114/1993 was academic.

6. Feeling aggrieved respondents 1 and 2 filed Regular Civil Appeal No.180/2002 against the decree for possession. Respondent No.1 filed a Regular Civil Appeal No.198/2002 against the dismissal of his suit for injunction. The first appellate court (District Court, Sangli) allowed both appeals by its common judgment dated 13.12.2007. The first appellate court formulated the following five questions for consideration : (i) Whether defendants in RCS No.278/93 are in unauthorized and illegal possession by making an encroachment in suit property? (ii) Whether the suit property-B & C portions was given to Chhaya as a gratuitous licensee in since 1986? (iii) Whether the possession of schedules B & C properties by Sadhu is referable to any legal right? (iv) Whether the possession of Sadhu was illegally obstructed by the owners? (v) What relief?

7. The first appellate court answered the first two points in the negative and the third and fourth in the affirmative. The first appellate court held that appellants failed to prove that the respondents were gratuitous licensees or that they had encroached upon one room. Consequently, it dismissed the suit for possession by appellants and decreed the suit for injunction by the first respondent. It did not address itself or

decide whether respondents were tenants. It held that they had paid some amounts and appellants had failed to explain the said payments.

8. The second appeals filed by the appellants challenging the judgment and decree of the first appellate court were dismissed by the High Court by a short common order dated 7.10.2008 holding that the finding of fact by the lower appellate court that the respondents were not gratuitous licensees did not call for interference and no substantial question of law arose for consideration. The said common judgment is under challenge in these appeals by special leave.

9. Normally this Court will not, in exercise of jurisdiction under Article 136 of the Constitution of India, interfere with finding of facts recorded by the first appellate court, which were not disturbed by the High Court in second appeal. But what should happen if the first appellate court reverses the findings of fact recorded by the trial court by placing the burden of proof wrongly on the plaintiffs and then holding that the plaintiffs did not discharge such burden; or if its decision is based on evidence which is irrelevant or inadmissible; or if its decision discards material and relevant evidence, or is based on surmises and conjectures; or if it bases its decision on wrong inferences drapwn about the legal effect of the documents exhibited; and if grave injustice occurs in such a case on account of High Court missing the real substantial question of law arising in the appeal and erroneously proceeds on the basis that the matter does not involve any question of law and summarily dismisses the second appeal filed by the appellant? In this context we may remember that the legal effect of proved facts and documents is a question of law. (See *Dhanna Mal vs. Rai Bahadur Lala Moti Sagar* [AIR 1927 P.C. 102] and *Gujarat Ginning & Manufacturing Co. Ltd. vs. Motilal Hirabhai Spinning & Manuacturing Co. Ltd*. [AIR 1936 PC 77]. In such cases, if the circumstances so warranted, this court may interfere in an appeal by special leave under Article 136. Let

us therefore consider whether circumstances in this case warrant such interference.

10. Two suits were tried together. In both the suits (suit for possession filed by the appellants, and suit for permanent injunction filed by the first respondent), the trial court framed issues placing the burden on both the plaintiff and defendants. The appellants were required to prove whether the suit portions were given to second respondent as a gratuitous licensee. The respondents were required to prove that they were in occupation from 1982 as tenants, initially by paying ‘ 25/- per month as rent up to 1988 and thereafter at the rate of ‘ 60/- per month. These issues were proper as it was evident from the pleadings that respondents were in possession of suit rooms, and appellants claimed that the respondents were licencees and respondents claimed that they were tenants, but admitted that there was no document evidencing tenancy/lease or payment of rent. The entire evidence was analysed in detail by the trial court, leading to the findings that the respondents were in occupation of the suit portions as gratuitous licensees and the respondents failed to prove that they were tenants paying rent. In appeals filed by the respondents, the court wrongly shifted the entire burden of proof on the appellants and held that the appellants had failed to prove that respondents were gratuitous licensees and consequently dismissed the suit for possession filed by the appellants. As noticed above, admittedly there was no lease deed or tenancy agreement to evidence the tenancy; nor were there any receipts for payment of any rent. The first appellant had given evidence on oath that respondents were gratuitous licensees and they had never paid any rent or other charges and his evidence was corroborated by a neighbour (PW2). In the circumstances, the burden was on the occupants (respondents) to establish that they were tenants and not licensees. But the first appellate court chose to wrongly place the burden upon the appellants. The first appellate court failed to record any finding that the respondents were the tenants. The documents produced by the respondents which merely showed

their possession were wrongly interpreted to hold that the appellants failed to prove that respondents were gratuitous tenants.

11. The undisputed facts noted by the first appellate court are : The appellants are the owners of the Premises No.289 (Schedule A property), Gandhi Chowk, Vita. The suit property earlier belonged to Ranganath Bhandare (father of appellants) who died in the year 1979. Dnyaneshwar (the first appellant) was employed in Pune and was away from Vita for several years. Lata, the sister of appellants got married and left the premises in the year 1984. Mukund, the second appellant got married in 1985 and left Vita and shifted to Sangli in the first half of 1986. Appellants' mother Laxmibai who was staying alone, died in November, 1986. Property bearing No.289 consists of a ground floor and first floor. Two rooms described in Schedules B & C to the plaint were in the possession of the second respondent Chhaya and the first respondent Sadhu. There was no lease deed or tenancy agreement evidencing tenancy, nor were any receipts to show payment of any rent. It is in this background, that the evidence was required to be examined.

12. Laxmibai was an old lady. The second appellant who was staying with his aged mother in 1985, was obviously not able to look after her. In the beginning of 1986, he left Vita in connection with his employment. Laxmibai was all alone from then till her death in November, 1986. Seen in this background, the evidence of first appellant (PW1) that the second respondent was appointed as a servant to look after his mother in the year 1985 and was permitted to stay in a portion of the premises free of rent, corroborated by the evidence of the neighbour (PW2) and the fact that there is absolutely no evidence of tenancy, that when his mother Laxmibai died, second respondent sought permission to continue living in a portion of the property till she got some alternative accommodation, and that the appellant agreeing for the same,

particularly as that also solved the problem of someone looking after the property as care taker, becomes very probable. His evidence is not shaken in cross-examination. There is nothing to disbelieve the evidence of PW1 and PW2.

13. According to the appellants, the first respondent was not legally married to second respondent and was a live-in-partner. According to the respondents they were a married couple. Whether they were a married couple or whether they were merely living together, is not very relevant for the decision in this case, as the fact that both were living in the schedule portion was not disputed. Further one of the witnesses of respondents — G.S.Thakale (DW3) gave evidence that second respondent and first respondent were his tenants in the year 1980 and that they got married some time in the year 1981 and that thereafter they shifted to the premises of appellants, demonstrates that at some point of time, second respondent and first respondent were living together without marriage. DW3 also admitted that he did not have any personal knowledge about the solemnization of marriage of second respondent with first respondent. However all the courts proceeded on the basis that they were married in the absence of any evidence to rebut the claim of Respondents 1 and 2 that they were a married couple.

14. None of the owners was staying at Vita and according to appellants second respondent continued to stay in a portion of Premises No.289 as a gratuitous licencee even after November 1986 and the first respondent was also living with her. Admittedly, there was no lease deed or tenancy agreement between the parties. No rent receipts are produced by the defendants. No document was produced by respondents which showed that they were tenants of the suit portions (B & C schedule properties) or that they were paying any rent to the owners of the property. As it was an admitted position that there was no document evidencing the tenancy or evidencing payment of any rent, the trial court also placed the burden upon

the defendants to prove that they were residing in the premises as tenants. The trial court believed the evidence of PW1 supported by the evidence of the neighbour (S.B.Bhandare) (PW2), that Laxmibai was ailing and to look after her and to look after the house, Laxmibai had engaged the second respondent as a maid servant and given her a place to stay free of cost as licencee and that the first respondent was also staying with her and neither of them had ever paid any rent to appellants or Laxmibai.

15. The trial court considered the following documentary evidence produced by the respondents to establish that they were the tenants : (a) Assessment Register extracts (Ex. 61 and Ex. 62); (b) Tax paid receipts (Ex. 63, Exs. 67 to 72); (c) Bank cash deposit challan counter foils (Ex. 64 to Ex. 66); (d) Electoral roll for 1991 (Ex. 74); (e) Notices through counsel dated 9.10.1992 and 15.6.1993 (Ex. 75 & Ex.77) with acknowledgments (Ex. 76 & Ex.78). The trial court held that none of the above documents established the claim of tenancy by the respondents and consequently, held that respondents failed to prove that they were in occupation of the premises from February 1982 as tenants on a rent of Rs. 25 per month from 1982 and Rs. 60 per month from 1988. The court however held that there was no evidence to show that Sadhu broke open the lock of 10' x 10' room and occupied it illegally. The court held that as the evidence showed that respondents were living as husband and wife and rejected the claim of the appellants that first respondent had forcibly occupied the premises, particularly as the appellants had not lodged any complaint in regard to such illegal occupation. The fact that the respondents were in possession of the B & C schedule properties was not in dispute and therefore the evidence that was required was evidence to show tenancy and not possession. The trial court found that the tax receipts were issued in the name of the owners and the fact that first respondent had produced some tax receipts merely showed that the owner had sent the tax through respondents for payment as they were not staying in Vita. In regard to

remittances to the Bank, he found that stray remittances of Rs. 300, Rs. 60 and Rs. 300 did not prove that they were paid towards the rent, or that the said payments were made with the knowledge and consent of the appellants. In regard to the other documents, the trial court held that all documents showed that the respondents were in possession but did not establish any tenancy.

16. On the very same material (that is Assessment Register extracts, tax paid receipts, bank cash deposit challans, Electoral Roll and notices), the first appellate court came to the conclusion that the case of appellants (in the pleadings and evidence), that second respondent was inducted as a licencee was not believable. Though the first appellate court does not anywhere record a finding that the respondents had established that they were the tenants, but concluded that the appellants failed to give a proper explanation in regard to the documents produced by the respondents and therefore their suit should be dismissed. We may examine each of the conclusions purportedly recorded by the first appellate court with reference to documents.

Re : Tax paid Receipts (Exs. 63, 67 to 72)

17. Ex. 63, 67 to 72 are the tax receipts issued by the Vita Municipality produced by first respondent which showed that the taxes for the period 1989-90 upto 1992-1993 were paid in the name of the registered owner Ranganath Bhandare. The first appellate court held that the appellant has not explained these receipts. But if the respondents were licencees in the premises, looking after Laxmibai and the premises, there is nothing strange in the appellants who were not living at Vita, to send the tax amount through respondents, for payment to the Municipal authorities. It is possible that first respondent was planning from 1988-89 onwards to create some kind of evidence to claim tenancy and had therefore retained the tax receipts. What is significant is that these receipts do not show that the amounts paid as taxes were paid by the first respondent

were from his personal funds. Further the case of the first respondent is that he was a tenant from 1982 to 1988 paying '25/- p.m. and thereafter '60/- per month. It is not the case of the respondents that in addition to rent, they were required to pay the municipal taxes and that they were therefore paying the municipal taxes. If payment of taxes was part of the consideration for the tenancy, there is no explanation by respondents as to why they did not pay the taxes for earlier years.

Re : Assessment Register Extracts (Exs.61 and 62)

18. The respondents relied upon the assessment register extracts (Exs. 61 and 62) pertaining to the years 1988-89 to 1991-92 in regard to property No.289. Appellants have relied upon assessment Register extract (Ex. 4) and CTS extracts (Exs. 5 to 8). These documents show that premises No.289 originally stood in the name of Ranganath Bhandare as owner and thereafter the property was mutated in the names of his legal representatives, namely, the appellants, their mother and sister. They also showed that initially Bhanudas Keshav Waghmode was a tenant in the said property. Ex. 62 pertaining to the years 1988-89 to 1991-92 showed that apart from Bhanudas Keshav Waghmode, first respondent was also an occupant of a portion of the premises.

19. The fact that Bhanudas Keshav Waghmode was a tenant of another portion of premises No.289 is not in dispute. The fact that second respondent and first respondent were also living in premises No.289, has never been in dispute. The issue is whether they were in occupation as tenants or as licensees. The assessment register extract would not help the respondents to establish that they were tenants of a portion of the premises. It will at best help them to show that they were occupying a portion of premises No.289. The fact that the name of first respondent was introduced as an occupant only during the year 1988-1989 belies his case that he was in occupation of the suit portions as a tenant from 1982. It only shows that in the absence

of the owners, first respondent had managed to get his name inserted in the municipal records as an occupant.

Re : Remittances to owner's account (Exs. 64, 65 and 66)

20. Exs. 64 to 66 produced by first respondent show that he had deposited Rs. 300, Rs. 60 and Rs. '360/- on 19.8.1988, 20.11.1991 and 14.3.1989 to the account of first appellant with Bank of Karad. The case of the respondents was that when Laxmibai inducted them as tenants of the suit portions on a monthly rent of '25/-; that they used to pay rent to Laxmibai; that after her death, they used to pay rent to the first appellant; that in 1988, the first appellant compelled them to increase the rent to 'Rs. 60/-; that as both the appellants were living outside Vita, the first respondent used to deposit rent in the bank account of the first appellant with Bank of Karad. The first appellate court held the fact that the amounts were deposited to first appellant's account showed that the appellants had given the account number to first respondent and inferred that the said amounts might have been deposited towards rent.

21. Appellants have given satisfactory explanation. They submitted that the bank account was a non-functional and non-operated account at Vita and as no notice of deposit was given, they were unaware of the deposits. They submitted that Bank of Karad went into liquidation and they therefore did not even have any record of these payments. They argued that as the second respondent was looking after Laxmibai and as respondents were also looking after the premises, the respondents would have come to know about the bank account of the first appellant and that first respondent, being aware that one day or the other, the owners will take action to evict them, had deposited the said amounts to create some kind of evidence. It should also be noted that the respondents did not send any communication informing the appellants about the deposits to the first appellant. Nor did the challans showed that the deposits were being made towards rent. These factors when coupled with the following three circumstances show that

the deposits were not bonafide: (i) There were no rent receipts from either Laxmibai or from the appellants; (ii) the respondents did not choose to send the rents by postal money orders; and (iii) there is no explanation as to non-deposit of the alleged rents for the earlier period. These receipts cannot be relied upon to support the uncorroborated oral testimony of DW-1 (Sadhu) that the same were deposited towards rent.

Re : Electoral Roll (Ex. 74) :

22. The Electoral Roll (Ex. 74) showed the respondents as husband and wife and they were staying in the premises No.289 in the year 1991. The appellate court held that Ex. 74 showed the respondents as the residents of premises No.289 in the year 1991 and if the second respondent was a mere licensee and if there was no marriage solemnized between her and the first respondent, the name of first respondent would not have been recorded as husband in Ex. 74. From this the first appellate court inferred that the second respondent was not a mere licensee and appellants had failed to prove that the first respondent was not the husband of the second respondent.

23. The Electoral Roll will not show whether a person is occupying a premises as a tenant or as a licencee. It may at best show that the person was residing in the premises. The fact that both respondents were residing in the premises had never been disputed. If they represented that they were husband and wife, the electoral roll will reflect the same. The inference drawn by the first appellate court from the electoral roll, that second respondent was not a mere licencee, is totally illogical and unsustainable.

Re : Notices (Exs. 75 to 78)

24. The first appellate court found that notices dated 9.10.1992 and 15.6.1993 issued by the respondents were not replied by the appellants and draws an inference therefrom that the averments therein should be true. But by then the litigations

were already pending. The petition for fixation of fair rent had been filed on 3.1.1992 (Application No.1/1992). A criminal case under section 24(4) of Rent Act had also been filed (Crl. Case No.6/1992). Thereafter, in 1993, suits were filed by the second defendant in RCS No.114/1993 and by the appellants in RCS No.278/1993. In view of the pending litigation, non issue of the replies to the notices cannot be treated as an admission of the averments in the notices.

Re : Application for fixation of standard rent

25. The first respondent filed a petition for fixation of standard rent in the year 1992 wherein he had claimed to be the tenant. The first appellate court held that as this was not controverted, the allegations therein should be true. The fact that the first respondent filed an application for determination of the standard rent is not disputed. But it is also not in dispute that the appellants filed a counter in the said proceedings wherein they clearly stated that the first respondent had no connection with the property and the premises was not given to him on rent or on any other understanding and that the first respondent was falsely claiming tenancy with the help of second respondent. It may be mentioned that the said petition for fixation of standard rent was not pursued by the first respondent and ultimately it was dismissed for non-prosecution on the ground that the first respondent had failed to prosecute the matter from 1998. Therefore, filing of the application for fixation of standard rent does not assist the respondents in proving tenancy.

Conclusion

27. It is thus seen that none of the documents produced or relied upon by respondents evidenced tenancy or payment of rent. The documents no doubt established that respondents were in possession of a portion of the premises No.289, but that fact was never in dispute. It should be noted that though

respondents submitted that they occupied the suit portions in 1982, they did not prove occupation of the suit portions from 1982. The first appellate court erroneously held that the appellants had failed to offer satisfactory explanation regarding the documents relied upon by the respondents and held that therefore the suit should be dismissed. The first appellate court has not recorded any finding that these documents produced by respondents established a tenancy. In fact as noticed above, there is no finding in the entire judgment that the respondents had proved that they were the tenants. The documents relied upon by respondents do not establish a tenancy. The trial court found that none of these documents established tenancy. The appellants had explained all documents relied upon by the respondents by demonstrating that they only prove occupation (which was not disputed) but not tenancy. When there was nothing more to explain, the first appellate court held that appellants failed to explain those documents and consequently failed to establish that respondents were licencees. The first appellate court inferred from documents which disclosed mere occupation of a portion of the house and documents which showed some payments which cannot be linked to rent, that appellants *failed to prove* that the occupation by respondents was as gratuitous licensees. It did not however infer from the documents that there is a tenancy. The entire reasoning is therefore unsound. In spite of this legal lacunae, the High Court did not interfere on the ground that no question of law was involved. It failed to notice that the inferences and legal effect from proved facts is a question of law and the inferences drawn by the first appellate court were wholly unwarranted. The fact that was proved was possession of suit portions which was not in dispute, but not tenancy in regard to the suit portions, which was in dispute. In the absence of any documentary evidence showing the tenancy or payment of rent, the evidence of PWs.1 and 2 is more trustworthy and probable than the uncorroborated interested evidence of DW1. (The evidence of DWs. 2 and 3 does not have any bearing on the issue of tenancy claimed by respondents). We therefore find that the judgments of the first

appellate court and the High Court are unsustainable and the finding of the trial court that respondents are gratuitous licencees was correct and justified.

28. Therefore, we allow this appeal, set aside the judgment of the High Court and the first appellate court and restore the decree for possession of the suit portions granted by the trial court. Parties to bear their respective costs.

N.J. Appeal allowed.

STATE OF HARYANA

v.

MUKESH KUMAR & ORS.

(Special Leave Petition (Civil) No. 28034 of 2011)

SEPTEMBER 30, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Adverse possession:

Property rights – Claim for, by way of adverse possession – Whether the State/Police Department, which is in charge of protection of life, liberty and property of people can be permitted to grab the land and property of its own citizens under the banner of the plea of adverse possession – Held: If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be total anarchy in the entire country – It is indeed a very disturbing and dangerous trend and must be arrested without further loss of time in the larger public interest – No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner – There is an urgent need for a fresh look on the entire law of adverse possession – In the instant case, the suit was filed by State of Haryana through the Superintendent of Police seeking right of ownership by adverse possession – Suit was dismissed by courts below – Revenue records of the State revealed that the disputed property stood in the name of the defendants – It is unfortunate that the Superintendent of Police, a senior official of the Indian Police Service, made repeated attempts to grab the property of the true owner by filing repeated appeals before different forums claiming right of ownership by way of adverse possession – Special Leave Petition dismissed with costs of

Rs.50,000/- to be paid by the State of Haryana for filing frivolous petition and unnecessarily wasting the time of the Court and demonstrating its evil design of grabbing the properties of lawful owners in a clandestine manner – Recommendation to Union of India to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternate to make suitable amendments in law of adverse possession – Need for legislation – Costs.

Historical background of adverse possession – Discussed.

Burden of proof – Held: A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner – It is for him to clearly plead and establish all facts necessary to establish adverse possession – Equity.

Right to property – Held: Is not only constitutional or statutory right but also a human right – Therefore, even claim of adverse possession has to be read in that context – Constitution of India, 1950.

Protection of property rights – Fifth Amendment of the U.S. Constitution - a principle of a civilized society – Discussed.

The State of Haryana filed a civil suit through the Superintendent of Police, Gurgaon, seeking a relief of declaration to the effect that it has acquired the rights of ownership by way of adverse possession over land measuring 8 biswas comprising khewat no. 34, khata no. 56, khasra no. 3673/452 situated in the revenue estate of Hidayatpur Chhavni, Haryana.

The trial court dismissed the suit. The first appellate court dismissed the appeal with exemplary cost of Rs.25000/- on the ground that the Police department is

for the protection of the people and property of the citizens and the police department had unnecessarily dragged the defendants in unnecessary litigation. The High Court dismissed the appeal.

The question which arose for consideration in the instant special leave petition was whether the State, which is in charge of protection of life, liberty and property of the people can be permitted to grab the land and property of its own citizens under the banner of the plea of adverse possession.

Dismissing the special leave petition, the Court

HELD: 1. In a democracy, governed by rule of law, the task of protecting life and property of the citizens is entrusted to the police department of the government. In the instant case, the suit was filed through the Superintendent of Police, Gurgaon, seeking right of ownership by adverse possession. The revenue records of the State revealed that the disputed property stood in the name of the defendants. It is unfortunate that the Superintendent of Police, a senior official of the Indian Police Service, made repeated attempts to grab the property of the true owner by filing repeated appeals before different forums claiming right of ownership by way of adverse possession. Such incidents would result in citizens losing faith in the entire police administration of the country and those responsible for the safety and security of their life and property are on a spree of grabbing the properties from the true owners in a clandestine manner. [Paras 26-28] [226-F-H; 227-A-B]

2.1. Adverse possession – Historical background: The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim right of "seisin" from his ancestry. Many felt that the original law that relied on "seisin" was difficult to

establish, and around 1623 a statute of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early English doctrine was designed to prevent legal disputes over property rights that were time consuming and costly. The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title. The concept of adverse possession was subsequently adopted in the United States. The doctrine was especially important in early American periods to cure the growing number of title disputes. The American version mirrored the English law, which is illustrated by most States adopting a twenty-year statute of limitations for adverse possession claims. As America has developed to the present date, property rights have become increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some States to as little as five years, while in others, it has remained as long as forty years. The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity. During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by States from private land owners without compensation. Initially, undeveloped tracts of land were the most common type of property acquired by the government, as they were sought for the installation of public road. Under the colonial system it was thought that benefits from the road would, in a newly opened country, always exceed the value of unimproved land. The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from

erupting. The concept of adverse possession exists to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence our country have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change. [Paras 30-33] [227-D-H; 228-A-F]

Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and Others **(2009) 16 SCC 517 – relied on.**

S.M. Karim v. Mst. Bibi Sakina **AIR 1964 SC 1254;** *Bhim Singh & Ors. v. Zile Singh & Ors.,* **AIR 2006 P & H 195;** *Food Corporation of India and Another v. Dayal Singh* **1991 PLJ 425;** *Kanak Ram & Ors. v. Chanan Singh & Ors.* **(2007) 146 PLR 498 – referred to.**

2.2. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. It is for him to clearly plead and establish all facts necessary to establish adverse possession. Though we got this law of adverse possession from the British, it is important to note that these days English Courts are taking a very negative view towards the law of adverse possession. The English law was amended and changed substantially to reflect these changes, particularly in light of the view that property is a human right adopted by the European Commission. The right to property is now considered to be not only constitutional or statutory right but also a human right. Human rights have already been considered in realm of individual rights such as right to health, right to

livelihood, right to shelter and employment etc. But now human rights are gaining a multi faceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. [Paras 35, 36] [230-D-H; 231-A-D]

Fairweather v. St. Marylebone Property Co **[1962] 2 WLR 1020: [1962] 2 All ER 288;** *Taylor v. Twinberrow* **[1930] 2 K.B. 16;** *Beaulane Properties Ltd.* v. *Palmer* **(2005) 3 WLR 554 – referred to.**

Fifth Amendment of the U.S. Constitution – a principle of a civilized society:

3. Another important development in the protection of property rights was the Fifth Amendment. James Madison was the drafter and key supporter for the Fifth Amendment. The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation". The main issue is to pay just compensation for acquiring the property. There are primarily two situations when a landowner may obtain compensation for land officially transferred to or depreciated by the government. First, an owner may be entitled to compensation when a governmental entity intentionally acquires private property through a formal condemnation proceeding and without the owner's consent. The State's power to take property is considered inherent through its eminent domain powers as a sovereign. Through the condemnation proceedings, the government obtains the necessary interest in the land, and the Fifth Amendment requires that the property owner be compensated for this loss. The second situation requiring compensation under Fifth Amendment occurs when the government has not officially acquired private property through a formal condemnation proceeding, but "nonetheless takes property by

physically invading or appropriating it". Under this scenario, the property owner, at the point in which a "taking" has occurred, has the option of filing a claim against the government actor to recover just compensation for the loss. When the landowner sues the government seeking compensation for a taking, it is considered an inverse condemnation proceeding, because the landowner and not the government is bringing the cause of action. This law of adverse possession was inherited from the British. The Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in law in the larger public interest. The Government instrumentalities – including the police – in the instant case have attempted to possess land adversely. This is a testament to the absurdity of the law and a black mark upon the justice system's legitimacy. The Government should protect the property of a citizen – not steal it. And yet, as the law currently stands, they may do just that. If this law is to be retained, according to the wisdom of the Parliament, then at least the law must require those who adversely possess land to compensate title owners according to the prevalent market rate of the land or property in question. This alternative would provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on property. While it may be indefensible to require all adverse possessors – some of whom may be poor – to pay market rates for the land they possess, perhaps some lesser amount would be realistic in most of the cases. The Parliament may either fix a set range of rates or to leave it to the judiciary with the option of choosing from within a set range of rates so as to tailor the compensation to the equities of a given case. The Parliament must seriously consider at least to abolish "bad faith" adverse possession, i.e., adverse possession

achieved through intentional trespassing. Actually believing it to be their own could receive title through adverse possession sends a wrong signal to the society at large. Such a change would ensure that only those who had established attachments to the land through honest means would be entitled to legal relief. In case, the Parliament decides to retain the law of adverse possession, the Parliament might simply require adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere 12. Such an extension would help to ensure that successful claimants have lived on the land for generations, and are therefore less likely to be individually culpable for the trespass (although their forebears might). A longer statutory period would also decrease the frequency of adverse possession suits and ensure that only those claimants most intimately connected with the land acquire it, while only the most passive and unprotective owners lose title. Reverting to the facts of this case, if the Police department of the State with all its might is bent upon taking possession of any land or building in a clandestine manner, then, perhaps no one would be able to effectively prevent them. It is our bounden duty and obligation to ascertain the intention of the Parliament while interpreting the law. Law and Justice, more often than not, happily coincide only rarely we find serious conflict. The archaic law of adverse possession is one such. A serious re-look is absolutely imperative in the larger interest of the people. Adverse possession allows a trespasser – a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian

citizen would find reprehensible. The doctrine of adverse possession has troubled a great many legal minds. Time has come for change. If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country. It is indeed a very disturbing and dangerous trend. It must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case. There is an urgent need for a fresh look of the entire law on adverse possession. The Union of India is recommended to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternate to make suitable amendments in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law. [Paras 40-51] [235-E-H; 236-A-H; 237-A-H; 238-A-F]

4. This Special Leave Petition is dismissed with costs of Rs.50,000/- (Rupees Fifty Thousand only) to be paid by the State of Haryana for filing a totally frivolous petition and unnecessarily wasting the time of the Court and demonstrating its evil design of grabbing the properties of lawful owners in a clandestine manner. The costs should be deposited within four weeks from the date of pronouncement of this judgment. In this petition, notice was not issued to the defendants, therefore, the costs is directed to be deposited with the National Legal Services Authority for utilizing the same to enable the poor litigants to contest their cases. [Para 52] [238-G-H; 239-A-B]

Case Law Reference:

AIR 1964 SC 1254	**referred to**	**Para 12**
AIR 2006 P and H 195	**referred to**	**Para 13**
1991 PLJ 425	**referred to**	**Para 20**
(2007) 146 PLR 498	**referred to**	**Para 21**
(2009) 16 SCC 517	**relied on**	**Para 34, 38**
[1962] 2 WLR 1020	**referred on**	**Para 35**
(1930) 2 K.B. 16	**referred to**	**Para 35**
(2005) 3 WLR 554	**referred to**	**Para 37**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 28034 of 2011.

From the Judgment and Order dated 17.03.2009 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 3909 of 2008.

Manjit Singh, AAG and Kamal Mohan Gupta for the Petitioner.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. People are often astonished to learn that a trespasser may take the title of a building or land from the true owner in certain conditions and such theft is even authorized by law.

2. The theory of adverse possession is also perceived by the general public as a dishonest way to obtain title to property. Property right advocates argue that mistakes by landowners or negligence on their part should never transfer their property rights to a wrongdoer, who never paid valuable consideration for such an interest.

3. The government itself may acquire land by adverse possession. Fairness dictates and commands that if the government can acquire title to private land through adverse possession, it should be able to lose title under the same circumstances.

4. We have heard the learned counsel for the State of Haryana. We do not deem it appropriate to financially burden the respondents by issuing notice in this Special Leave Petition. A very vital question which arises for consideration in this petition is whether the State, which is in charge of protection of life, liberty and property of the people can be permitted to grab the land and property of its own citizens under the banner of the plea of adverse possession?

5. Brief facts, relevant to dispose of this Special Leave Petition are recapitulated as under:

6. The State of Haryana had filed a Civil Suit through the Superintendent of Police, Gurgaon, seeking a relief of declaration to the effect that it has acquired the rights of ownership by way of adverse possession over land measuring 8 biswas comprising khewat no. 34, khata no. 56, khasra no. 3673/452 situated in the revenue estate of Hidayatpur Chhavni, Haryana.

7. The other prayer in the suit was that the sale deed dated 26th March, 1990, mutation no. 3690 dated 22nd November, 1990 as well as judgment and decree dated 19th May, 1992, passed in Civil Suit No. 368 dated 9th March, 1991 are liable to be set aside. As a consequential relief, it was also prayed that the defendants be perpetually restrained from interfering with the peaceful possession of the plaintiff (petitioner herein) over the suit land. For the sake of convenience we are referring the petitioner as the plaintiff and the respondents as defendants.

8. In the written statement, the defendants raised a number

of preliminary objections pertaining to estoppel, cause of action and mis-joinder of necessary parties. It was specifically denied that the plaintiff ever remained in possession of the suit property for the last 55 years. It was submitted that the disputed property was still lying vacant. However, the plaintiff recently occupied it by using force and thereafter have also raised a boundary wall of police line. It was denied in the written statement that the plaintiff acquired right of ownership by way of adverse possession qua property in question. The defendants prayed for dismissal of suit and by way of a counter claim also prayed for a decree for possession qua suit property be passed.

9. The Trial Court framed the following Issues in the suit.

1. Whether plaintiffs have become owner of disputed property by way of adverse possession? OPP
2. Whether sale deed 26.3.1990 and mutation no. 3690 dated 22.11.90 are null and void as alleged? OPP
3. Whether judgment and decree dated 19.05.92 passed in civil suit no. 368 dated 9.3.91 is liable to be set aside alleged? OPP
4. Whether the suit of the plaintiff is not maintainable in the present form? OPP
5. Whether the plaintiff has no locus-standi to file the present suit? OPP
6. Whether the plaintiff has no cause of action to filethe present suit? OPP
7. Whether the suit of the plaintiff is bad for misjoinder of necessary parties? OPP
8. Whether defendants no. 1 to 4 are rightful owners of disputed property on the basis of impugned sale

deed dated 23.6.1990 registered on 3.7.1990? OPP

9. Whether defendants are entitled for possession of disputed property? OPP

10. Relief.

10. Issue No. 1 which relates to adverse possession and issue No. 4 pertaining to maintainability were decided together. According to the Trial Court, the plaintiff has failed to prove the possession over the disputed property because the plaintiff could not produce any documentary evidence to prove this. On the contrary, revenue records placed on the file shows that the defendants are the owners in possession of disputed property. The Trial Court observed that possession of State, as claimed in the plaint for a continuous period of 55 years, stood falsified by the documents issued by the officials of the State.

11. The Trial Court also observed that despite claiming adverse possession, there was no pleading qua denial of title of the defendants by the plaintiff, so much so that the specific day when the alleged possession of State allegedly became adverse against the defendants has not been mentioned in order to establish the starting point of limitation could be ascertained.

12. The Trial Court relied on the judgment of this Court in S.M. Karim v. Mst. Bibi Sakina AIR 1964 SC 1254 wherein this Court has laid down that the adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse. The Court also held that long possession is not necessarily adverse possession.

13. The Trial Court also relied on a decision of the High Court of Punjab and Haryana in the case of *Bhim Singh & Ors. v. Zile Singh & Ors.,* AIR 2006 P and H 195, wherein it was stated that no declaration can be sought by a plaintiff with

regard to the ownership on the basis of adverse possession.

14. The Trial Court came to specific conclusion that despite the fact that the possession of the plaintiff over the disputed land is admitted on behalf of defendants, Issue No. 1 stand decided against the plaintiff. It was held that the suit of the plaintiff claiming ownership by way of adverse possession is not maintainable. Consequently, Issue No. 1 was decided against the plaintiff and Trial No. 4 was decided in favour of the defendants.

15. The Trial Court decided Issue Nos. 2, 3, 5 and 6 together and came to the definite conclusion that the plaintiff failed to prove its possession over the property in question. It was also held that the plaintiff had no *locus standi* to challenge the validity of the impugned sale deed, mutation as well as the judgment and decree because the plaintiff was neither the owner nor in possession of the property in dispute. Consequently, the plaintiff had no right to say that the impugned sale deed dated 26th March, 1990 was a sham transaction and the suit of mutation dated 22nd November, 1990 and, thereafter, the judgment and decree dated 19th May, 1992 passed in Civil Suit No. 386 dated 9th March, 1991 are liable to be set aside.

16. The Trial Court came to the conclusion that the plaintiff having no right or title in the suit property has neither *locus standi* nor cause of action to file the present suit. Issue Nos. 2 and 3 were decided against the plaintiff, whereas, Issue Nos. 5 and 6 were decided in favour of the defendants.

17. Regarding Issue Nos. 8 and 9, the Trial Court observed that once it is held that defendant Nos. 1 to 4 are owners of the disputed property, which is presently in possession of the plaintiff without any right, they (defendants) are entitled to its possession. Hence, Issue Nos. 8 and 9 were also decided in favour of the defendants.

18. Issue No. 7 was not pressed and decided against the defendants.

19. Regarding Issue No. 10 (relief) the Trial Court observed as under:

> "As a sequel to the findings of this court on the issues mentioned above, the suit of the plaintiff stands dismissed, however, counter claim filed by defendants is decreed with costs to the effect that they are entitled to possession of land measuring 8 biswas comprising of khewat no. 34 khata no. 56 khasa no. 3673/452 situated in revenue estate of Hidayatpur Chhavni village now the part of known as Patel Nagar, Gurgaon. Decree sheet be drawn accordingly. File be consigned to the record room after due compliance."

20. The plaintiff, aggrieved by the judgment of the Trial Court filed an appeal (Civil Appeal No. 33) before the learned Additional District Judge, Gurgaon. Learned Additional District Judge while deciding the appeal, relied on the judgment of the Punjab & Haryana High Court delivered in the case of *Food Corporation of India and Another v. Dayal Singh* 1991 PLJ 425, wherein it was observed that it does not behove the Government to take the plea of adverse possession against the citizens.

21. Learned Additional District Judge also relied on other judgments of Punjab & Haryana High Court in the cases of *Bhim Singh & Ors.* (supra) and *Kanak Ram & Ors. v. Chanan Singh & Ors.* (2007) 146 PLR 498 wherein it was held that a person in adverse possession of immovable property cannot file a suit for declaration claiming ownership and such a suit was not maintainable.

22. Before parting with the judgment the learned Additional District Judge observed regarding conduct of the plaintiff that the present suit was filed by State of Haryana by the then

Superintendent of Police, Gurgaon on 11th May, 1996. It was also observed by the learned Additional District Judge that the Police department is for the protection of the people and property of the citizens and the police department had unnecessarily dragged the defendants in unnecessary litigation. The appeal was dismissed with exemplary cost of Rs.25,000/-.

23. Unfortunately, despite serious strictures passed by the Court, the State of Haryana did not learn a lesson and preferred a Second Appeal (RSA No. 3909 of 2008) before the High Court of Punjab and Haryana, Chandigarh against the judgments and decrees of the two courts below.

24. The High Court, relying on the earlier judgments, observed that the welfare State which was responsible for the protection of life and property of its citizens, was in the present case, itself trying to grab the land/property of the defendants under the garb of plea of adverse possession and hence the action of the plaintiff is deplorable and disgraceful.

25. Unfortunately, the State of Haryana, is still not satisfied with the three strong judgments by three different forums given against the State and is still quite anxious and keen to grab the property of the defendants in a clandestine manner on the plea of adverse possession.

26. In a democracy, governed by rule of law, the task of protecting life and property of the citizens is entrusted to the police department of the government. In the instant case, the suit has been filed through the Superintendent of Police, Gurgaon, seeking right of ownership by adverse possession.

27. The revenue records of the State revealed that the disputed property stood in the name of the defendants. It is unfortunate that the Superintendent of Police, a senior official of the Indian Police Service, made repeated attempts to grab the property of the true owner by filing repeated appeals before

different forums claiming right of ownership by way of adverse possession.

28. The citizens may lose faith in the entire police administration of the country that those responsible for the safety and security of their life and property are on a spree of grabing the properties from the true owners in a clandestine manner.

29. A very informative and erudite Article was published in Neveda Law Journal Spring 2007 with the title *'Making Sense Out of Nonsense: A Response to Adverse Possession by Governmental Entities'*. The Article was written by Andrew Dickal. Historical background of adverse possession was discussed in that article.

Historical background

30. The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim right of "seisin" from his ancestry. Many felt that the original law that relied on "seisin" was difficult to establish, and around 1623 a statue of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early Englishdoctrine was designed to prevent legal disputes over property rights that were time consuming and costly. The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title.

31. The concept of adverse possession was subsequently adopted in the United States. The doctrine was especially important in early American periods to cure the growing number of title disputes. The American version mirrored the English law, which is illustrated by most States adopting a twenty-year statue of limitations for adverse possession claims. As America has developed to the present date, property rights have become

increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some States to as little as five years, while in others, it has remained as long as forty years. The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity.

32. During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by states from private land owners without compensation. Initially, undeveloped tracts of land were the most common type of property acquired by the government, as they were sought for the installation of public road. Under the colonial system it was thought that benefits from the road would, in a newly opened country, always exceed the value of unimproved land.

33. The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exits to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.

34. In *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and Others* (2009) 16 SCC 517 (one of us Bhandari, J.), this Court had an occasion to examine the English and American law on "adverse possession". The relevant paras of that judgment (Paras 24 and 26 to 29) are reproduced as under:

"24. In a relatively recent case in *P.T. Munichikkanna Reddy v. Revamma* (2007) 6 SCC 59, this Court again had an occasion to deal with the concept of adverse possession in detail. The Court also examined the legal position in various countries particularly in English and American systems. We deem it appropriate to reproduce relevant passages in extenso. The Court dealing with adverse possession in paras 5 and 6 observed as under: (SCC pp. 66-67)

> "5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. (See *Downing v. Bird* 100 So 2d 57 (Fla 1958), *Arkansas Commemorative Commission v. City of Little Rock* 227, Ark 1085 : 303 SW 2d 569 (1957); *Monnot v. Murphy* 207 NY 240 : 100 NE 742 (1913); *City of Rock Springs v. Sturm* 39 Wyo 494 : 273 P 908 : 97 ALR 1 (1929).)
>
> 6. Efficacy of adverse possession law inmost jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a

> specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See *American Jurisprudence,* Vol. 3, 2d, p. 81. *It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim."*

35. A person pleading adverse possession has no equities in his favour since he is trying to defeat the rights of the true owner. It is for him to clearly plead and establish all facts necessary to establish adverse possession. Though we got this law of adverse possession from the British, it is important to note that these days English Courts are taking a very negative view towards the law of adverse possession. The English law was amended and changed substantially to reflect these changes, particularly in light of the view that property is a human right adopted by the European Commission. This Court in *Revamma* (supra) observed that to understand the true nature of adverse possession, *Fairweather v. St Marylebone Property Co* [1962] 2 WLR 1020 : [1962] 2 All ER 288 can be considered where House of Lords referring to *Taylor v. Twinberrow* [1930] 2 K.B. 16 termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law. As against the rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property.

36. The right to property is now considered to be not only constitutional or statutory right but also a human right. Human rights have already been considered in realm of individual rights such as right to health, right to livelihood, right to shelter and employment etc. But now human rights are gaining a multi faceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context.

37. The changing attitude of the English Courts is quite visible from the judgment of *Beaulane Properties Ltd. v. Palmer* (2005) 3 WLR 554. The Court here tried to read the human rights position in the context of adverse possession. But what is commendable is that the dimension of human rights have widened so much that now property dispute issues are also being raised within the contours of human rights. With the expanding jurisprudence of the European Courts of Human Rights, the Court has taken an unkind view to the concept of adverse possession.

38. Paragraphs from 26 to 29 of *Hemaji Waghaji Jat* (supra) are set out as under:-

> 26. With the expanding jurisprudence of the European Court of Human Rights, the Court has taken an unkind view to the concept of adverse possession in the recent judgment of *JA Pye (Oxford) Ltd. v. United Kingdom* (2005) 49 ERG 90 which concerned the loss of ownership of land by virtue of adverse possession. In the said case, "the applicant company was the registered owner of a plot of 23 hectares of agricultural land. The owners of a property adjacent to the land, Mr and Mrs Graham (the Grahams) occupied the land under a grazing agreement. After a brief exchange of documents in December 1983 a chartered surveyor acting for the applicants wrote to the Grahams noting that the grazing agreement was about to expire and requiring them to vacate the land." The Grahams continued to use the whole

of the disputed land for farming without the permission of the applicants from September 1998 till 1999. In 1997, Mr Graham moved the Local Land Registry against the applicant on the ground that he had obtained title by adverse possession. The Grahams challenged the applicant company's claims under the Limitation Act, 1980 (the 1980 Act) which provides that a person cannot bring an action to recover any land after the expiration of 12 years of adverse possession by another.

27. The judgment was pronounced in *JA Pye (Oxford) Ltd. v. Graham* (2000) 3 WLR 242 : 2000 Ch 676. The Court held in favour of the Grahams but went on to observe the irony in law of adverse possession. The court observed that the law which provides to oust an owner on the basis of inaction of 12 years is "illogical and disproportionate". The effect of such law would "seem draconian to the owner" and "a windfall for the squatter". The court expressed its astonishment on the prevalent law that ousting an owner for not taking action within limitation is illogical. The applicant company aggrieved by the said judgment filed an appeal and the Court of Appeal reversed the High Court decision. The Grahams then appealed to the House of Lords, which, allowed their appeal and restored the order of the High Court.

28. The House of Lords in *JA Pye (Oxford) Ltd. v. Graham* (2003) 1 AC 419 : (2002) 3 WLR 221 : (2002) 3 All ER 865 (HL), observed that the Grahams had possession of the land in the ordinary sense of the word, and, therefore, the applicant company had been dispossessed of it within the meaning of the Limitation Act of 1980.

29. We deem it proper to reproduce the relevant portion of the judgment in *P.T. Munichikkanna Reddy v. Revamma* (2007) 6 SCC 59: (SCC p. 79, paras 51-52)

"51. Thereafter the applicants moved the European Commission of Human Rights (ECHR) alleging that the United Kingdom law on adverse possession, by which they lost land to a neighbour, operated in violation of Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention').

52. It was contended by the applicants that they had been deprived of their land by the operation of the domestic law on adverse possession which is in contravention with Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), which reads as under:

'Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' "

This Court in *Revamma case* also mentioned that the European Council of Human Rights importantly laid down three-pronged test to judge the interference of the Government with the right of "peaceful enjoyment of property": (SCC p. 79, para 53)

"53. ... [In] *Beyeler v. Italy* [GC] No. 33202of 1996 §§ 108-14 ECHR 2000-I, it was held that the 'interference' should comply with the principle of lawfulness and pursue

a legitimate aim (public interest) by means reasonably proportionate to the aim sought to be realised."

The Court observed:(*Revamma case* 79-80, paras 54-56)

"54. ... 'The question nevertheless remains whether, even having regard to the lack of care and inadvertence on the part of the applicants and their advisers, the deprivation of their title to the registered land and the transfer of beneficial ownership to those in unauthorized possession struck a fair balance with any legitimate public interest served.

In these circumstances, the Court concludes that the application of the provisions of the 1925 and 1980 Acts to deprive the applicant companies of their title to the registered land imposed on them an individual and excessive burden and upset the fair balance between the demands of the public interest on the one hand and the applicants' right to the peaceful enjoyment of their possessions on the other.

There has therefore been a violation of Article 1 of Protocol 1.'

55. The question of the application of Article 41 was referred for the Grand Chamber Hearing of the ECHR. This case sets the field of adverse possession and its interface with the right to peaceful enjoyment in all its complexity.

56. Therefore it will have to be kept in mind the courts around the world are taking an unkind view towards statutes of limitation overriding property rights."

39. In *Hemaji Waghaji Jat case*, this Court ultimately observed as under:

"32. Before parting with this case, we deem it appropriate to observe that the law of adverse possession

which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

33. We fail to comprehend why the law should place premium on dishonesty by legitimising possession of a rank trespasser and compelling the owner to lose his possession only because of his inaction in taking back the possession within limitation."

Fifth Amendment of the U.S. Constitution – a principle of a civilized society

40. Another important development in the protection of property rights was the Fifth Amendment. James Madison was the drafter and key supporter for the Fifth Amendment. The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation". The main issue is to pay just compensation for acquiring the property. There are primarily two situations when a landowner may obtain compensation for land officially transferred to or depreciated by the government. First, an owner may be entitled to compensation when a governmental entity intentionally acquires private property through a formal condemnation proceeding and without the owner's consent. The State's power to take property is considered inherent through its eminent domain powers as a sovereign. Through the condemnation proceedings, the government obtains the necessary interest in the land, and the Fifth Amendment requires that the property owner be compensated for this loss.

41. The second situation requiring compensation under Fifth Amendment occurs when the government has not officially acquired private property through a formal condemnation proceeding, but "nonetheless takes property by physically invading or appropriating it". Under this scenario, the property owner, at the point in which a "taking" has occurred, has the option of filing a claim against the government actor to recover just compensation for the loss. When the landowner sues the government seeking compensation for a taking, it is considered an inverse condemnation proceeding, because the landowner and not the government is bringing the cause of action.

42. We inherited this law of adverse possession from the British. The Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in law in the larger public interest. The Government instrumentalities – including the police – in the instant case have attempted to possess land adversely. This, in our opinion, a testament to the absurdity of the law and a black mark upon the justice system's legitimacy. The Government should protect the property of a citizen – not steal it. And yet, as the law currently stands, they may do just that. If this law is to be retained, according to the wisdom of the Parliament, then at least the law must require those who adversely possess land to compensate title owners according to the prevalent market rate of the land or property in question. This alternative would provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on property. While it may be indefensible to require all adverse possessors – some of whom may be poor – to pay market rates for the land they possess, perhaps some lesser amount would be realistic in most of the cases. The Parliament may either fix a set range of rates or to leave it to the judiciary with the option of choosing from within a set range of rates so as to tailor the compensation to the equities of a given case.

43. The Parliament must seriously consider at least to

abolish "bad faith" adverse possession, i.e., adverse possession achieved through intentional trespassing. Actually believing it to be their own could receive title through adverse possession sends a wrong signal to the society at large. Such a change would ensure that only those who had established attachments to the land through honest means would be entitled to legal relief.

44. In case, the Parliament decides to retain the law of adverse possession, the Parliament might simply require adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere

12. Such an extension would help to ensure that successful claimants have lived on the land for generations, and are therefore less likely to be individually culpable for the trespass (although their forebears might). A longer statutory period would also decrease the frequency of adverse possession suits and ensure that only those claimants most intimately connected with the land acquire it, while only the most passive and unprotective owners lose title.

45. Reverting to the facts of this case, if the Police department of the State with all its might is bent upon taking possession of any land or building in a clandestine manner, then, perhaps no one would be able to effectively prevent them.

46. It is our bounden duty and obligation to ascertain the intention of the Parliament while interpreting the law. Law and Justice, more often than not, happily coincide only rarely we find serious conflict. The archaic law of adverse possession is one such. A serious re-look is absolutely imperative in the larger interest of the people.

47. Adverse possession allows a trespasser – a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is,

logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible.

48. The doctrine of adverse possession has troubled a great many legal minds. We are clearly of the opinion that time has come for change.

49. If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country.

50. It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case.

51. In our considered view, there is an urgent need for a fresh look of the entire law on adverse possession. We recommend the Union of India to immediately consider and seriously deliberate either abolition of the law of adverse possession and in the alternate to make suitable amendments in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.

52. This Special Leave Petition is dismissed with costs of Rs.50,000/- (Rupees Fifty Thousand only) to be paid by the State of Haryana for filing a totally frivolous petition and unnecessarily wasting the time of the Court and demonstrating its evil design of grabbing the properties of lawful owners in a

clandestine manner. The costs be deposited within four weeks from the date of pronouncement of this judgment. In this petition, we did not issue notice to the defendants, therefore, we direct that the costs be deposited with the National Legal Services Authority for utilizing the same to enable the poor litigants to contest their cases.

53. This Special Leave Petition being devoid of any merit is accordingly dismissed.

D.G. Special Leave Petition dismissed.

OM PRAKASH & ANR.
v.
UNION OF INDIA & ANR.
(Writ Petition (Crl.) No. 66 of 2011)

SEPTEMBER 30, 2011

[ALTAMAS KABIR, CYRIAC JOSEPH AND SURINDER SINGH NIJJAR, JJ.]

Central Excise Act, 1944/Customs Act, 1962 – ss. 9A/ 104(3) – Duty evasion and other offences under – Held: Are non-cognizable and bailable – Provisions of s. 104(3) of the 1962 Act and s. 13 of the 1944 Act, vest customs officers and excise officers with the same powers as that of a police officer in charge of a police station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable – If person arrested offers bail, he should be released on bail.

The question which arose for consideration in these matters is that whether all offences under the Central Excise Act, 1944 and the Customs Act, 1962 are non-cognizable and, if so, whether such offences are bailable.

Allowing the Writ Petitions and disposing of the Criminal Misc. Petition, the Court

HELD: 1.1 Sub-section (1) of Section 9A of the Central Excise Act, 1944, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. The expression "bailable offence" has been defined in Section 2(a) of the Code to mean an offence which is either shown to be bailable in

the First Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code consists of Part 1 and Part 2. While Part 1 deals with offences under the Penal Code, Part 2 deals with offences under other laws. Accordingly, if the provisions of Part 2 of the First Schedule are to be applied, an offence in order to be cognizable and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part 2 could be attracted for the purpose of granting bail since all offences under Section 9 of the 1944 Act are deemed to be non-cognizable. [Para 24] [259-F-H; 260-A-E]

1.2 Section 2(i) Cr.P.C. defines a "non-cognizable offence", in respect whereof a police officer has no authority to arrest without warrant. The said definition defines the general rule since even under the Code some offences, though "non-cognizable" have been included in Part I of the First Schedule to the Code as being non-bailable. In the instant case, the concern is with the offences under a specific Statute which falls in Part 2 of the First Schedule to the Code. However, the language of the Scheme of 1944 Act seem to suggest that the main object of the enactment of the said Act was the recovery of excise duties and not really to punish for infringement of its provisions. The introduction of Section 9A into the 1944 Act by way of amendment reveals the thinking of the legislature that offences under the 1944 Act should be non-cognizable and, therefore, bailable. From Part 1 of the First Schedule to the Code, it will be clear that as a

general rule all non-cognizable offences are bailable, except those indicated above. The said provisions, which are excluded from the normal rule, relate to grave offences which are likely to affect the safety and security of the nation or lead to a consequence which cannot be revoked. [Para 26] [260-G-H; 261-A-D]

1.3 The definition of "non-cognizable offence" in Section 2(l) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. The expression "cognizable offence" in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an excise officer, would have no authority to make an arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 41 of the Code which specifies when a police officer may arrest without order from a Magistrate or without warrant. [Para 27] [261-E-G]

1.4 The offences under the 1944 Act cannot be equated with offences under the Penal Code which have been made non-cognizable and non-bailable. In fact, in the Code itself exceptions have been carved out in respect of serious offences directed against the security of the country, which though non-cognizable have been made non-bailable. However, sub-section (2) of Section 9A makes provision for compounding of all offences under Chapter II. Significantly, Chapter II of the 1944 Act deals with levy and collection of duty and offense under the said Act have been specified in Section 9, which provides that whoever commits any of the offense set out

in Section 9, would be punishable in the manner indicated under Sub-section (1) itself. What is even more significant is that Section 20 of the 1944 Act, provides that the Officer in-Charge of a police station to whom any person is forwarded under Section 19, shall **either admit him to bail to appear before the Magistrate having jurisdiction, or on his failure to provide bail, forward him in custody to such Magistrate. The said provision clearly indicates that offences under the Central Excise Act, as set out in Section 9 of the Act, are bailable, since the Officer in-Charge of a police station has been mandated to grant bail to the person arrested and brought before him in terms of Section 19 of the Act. [Paras 28 and 29] [261-H; 262-A-F]**

1.5 In view of the provisions of Sections 9 and 9A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being non-cognizable, are also bailable, though not on the logic that all non-cognizable offences are bailable, but in view of the said provisions of the 1944 Act, which indicate that offences under the said Act are bailable in nature. [Para 30] [263-B]

1.6 The provisions of the Customs Act, 1962 and Central Excise Act, 1944 on the issue whether offences under both the said Acts are bailable, are not only similar, but the provisions of the two enactments are also in *pari materia* in respect thereof. [Para 42] [268-E]

1.7 The provisions of Section 104(3) of the Customs Act, 1962, and Section 13 of the Central Excise Act, 1944, vest Customs Officers and Excise Officers with the same powers as that of a Police Officer in charge of a Police Station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable. Both Section 9A of the 1944 Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding

anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable. [Para 43] [268-F-H]

1.8. The offences under the Customs Act, 1962 must also be held to be bailable. Consequently, as in the case of offences under the Central Excise Act, 1944, the offences under Section 135 of the Customs Act, 1962, are bailable and if the person arrested offers bail, he should be released on bail in accordance with the provisions of sub-Section (3) of Section 104 of the Customs Act, 1962, if not wanted in connection with any other offence. [Para 44] [269-B-D]

Ramesh Chandra Mehta v. State of West Bengal **AIR 1970 SC 940;** *Directorate of Enforcement v. Deepak Mahajan* **(1994) 3 SCC 440: 1994 (1) SCR 445 ;** *Union of India v. Padam Narian* Aggarwal **2008 (231) ELT 397(SC);** *Sunil Gupta v. Union of India* **2000 (118) ELT 8 P&H;** *Bhavin Impex Pvt. Ltd. v. State of Gujarat* **2010 (260) ELT 526 (Guj);** *Superintendent of Police, CBI & Ors. v. Tapan Kumar Singh* **(2003) 6 SCC 175: 2003 (3) SCR 485;** *Bhupinder Singh v. Jarnail Singh* **(2006) 6 SCC 207;** *Commissioner of Customs v. Kanhaiya Exports (P) Ltd.* **Civil Appeal No.81 of 2002;** *Union of India v. Padam Narain Aggarwal* **(2008) 13 SCC 305: 2008 (14) SCR 179;** *N.H. Dave, Inspector of Customs v. Mohd. Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatt) & Ors.* **1984 (15) ELT 353 (Guj.) – Referred to.**

Case Law Reference:

AIR 1970 SC 940	**Referred to**	**Para 18**
1994 (1) SCR 445	**Referred to**	**Para 19**
2008 (231) ELT 397(SC)	**Referred to**	**Para 20**
2000 (118) ELT 8 P&H	**Referred to**	**Para 20**
2010 (260) ELT 526 (Guj)	**Referred to**	**Para 20**
2003 (3) SCR 485	**Referred to**	**Para 23**

(2006) 6 SCC 207	**Referred to**	**Para 23**
2008 (14) SCR 179	**Referred to**	**Para 38**
1984 (15) ELT 353 (Guj.)	**Referred to**	**Para 39**

CRIMINAL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Criminal) No. 66 of 2011.

WITH

W.P. (Crl.) No. 85 of 2010

W.P. (Crl.) No. 74 of 2011

W.P. (Crl.) No. 87 of 2011

W.P. (Crl.) No. 101 of 2011

W.P. (Crl.) No. 102 of 2011

W.P. (Crl.) No. 74 of 2010

W.P. (Crl.) No. 36 of 2011

W.P. (Crl.) No. 37 of 2011

W.P. (Crl.) No. 51 of 2011

W.P. (Crl.) No. 84 of 2011

Crl. MP No. 10673 of 2011 in W.P. (Crl.) No. 76 of 2011.

P.P. Malhotra and Mohan Prasaran, AAG, Mukul Rohatgi, Atul Nanda and U.U. Lalit, Sujay N. Kantawala, Vikram Chaudhary, Saurabh Kirpal, Sanjay Agarwal, Dilip Kumar Sharma, Jyoti Taneja, R.K. Adsure, Rakesh Dahiya, Nikhil Jain, VIkram Choudhary, Gauram Awasthi (AOR), Satish Pandey, Ranjeeta Rohatgi, Dikhsa Rai, Ravindra Keshavrao Adsure, Rajiv Nanda, Naresh Kaushik, Chetan Chawla, D.L. Chidanand,

B.K. Prasad, T.A. Khan, Ch. Shamunddin Khan, Arvind Kumar Sharma, B. Krishna Prasad, Satish Aggarwala, Sushil Kaushik, Anirudha Sharma, Anando Mukherjee, Harsh N. Parekh, Arvind Kumar Sharma, Rajiv Nanda, D.L. Chidaranda, R. Balasubramanium, A.K. Sharma, Anirudh Sharma, Anando Mukherjee, Asha Gopalan Nair and Shankar Chillarge for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Two sets of matters have been heard together, one relating to the provisions of the Customs Act, 1962, and the other involving the provisions of the Central Excise Act, 1944, since the issue in both sets of matters is the same. The common question in these two sets of matters is that since all offences under the Central Excise Act, 1944 and the Customs Act, 1962, are non-cognizable, are such offences bailable? Although, the provisions of both the two Acts in this regard are pari materia to each other, we shall first take up the matters relating to the Central Excise Act, 1944, hereinafter referred to as "the 1944 Act", namely, (1) Writ Petition (Crl) No.66 of 2011, Om Prakash & Anr. Vs. Union of India & Anr., which has been heard as the lead case, (2) Writ Petition No.85 of 2010 and (3) Writ Petition (Crl.) Nos.74, 87, 101 and 102 of 2011.

2. Section 9A of the 1944 Act, which was introduced in the Act with effect from 1st September, 1972, provides that certain offences are to be non-cognizable. Since we shall be dealing with this provision in some detail, the same is extracted hereinbelow :-

> **"9A. Certain offences to be non-cognizable. –** (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under section 9 shall be deemed to be non-cognizable within the meaning of that Code.
>
> (2) Any offence under this Chapter may, either before

or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount and in such manner of compounding, as may be prescribed.

Provided that nothing contained in this sub-section shall apply to –

(a) a person who has been allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of sub-section (1) of Section 9;

(b) a person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);

(c) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore;

(d) a person who has been convicted by the court under this Act on or after the 30th day of December, 2005."

3. What is important is the non-obstante clause with which the Section begins and in very categorical terms makes it clear that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 of the 1944 Act would be deemed to be non-cognizable within the meaning of the Code. In fact, Sub-section (2) of Section 9A also provides for compounding of offences upon payment of the compounding amount with the exceptions as mentioned in the proviso thereto.

4. Mr. Mukul Rohatgi, learned senior counsel appearing for the Petitioners in both sets of matters, submitted that since the expressions "cognizable" or "non-cognizable" or even "bailable

offences" had not been defined in either the 1944 Act or the Customs Act, 1962, one would have to refer to the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.) to understand the meaning of the said expressions in relation to criminal offences. Section 2(a) Cr.P.C. defines "bailable offence" as follows :-

"2(a). "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;"

Section 2(c) defines "cognizable offence" as follows :-

"2(c). "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;"

Section 2(l) defines "non-cognizable offence" as follows :-

"2(l). "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;"

5. Mr. Rohatgi then submitted that offences which are punishable under the 1944 Act have been indicated in Section 9 of the said Act and these sets of cases relate to the offences indicated in Section 9(1)(d) of the said Act. Section 9(1)(d) is again divided into two sub-clauses and reads as follows:-

"**9**. **Offences and penalties.** (1) Whoever commits any of the following offences, namely:-

(a) to (c)
……

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and

(b) of this section;

shall be punishable,-

(i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both."

6. What is of significance is that offences covered by clauses (a) and (b) and the subsequent amendments thereto relating to any excisable goods, where the duty leviable thereon under the Act exceeds one lakh of rupees, would be punishable with imprisonment for a term which may extend to seven years and with fine, whereas under Section 9(1)(d)(ii), in any other case, the offence would be punishable with imprisonment for a term which may extend to three years or with fine or with both.

7. Since the question of arrest is in issue in these sets of cases, Mr. Rohatgi then referred to the provisions of Section 13 of the 1944 Act, which deals with the power to arrest in the following terms:-

"13. Power to arrest: - Any Central Excise Officer not below the rank of Inspector of Central Excise may, with the prior approval of the Commissioner of Central Excise, arrest any person whom he has reason to believe to be liable to punishment under this Act or the rules made thereunder."

8. Mr. Rohatgi submitted that the said power would have to be read along with Sections 18, 19, 20 and 21 of the 1944 Act along with Section 155 Cr.P.C. Section 18 of the 1944 Act provides for searches and how arrests are to be made under the Act and rules framed thereunder and reads as follows :-

"18. Searches and arrests how to be made.- All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating respectively to searches and arrests made under that Code."

9. Sections 19, 20 and 21 deal with how a person arrested is to be dealt with after his arrest and the procedure to be followed by the Officer in-Charge of the police station concerned to whom any person is forwarded under Section 19. For the sake of understanding the Scheme, the provisions of Sections 19, 20 and 21 of the 1944 Act are extracted hereinbelow ad seriatim :-

"19. Disposal of persons arrested.- Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station.

20. Procedure to be followed by officer-in-charge of police station.- The officer-in-charge of a police station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate.

21. Inquiry how to be made by Central Excise Officers against arrested persons forwarded to them under

Section 19.-(1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to enquire into the charge against him.

(2) For this purpose, the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise, and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case:

Provided that –

(a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

10. As indicated in Section 18, all steps taken under Sections 19, 20 and 21 would have to be taken in accordance with the provisions of the Code of Criminal Procedure and the relevant provision thereof is Section 155 which deals with information as to non-cognizable cases and investigation of such cases, since under Section 9A of the 1944 Act all offences under the Act are non-cognizable. For the sake of reference Section 155 Cr.P.C. is extracted hereinbelow :-

"155. Information as to non-cognizable cases and investigation of such cases.- (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

11. As will be evident from the aforesaid provisions of Section 155 Cr.P.C., no police officer in charge of a police station is entitled to investigate a non-cognizable case without the order of a Magistrate having the power to try such case or to commit the case for trial. Furthermore, no such police officer is entitled to effect arrest in a non-cognizable case without a warrant to effect such arrest. According to Mr. Rohatgi, since all offences under the 1944 Act, irrespective of the length of punishment are deemed to be non-cognizable, the aforesaid provisions would fully apply to all such cases. This now brings us to the question as to whether all offences under the 1944 Act are bailable or not. As has been indicated hereinbefore in this judgment, Section 2(a) of the Code defines "bailable offence" to be an offence shown as bailable in the First

Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code which deals with classification of offences is in two parts. The first part deals with offences under the Indian Penal Code, while the second part deals with classification of offences in respect of other laws. Inasmuch as, the offences relate to the offences under the 1944 Act, it is the second part of the First Schedule which will have application to the cases in hand. The last item in the list of offences provides that if the offence is punishable with imprisonment for less than three years or with fine only, the offence will be non-cognizable and bailable. Accordingly, if the offences come under the said category, they would be both non-cognizable as well as bailable offences. However, in the case of the 1944 Act, in view of Section 9A, all offences under the Act have been made non-cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.

12. Mr. Rohatgi submitted that Section 20 of the 1944 Act would also make it clear that the Officer in-Charge of a police station to whom any person arrested is forwarded under Section 19, shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate. In other words, unless the offence was bailable, the Officer in-Charge of the police station would not have been vested with the power to admit him to bail and to direct him to appear before the Magistrate having jurisdiction. Mr. Rohatgi pointed out that Section 21 which deals with the manner in which the enquiry is to be made by the Central Excise Officer against the arrested person forwarded to him under Section 19, is similar to the procedure prescribed under Section 20.

13. The submissions made by Mr. Rohatgi will have to be considered in the context of the provisions of Sections 9A, 13 and 18 to 21 of the 1944 Act and Section 155 Cr.P.C.

14. Section 41 of the Code provides the circumstances in which a police officer may, without an order from a Magistrate and without a warrant, arrest any person. What is relevant for our purpose are Sub-section (1)(a) and Sub-section (2) of Section 41 which are extracted hereinbelow:-

> **"41. When police may arrest without warrant.-** (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person-
>
> (a) Who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or
>
> (b) to (h)…….....
>
> (2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any, person, belonging to one or more of the categories of persons specified in section 109 or section 110."

15. An exception to the provisions of Section 41 has been made in Section 42 of the Code which enables a police officer to arrest a person who has committed in the presence of such officer or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false.

16. One other provision of the Code referred to is Section 46 which deals with how arrests are to be made. The same merely provides the procedure for effecting the arrest for which purpose the officer or other person making the same shall actually touch or confine the body of the person to be arrested. The said provision is not really material for a determination of the issues in this case and need not detain us.

17. In this connection, Section 436 Cr.P.C. which provides in what cases bail could be taken, may be taken note of. The said Section provides as under:-

> **"436. In what cases bail to be taken.**-(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail:
>
> Provided that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:
>
> Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A].
>
> (2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446."

As will be evident from the above, when any person, other than a person accused of a non-bailable offence, is arrested or detained without warrant by an Officer in-Charge of a police station, or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before a Court to give bail, he shall be released

on bail. In other words, in respect of a non-cognizable case, a person who is arrested without warrant shall be released on bail if he is prepared to give bail. The scheme of the Section is that without a warrant, if a person is arrested by the Officer in-Charge of a police station or if such person is brought before the Court, he is entitled to be released on bail, either by the police officer, or the Court concerned.

18. The legal contentions indicated hereinabove were opposed on behalf of the Union of India and the stand taken by Mr. Mohan Parasaran, learned Additional Solicitor General, was that what was required to be considered in the Writ Petitions was whether there is a power to arrest vested in the officers exercising powers under Section 13 of the 1944 Act without issuance of a warrant and whether such power could be exercised only after an FIR/complaint had been lodged under Section 13 of the aforesaid Act. It was also contended that it was necessary to consider further whether criminal prosecution or investigation could be initiated, which could lead to arrest, without final adjudication of a dual liability. The last contention raised was whether offences referred to in Section 9(1)(d)(i) of the 1944 Act were bailable or not on account of the fact that in the said Act by a deeming fiction all offences under the respective Sections are deemed to be non-cognizable. Mr. Parasaran pointed out that the Preamble to the 1944 Act states that it is expedient to consolidate and amend the law relating to central excise duty on goods manufactured or produced in certain parts of India. Under the Act it is the duty of the officers to ensure that duty is not evaded and persons who attempt to evade duty are proceeded against. The learned Additional Solicitor General submitted that wide powers have been conferred on the Officers under the Act to enable them to discharge their duties in an effective manner, though not for the purpose of prevention and detection of crime, but to prevent smuggling of goods or clandestine removal thereof and for due realization of excise duties. It was also urged that the Officers under the said Act are not police officers and that the said

question is no longer res integra. Consequently, in *Ramesh Chandra Mehta Vs. State of West Bengal* [AIR 1970 SC 940], a Constitution Bench of this Court held that since a customs officer is not a police officer, as would also be the case in respect of an officer under the Excise Act, submissions made before him would not be covered under Section 25 of the Evidence Act.

19. Mr. Prasaran submitted that the High Court had also made a distinction on the basis that while Section 13 of the 1944 Act refers to a "person" and not to an "accused" or "accused person", the power under the Central Excise Act is for arrest of any person who is suspected of having committed an offence and is not an accused, but is a person who would become an accused after the filing of a complaint or lodging of an FIR, as was held by this Court in the case of *Directorate of Enforcement Vs. Deepak Mahajan* [(1994) 3 SCC 440]. The learned ASG submitted that although under the powers reserved under the Customs Act and the Excise Act to a Customs Officer or a Central Excise Officer, as the case may be, the said Officer would be entitled to exercise powers akin to that of a police officer, but that did not mean that such officers are police officers in the eyes of law. The said officers had no authority or power to file an investigation report under Section 173 Cr.P.C. and in all cases the officer concerned has to produce the suspect before the Magistrate after investigation for the purpose of remand. The learned ASG submitted that only on the filing of a complaint, can the criminal law be set in motion.

20. Mr. Prasaran also urged that the power to arrest must necessarily be vested in the Officer concerned under the 1944 Act for the efficient discharge of his functions and duties, inter alia, in order to prevent and tackle the menace of black money and money laundering. Mr. Prasaran submitted that in *Union of India Vs. Padam Narian Aggarwal* [2008 (231) ELT 397(SC)], this Court had held that even though personal liberty

is taken away, there are norms and guidelines providing safeguards so that such a power is not abused, but is exercised on objective facts with regard to commission of any offence. Reference was also made to the decision of the Punjab & Haryana High Court in *Sunil Gupta Vs. Union of India* [2000 (118) ELT 8 P&H] and *Bhavin Impex Pvt. Ltd. Vs. State of Gujarat[*2010 (260) ELT 526 (Guj)], in which the issue, which is exactly in issue in the present case, was considered and, as submitted by the learned ASG, it has been held that the FIR or complaint or warrant is not a necessary pre-condition for an Officer under the Act to exercise powers of arrest. It was also submitted that the Petitioners had nowhere questioned the vires of the Section granting power to investigate to the Officer under the Act as being unconstitutional and ultra vires and as such in case of any mistake or illegality in the exercise of such statutory powers, the affected persons would always have recourse to the Courts.

21. Coming to the question of the provisions of Section 9A of the 1944 Act wherein in Sub-section (1) it has been clearly mentioned that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of the Code, the learned ASG submitted that the aforesaid Section does not state anything as to whether such offences are also bailable or not. It was contended that if the submissions made by Mr. Rohatgi on this point were to be accepted, it would mean that all offences under Section 9, including offences punishable with imprisonment upto seven years, would also be bailable, which could not have been the intention of the legislators enacting the 1944 Act. Mr. Prasaran submitted that the provisions of Section 9A of the 1944 Act merely import the provisions of Section 2(i) Cr.P.C., thereby debarring a "police officer" from arresting a person without warrant for an offence under the Act. It was submitted that Section 9A does not refer to a Central Excise Officer and as such there is no embargo on an Officer under the 1944 Act from arresting a person.

22. Mr. Prasaran's next submission was with regard to the provisions of part 2 of the First Schedule to the Code of Criminal Procedure and it was submitted that the same has to be given a meaningful interpretation. It was urged that merely because a discretion had been given to the Magistrate to award punishment of less than three years, it must fall under the third head of the said Schedule and, therefore, be non-cognizable and bailable. On the other hand, as long as the Magistrate had the power to sentence a person for imprisonment of three years or more, notwithstanding the fact that he has discretion to provide a sentence of less than three year, the same will make the offence fall under the second head thereby making such offence non-bailable. It was submitted that in essence it is the maximum punishment which has to determine the head under which the offence falls in Part 2 of the First Schedule to the Code and not the use of discretion by the Magistrate to award a lesser sentence.

23. In support of his submissions, Mr. Prasaran referred to the decisions of this Court in *Superintendent of Police, CBI & Ors. Vs. Tapan Kumar Singh* [(2003) 6 SCC 175] and *Bhupinder Singh Vs. Jarnail Singh* [(2006) 6 SCC 207], to which reference will be made, if necessary.

24. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non-cognizable and, if so, whether such offences are bailable? In order to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question. Sub-section (1) of Section 9A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider

the submissions made by Mr. Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable. The expression "bailable offence" has been defined in Section 2(a) of the Code and set out hereinabove in paragraph 3 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part 1 and Part 2. While Part 1 deals with offences under the Indian Penal Code, Part 2 deals with offences under other laws. Accordingly, if the provisions of Part 2 of the First Schedule are to be applied, an offence in order to be cognizable and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part 2 could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable.

25. This leads us to the next question as to meaning of the expression "non-cognizable".

26. Section 2(i) Cr.P.C. defines a "non-cognizable offence", in respect whereof a police officer has no authority to arrest without warrant. The said definition defines the general rule since even under the Code some offences, though "non-cognizable" have been included in Part I of the First Schedule to the Code as being non-bailable. For example, Sections 194, 195, 466, 467, 476, 477 and 505 deal with non-cognizable offences which are yet non-bailable. Of course, here we are

concerned with offences under a specific Statute which falls in Part 2 of the First Schedule to the Code. However, the language of the Scheme of 1944 Act seem to suggest that the main object of the enactment of the said Act was the recovery of excise duties and not really to punish for infringement of its provisions. The introduction of Section 9A into the 1944 Act by way of amendment reveals the thinking of the legislature that offences under the 1944 Act should be non-cognizable and, therefore, bailable. From Part 1 of the First Schedule to the Code, it will be clear that as a general rule all non-cognizable offences are bailable, except those indicated hereinabove. The said provisions, which are excluded from the normal rule, relate to grave offences which are likely to affect the safety and security of the nation or lead to a consequence which cannot be revoked. One example of such a case would be the evidence of a witness on whose false evidence a person may be sent to the gallows.

27. In our view, the definition of "non-cognizable offence" in Section 2(l) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression "cognizable offence" in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an excise officer, will have no authority to make an arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 41 of the Code which specifies when a police officer may arrest without order from a Magistrate or without warrant.

28. Having considered the various provisions of the Central Excise Act, 1944, and the Code of Criminal Procedure, which

have been made applicable to the 1944 Act, we are of the view that the offences under the 1944 Act cannot be equated with offences under the Indian Penal Code which have been made non-cognizable and non-bailable. In fact, in the Code itself exceptions have been carved out in respect of serious offences directed against the security of the country, which though non-cognizable have been made non-bailable.

29. However, Sub-section (2) of Section 9A makes provision for compounding of all offences under Chapter II. Significantly, Chapter II of the 1944 Act deals with levy and collection of duty and offences under the said Act have been specified in Section 9, which provides that whoever commits any of the offences set out in Section 9, would be punishable in the manner indicated under Sub-section (1) itself. What is even more significant is that Section 20 of the 1944 Act, which has been extracted hereinabove, provides that the Officer in-Charge of a police station to whom any person is forwarded under Section 19, **shall** (emphasis supplied) either admit him to bail to appear before the Magistrate having jurisdiction, or on his failure to provide bail, forward him in custody to such Magistrate. The said provision clearly indicates that offences under the Central Excise Act, as set out in Section 9 of the Act, are bailable, since the Officer in-Charge of a police station has been mandated to grant bail to the person arrested and brought before him in terms of Section 19 of the Act. The decisions which have been cited by Mr. Parasaran deal mainly with powers of arrest under the Customs Act. The only cited decision which deals with the provisions of the Central Excise Act is the decision of the Division Bench of the Punjab & Haryana High Court in the case of Sunil Gupta Vs. Union of India. In the said case also, the emphasis is on search and arrest and the learned Judges in paragraph 22 of the judgment specifically indicated that the basic issue before the Bench was whether arrest without warrant was barred under the provisions of the 1944 Act and the Courts had no occasion to look into the

aspect as to whether the offences under the said Act were bailable or not.

30. In the circumstances, we are inclined to agree with Mr. Rohatgi that in view of the provisions of Sections 9 and 9A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being non-cognizable, are also bailable, though not on the logic that all non-cognizable offences are bailable, but in view of the aforesaid provisions of the 1944 Act, which indicate that offences under the said Act are bailable in nature.

31. Consequently, this batch of Writ Petitions in regard to the Central Excise Act, 1944, must succeed and are, accordingly, allowed in terms of the determination hereinabove, and we hold that the offences under the Central Excise Act, 1944, are bailable.

32. The remaining writ petitions which deal with offences under the Customs Act, 1962, namely, Writ Petition (Crl.) No.74 of 2010, Choith Nanikram Harchandani Vs. Union of India & others, which has been heard as the lead case, and Writ Petition (Crl.) Nos.36, 37, 51, 76 and 84 of 2011 and Crl. M.P. No.10673 of 2011 in W.P. (Crl.) No.76 of 2011, all deal with offences under the Customs Act, though the issues are exactly the same as those canvassed in the cases relating to the provisions of the Central Excise Act, 1944. Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Writ Petitioners in these matters submitted that the provisions of the Customs Act, 1962, are in pari materia with the provisions of the Central Excise Act, 1944, which are relevant to the facts of these cases. The same submissions as were made by Mr. Rohtagi in relation to Writ Petitions filed in respect of offences under the Central Excise Act, 1944, were also advanced by him with regard to offences under the Customs Act. In addition, certain decisions were also referred to and relied upon by him in support of the contention that offences under the Customs Act were also intended to be bailable and they aimed at recovery of unpaid

and/or avoided custom duties. Mr. Rohatgi submitted that, as in the case of the provisions of the 1944 Act, the ultimate object of the Customs Act is to recover revenue which the State was being wrongly deprived of.

33. Mr. Rohatgi submitted that the provisions of Section 104(4) of the Customs Act are the same as the provisions of Section 9A of the Central Excise Act, 1944. Section 104 of the Customs Act empowers an officer of Customs to arrest a person in case of offences alleged to have been committed and punishable under Sections 132, 133, 135, 135A or Section 136 of the Act. In addition, Sub-section (4) of Section 104, which is similar to Section 9A(i) of the Central Excise Act, 1944, provides as follows :-

"**104. Power to arrest.** –

(1) to (3) .....

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Act shall not be cognizable."

34. It was further pointed out that as in the case of Section 20 of the Central Excise Act, 1944, under Sub-section (3) of Section 104 of the Customs Act, an Officer of Customs has been vested with the same power and is subject to the same provisions as an Officer in-Charge of a police station has under the Code of Criminal Procedure, for the purpose of releasing the arrested person on bail or otherwise. Mr. Rohatgi submitted that as in the case of Section 20 of the 1944 Act, the provisions of Sub-section (3) of Section 104 of the Customs Act, 1962, indicate that offences under the Customs Act would not only be non-cognizable, but would also be bailable.

35. Reverting to his submissions in relation to the Writ Petitions under the Central Excise Act, 1944, Mr. Rohatgi submitted that if it is assumed that the bailability in respect of

an offence was to be determined by the length of punishment in relation to Part 2 of the First Schedule to Cr.P.C., it would be necessary that the duty leviable under the provisions of the Customs Act would first have to be adjudicated upon and determined. It was further submitted that there has to be a process of adjudication to determine the amount of levy before any punitive action by way of arrest could be taken. Reference was also made to the decision of this Court in *Commissioner of Customs Vs. Kanhaiya Exports (P) Ltd.* (Civil Appeal No.81 of 2002), in which it had been held that a show cause notice is mandatory before initiation of any action under the Customs Act. Mr. Rohatgi contended that arrest by prosecution could follow only thereafter.

36. Appearing for the Union of India in the matters relating to the Customs Act, 1962, the learned Additional Solicitor General, Mr. P.P. Malhotra, urged that the submissions made by Mr. Rohatgi that since offences under the Customs Act are non-cognizable, they are, therefore, bailable, was wholly incorrect, as all non-cognizable offences are not bailable. The learned ASG submitted that from the First Schedule to the Cr.P.C., it would be clear that offences under Sections 194, 195, 274, 466, 467, 476, 493 and 505 IPC, though non-cognizable are yet non-bailable. It was submitted that Section 505 IPC is punishable with imprisonment upto 3 years or with fine or both. The said offence being both non-cognizable and non-bailable is in consonance with the last entry of Part 2 of Schedule I to the Code, dealing with offences under other laws. The learned ASG submitted that the bailability or non-bailability of an offence is not dependent upon the offence being cognizable or non-cognizable. It was submitted that the bailable offences are those which are made bailable in terms of Section 2(a) Cr.P.C. which are defined as such under the First Schedule itself. The learned ASG contended that whether an offence was bailable or not, was to be determined with reference to the First Schedule to the Code of Criminal Procedure, 1973.

37. Referring to Part 2 of Schedule I to the Code, the learned ASG submitted that in terms of the third entry if the offence was punishable with imprisonment which was less than three years or with fine only, in that event, the offence would be bailable. If, however, the punishment was for three years and upwards, it would be non-bailable. It was further submitted that the offences under Section 135 of the Customs Act, 1962, being punishable upto three years and seven years depending on the facts, would be non-bailable.

38. In response to Mr. Rohatgi's submissions that since offences under Section 9A of the Excise Act were non-cognizable and the Excise Officer, therefore, had no power to arrest such a person, the learned ASG submitted that such an argument was fallacious since it was only for the purposes of the Code of Criminal Procedure that the offences would be non-cognizable, but it did not mean that the concerned officer, who had been authorized to investigate into the evasion of excise duty, would have no power to investigate or arrest a person involved in such offences. In support of his submissions, Mr. Malhotra referred to the decision of this Court in *Union of India Vs. Padam Narain Aggarwal* [(2008) 13 SCC 305], wherein this Court had considered powers of arrest under other provisions such as the Customs Act. While deciding the matter, this Court had held that the power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. However, such power of arrest can be exercised only in such cases where the Customs Officer has reasons to believe that a person has committed an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Customs Act. It was further observed that the power of arrest was circumscribed by objective considerations and could not be exercised on whims, caprice or fancies of the officer.

39. The learned ASG submitted that in *N.H. Dave, Inspector of Customs Vs. Mohd. Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatt) & Ors.* [1984 (15) ELT 353

(Guj.)], the Division Bench of the Gujarat High Court, inter alia, observed that since offences under Section 135 of the Customs Act, 1962, are punishable with imprisonment exceeding three years, the offences would be non-bailable. The learned ASG submitted that the aforesaid view had been confirmed by this Court in *Deepak Mahajan's* case (supra), wherein it was held that although the powers of the Customs Officer and Enforcement Officer are not identical to those of Police Officers in relation to investigation under Chapter XII of the Code, yet Officers under the Foreign Exchange Regulation Act and the Customs Act are vested with powers which are similar to the powers of a police officer. The learned ASG submitted further that such officers, who have the power to arrest, do not derive their power from the Code, but under the special statutes, such as the Central Excise Act, 1944, and the Customs Act, 1962.

40. The learned ASG submitted further that the powers of the Customs Officer to release an arrested person on bail is limited and when an accused is to be produced before the Court, it is the Court which would grant bail and not the Customs Officer. He only ensures that the person is produced before the Magistrate. According to the learned ASG, what is of paramount importance is the nature of the offence which would determine whether a person is to be released by the Court on bail. The learned ASG submitted that while in a cognizable case a police officer could arrest without warrant and in non-cognizable cases he could not, the offences under the Excise Act, Customs Act or Foreign Exchange Regulation Act, 1973, are offences under special Acts which deal in the evasion of excise, custom and foreign exchange. According to the learned ASG, in such matters, police officers have been restrained from investigating into the offences and arresting without warrant, but the concerned Customs, Excise, Foreign Exchange, Food Authorities, were not police officers within the meaning of the Code, and, they could, accordingly arrest such persons for the purposes of the investigation, their interrogation and for finding out the manner and extent of evasion of the excise duty, customs

duty and foreign exchange etc. The learned ASG submitted that cognizability of an offence did not mean that the person could not be arrested by the officials of the Department for the purpose of the investigation and interrogation. It was further submitted that Section 104(4) of the Customs Act, 1962, indicates that the offences thereunder would be non-cognizable within the meaning of the Code and would prevent police officers under the Code from exercising powers of arrest, but such restriction do not apply to the special officers under various special statutes.

41. Mr. Malhotra submitted that the offences which were non-cognizable were not always bailable and special officers under special Statutes would continue to have the power to arrest offenders, even if under the Code police officers were prevented from doing so.

42. The submissions advanced by Mr. Rohatgi and the learned ASG, Mr. Malhotra, with regard to the question of bailability of offences under the Customs Act, 1962, are identical to those involving the provisions of the Central Excise Act, 1944. The provisions of the two above-mentioned enactments on the issue whether offences under both the said Acts are bailable, are not only similar, but the provisions of the two enactments are also in pari materia in respect thereof.

43. The provisions of Section 104(3) of the Customs Act, 1962, and Section 13 of the Central Excise Act, 1944, vest Customs Officers and Excise Officers with the same powers as that of a Police Officer in charge of a Police Station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable. Both Section 9A of the 1944 Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable. The arguments advanced on behalf of respective parties in Om Prakash & Anr. Vs. Union of India & Anr. (Writ Petition (Crl)

No.66 of 2011) and other similar cases under the Central Excise Act, 1944, are equally applicable in the case of Choith Nanikram Harchandani Vs. Union of India & Ors. (Writ Petition (Crl) No.74 of 2010 and the other connected Writ Petitions in respect of the Customs Act, 1962.

44. Accordingly, on the same reasoning, the offences under the Customs Act, 1962 must also be held to be bailable and the Writ Petitions must, therefore, succeed. The same are, accordingly, allowed. Crl. M.P. No.10673 of 2011 in WP (Crl.) No.76 of 2011 is also disposed of accordingly. Consequently, as in the case of offences under the Central Excise Act, 1944, it is held that offences under Section 135 of the Customs Act, 1962, are bailable and if the person arrested offers bail, he shall be released on bail in accordance with the provisions of sub-Section (3) of Section 104 of the Customs Act, 1962, if not wanted in connection with any other offence.

N.J. Matters disposed of.

DEEPAK VERMA

v.

STATE OF HIMACHAL PRADESH

(CRIMINAL APPEAL NO.2423 OF 2009)

OCTOBER 11, 2011

[R.M. LODHA AND JAGDISH SINGH KHEHAR, JJ.]

Penal Code, 1860:

ss.302 and 323 r/w s.27 of Arms Act – Conviction of two accused under, for causing death of two persons by gun shot injuries – Allegation that offence was committed on account of retaliation and vengeance – Accused no.1 fired shots at the first victim from his double barrel gun – Thereafter, accused no.2 handed over cartridges to accused no.1 who reloaded his gun – When second victim came to save the first victim, accused no.1 shot at him – Conviction by courts below – On appeal, held: Prosecution established that it was only on account of the rejection of marriage proposal of accused no.1 by the first victim's father that the accused nos.1 and 2, as an act of retaliation and vengeance, jointly committed the offence – Discrepancies in recording time, as well as the overwriting in the dying declaration were too trivial to brush aside the overwhelming oral evidence produced by the prosecution – Dying declaration of the victim and the statements of her relations, who had appeared as prosecution witness, duly established the commission of the offence, as well as, the common motive for the two accused to have joined hands in committing the crime – Conviction upheld.

ss.302 and 323 r/w s.27 of Arms Act – Conviction of two accused under, for causing death of two persons – Plea of accused no.2 that no role whatsoever was attributed to him – Held: Evidence on record showed that the two accused had come together on a scooter to commit the offence – Accused

no.1 fired first two shots at the victim from his double barrel gun – Thereafter, there were no live cartridges in the gun and it was accused no.2 who provided two live cartridges to the accused no.1 – After commission of the crime, both accused jointly made escape on a scooter – Therefore, it cannot be held that accused no.2 was merely a bystander and was incidentally present at the place of occurrence – He was rightly convicted.

Evidence:

Delay in lodging FIR – Effect on prosecution case – Plea that all the family members of deceased did not make any statement to police until the eventual disclosure of the names of the two accused by deceased herself in her dying declaration – Held: It is not expected that the close family members would proceed to police station to lodge a report when the injured are in critical condition – Full attention for the welfare of the two close family members is the expected behaviour of all family members – Therefore, delay in lodging complaint could not be considered fatal to the prosecution case.

Motive – Held: Proof of motive is not a sine qua non before a person can be held guilty of the commission of a crime – Motive being a matter of the mind, is more often than not, difficult to establish through evidence.

The prosecution case was that the father of the appellants-accused no.1 and 2 was tenant in the house of PW-2. Accused no.2 was giving home tuitions to the children of PW-2. One and half years prior to the incident, the appellant-accused no.2 had approached PW-2 with the marriage proposal of daughter of PW-2 'KV' with his brother the appellant-accused no.1. PW-2 did not accept the proposal. Thereafter 'KV' was married and staying in a different city. On the day of incident, 'KV' had come to her father's house to stay. At 10.30, the appellants-

accused no.1 and 2 went to the house of PW-2 on a scooter. Appellant-accused no.1 had in his possession a double barrel gun. When 'KV' came in the courtyard, appellant-accused no.1 fired two shot at 'KV' from his double barrel gun which hit her on her abdomen and shoulder. PW-4, grandmother of 'KV' came to the courtyard and tried to catch the two accused. Appellant-accused no.1 hit PW-4 in her abdomen, chest and on her wrist with the butt of the gun. After the two shots were fired by appellant-accused no.1, appellant-accused no.2 handed over two cartridges to appellant-accused no.1 who reloaded his gun and shot at 'RK' maternal uncle of 'KV' who had come to the courtyard and trying to lift 'KV'. Thereafter the two accused fled away. PW-3, wife of 'RK' on hearing the first shot had also rushed to the courtyard. Both the injured were taken to hospital. 'RK' was declared dead on the same day. The doctor, PW-11 gave a report at 12.20 that 'KV' was not fit to make her statement since her pulse rate and blood pressure, at that time was not recordable and also she had no control over her speech. Subsequently at 13.00, PW-11 declared her medically fit. Thereafter, the statement of 'KV' was recorded by ASI PW-26. The similar statement was made by her to PW-2 on way when she was shifted to another hospital. She died after 4 days.

On the day of occurrence, the two accused were apprehended at the police naka. A double barrel gun with one live cartridge and one spent cartridge were recovered from their possession. Based on disclosure statement of appellant-accused no.1, 13 more live cartridges besides four empty cartridge were recovered from his house.

The trial court convicted the appellants-accused no.1 and 2 under Sections 302 and 323 r/w Section 34, IPC and Section 27 of Arms Act. The High Court affirmed the order

of conviction.

In the instant appeal, it was contended for the appellants that the case set up by the prosecution was false and fabricated; that even though the two accused were well known to the family of the deceased, yet all the family of members of the deceased remained quiet till the statement made by 'KV' involving them in the incident; that the incident occurred at 10.30 a.m. and yet none of the eye-witnesses disclosed the names of the offenders.

The appellant-accused no.2 pleaded that no role whatsoever was attributed to him and that even as per the prosecution, all the shots were fired by appellant-accused no.1 and the double barrel gun remained in his possession and, therefore, appellant-accused no.2 was a mere by-stander and had no role in the crime; that there was no motive whatsoever for appellant-accused no.2 to have committed the offence in question.

Dismissing the appeal, the Court

HELD: 1. The occurrence took place at 10:30 hrs. on 28.7.2003. Both the victim-deceased 'KV' and the paternal uncle of the deceased 'RK' were taken to the hospital immediately after the occurrence. The uncle was declared dead at 12:30 hrs. on the date of occurrence itself. The condition of 'KV' was critical at that juncture. This is evident from the fact that the doctor PW11 gave a report at 12:20 hrs., (on 28.7.2003) to the effect, that 'KV' was not fit to record her statement. The attending doctor had recorded, that her pulse rate and blood pressure were not recordable. In the peculiar facts, it is evident that the first endeavour of all close family members would have been to have the two injured treated. None of the close family members could have been expected to proceed to the police station to lodge a report when both the injured were critical. Full attention for the welfare of the two close

family members would have been the expected behaviour of all family members. The action to be taken against the assailants would have been a matter of secondary concern. The contention of their not having made any statements at that juncture to the police, cannot therefore, be considered unnatural. 'KV' was declared medically fit at 13:00 hrs., on 28.7.2003 by PW11. She specifically identified the two accused appellant no.1 and 2 as the perpetrators of the occurrence. There is no reason whatsoever to doubt the dying declaration made by 'KV'. Besides, the dying declaration of 'KV' the prosecution endeavoured to establish the guilt of the accused, by producing three eye-witnesses. PW1, (aged 14 years at the time of occurrence), who was in the courtyard itself at the time of occurrence was the younger brother of the deceased 'KV'. In his deposition, he reiterated the factual position recorded by 'KV' in her dying declaration. The grand-mother of the deceased PW4, aged 61 years, was a stamped witness. At the time of occurrence she was hit by appellant-accused no.1, in her abdomen, chest and on her right wrist with the butt of his double barrel gun. She also identified the accused in her statement. On medical examination, she was found to have suffered multiple bruises, which could have been caused by the butt of a double barrel gun. Additionally, PW3 was also an eye-witness whose statement was recorded. She was the wife of the deceased 'RK'. She had come into the courtyard on hearing the first shot fired at 'KV. The dying declaration of 'KV' was supplemented by PW3 as well. The said three witnesses, a young boy, the wife of the deceased and an old grandmother were natural witness, whose presence at the place of occurrence, did not cast any shadow of doubt. The prosecution was able to establish the motive of the appellants-accused in having committed the crime. In so far as the instant aspect of the matter is concerned, the alleged motive of declining the marriage proposal of the appellant-accused no.1, at the

hands of his elder brother, appellant-accused no.2 was reiterated by PW1, PW2, PW3 as also PW4, as well as, by 'KV' in her statement recorded by ASI PW-26. It is only on account of the rejection of the said marriage proposal that and appellants-accused nos.1 and 2, as an act of retaliation and vengeance, jointly committed the offence in question. No reason whatsoever emerges from the evidence produced before the trial court why the family of the deceased 'KV' and/or 'RK' would falsely implicate the accused-appellants nos.1 and 2. The cumulative effect of all the factors clearly negate the first contention raised on behalf of the appellants. [Para 17] [286-G-H; 287-A-H; 288-A-F]

2. It is not possible to accept the contention that the appellant-accused no.2 was not an active participant in the crime in question. The evidence produced by the prosecution clearly established that the two accused-appellants nos.1 and 2 had come to the house of PW2 on a scooter to commit the crime in question. It is also apparent that at one juncture only two cartridges can be loaded in a double barrel gun. With the cartridges loaded in the gun, the appellant-accused no.1 had fired the first two shots at 'KV'. Thereafter, there were no live cartridges in the gun. PW4 pointed out, that after the appellant-accused no.1 had fired two shots at 'KV', the appellant-accused no.2 provided two live cartridges to the appellant-accused no.1. Accused no.1 then reloaded his double barrel gun with the two live cartridges furnished by appellant-accused no.2 and fired one further shot at the deceased 'RK'. After the commission of the crime, the two accused jointly made good their escape on a scooter. When the two accused were apprehended at police "naka" the appellant-accused no.2 was driving the scooter, whereas, appellant-accused no.1 was pillion riding with him. It, accordingly emerged that after having committed the crime, the appellant-accused no.2 also

helped his brother appellant-accused no.1 to make good his escape from the place of occurrence. It is, therefore, not possible to conclude that appellant-accused no.2 was merely a by-stander, who was incidentally present at the place of occurrence. Both the accused jointly planned and committed the crime. Various eye-witnesses had identified the two accused who had committed the offence. The dying declaration of 'KV' and the statements of her relations, who had appeared as prosecution witness, duly established the commission of the crime, as well as, the common motive for the two accused to had joined hands in committing the crime. The handing over of two live cartridges by the appellant-accused no.2 to his brother accused no.1, after he had fired two shots from the double barrel gun with which the crime in question was committed, completely demolished the contention, in so far as the participation of the appellant-accused no.2 in the crime was concerned. [Para 19] [292-G-H; 293-A-H; 294-A-B]

State of Uttar Pradesh vs. Sahrunnisa & Anr. **(2009) 15 SCC 452: 2009 (10) SCR 237;** *Aizaz & Others vs. State of Uttar Pradesh* **(2008) 12 SCC 198: 2008 (12) SCR 13 – held inapplicable.**

3. Proof of motive is not a *sine qua non* before a person can be held guilty of the commission of a crime. Motive being a matter of the mind, is more often than not, difficult to establish through evidence. In the instant case, there was extensive oral evidence in the nature of the statements of three eye-witnesses out of which one was a stamped witness, that appellant-accused no.2 was an active participant in the crime in question. There is also the dying declaration of 'KV' implicating both the accused. The oral evidence against the appellant-accused no.2 was clear and unambiguous. Besides, motive of appellant-accused no.2 was also fully established. [Para 21] [297-B-F]

State of Uttar Pradesh v. Rajvir **(2007) 15 SCC 545 – held inapplicable.**

4. There can be no doubt that there were certain discrepancies in the time recorded in the dying declaration. Additionally, there can also be no doubt that certain words which are not in common use have found place in the dying declaration made by 'KV'. Despite that it is not possible to accept that 'KV' was not fit to make her statement when she actually recorded the same in the presence of ASI PW26 and the doctor PW11. The very medical report, relied upon by the appellants, which depicted that the pulse rate and blood pressure of 'KV' was not recordable, also revealed, that on having been given treatment her blood pressure improved to 140/70 and her pulse rate improved to 120 per minute. This aspect of the medical report was not subject matter of challenge. The fact that the incident occurred on 28.7.2003 and 'KV' eventually died on 1.8.2003, i.e., 4 days after the recording of the dying declaration also showed that she could certainly have been fit to make her dying declaration on 28.7.2003. Her fitness was actually recorded on the dying declaration by PW11. A number of prosecution witnesses revealed that she was conscious and was able to speak. 'KV' after having recorded her statement before ASI PW26, also repeated the same version of the incident (as she had narrated while recording her dying declaration) to her father PW2, when she was being shifted from Chamba to Amritsar for medical treatment. Moreover, the doctor PW11 appeared as a prosecution witness, and affirmed the veracity of her being in a fit condition to make the statement. There is no reason whatsoever to doubt the statement of PW11. The question of doubting the dying declaration made by 'KV' could have arisen if there had been other cogent evidence to establish any material discrepancy therein. Three eye witnesses PW1, PW3 and PW4 supported the

version of the factual position depicted in the statement of 'KV'. It is, therefore, not possible to accept, that the statement of 'KV' was either false or fabricated, or that, the statement was manipulated at the hands of the prosecution to establish the guilt of the appellants-accused nos.1 and 2 or that she was not medically fit to make a statement. The discrepancies in recording time, as well as, the overwriting pointed out were too trivial to brush aside the overwhelming oral evidence produced by the prosecution. The order passed by the trial court and also, the order passed by the High Court are affirmed. [Paras 23, 24] [299-C-H; 300-A-E]

Case Law Reference:

2009 (10) SCR 237	**held inapplicable**	**Para 18**
2008 (12) SCR 13	**held inapplicable**	**Para 18**
(2007) 15 SCC 545	**held inapplicable**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2423 of 2009.

From the Judgment and Order dated 02.09.2009 of the Division Bench of the High Court of Himanchal Pradesh at Shimla in Criminal Appeal No. 27 of 2006.

WITH

Criminal Appeal No. 157 of 2010.

R.N. Mittal, Arvind Kumar Gupta, Rahul Mangla and Mohit Garg for the Appellant.

Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. These appeals have been preferred by Dheeraj Verma (original accused no.1) and

Deepak Verma (original accused no.2) so as to assail the order of conviction and sentence dated 30.12.2005 rendered in Sessions Trial no.55 of 2003 by the Sessions Judge, Chamba, as also, the decision rendered by the Himachal Pradesh High Court in Criminal Appeal No.27 of 2006, whereby, the conviction and sentence awarded by the Sessions Judge, Chamba, on 30.12.2005, came to be upheld on 2.9.2009.

2. The prosecution, in order to bring home the case against the appellants-accused examined as many as 27 witnesses. The prosecution story, as is emerged from the statements of the witnesses, produced by the prosecution, reveals that Kamini Verma alias Doli resided with her father Arun Kumar PW2 in Mohalla Sultanpur, Chamba, in the State of Himachal Pradesh. Kamini Verma was married to Anmol Verma alias Munna on 6.2.2003. Thereafter, she had been residing along with her husband at Mukerian in the State of Punjab. On 28.7.2003, Kamini Verma came to her father's house in Chamba from Pathankot. She had arrived at 05:30 hrs. She had been escorted to her father's house by Rakesh Verma (her paternal uncle, i.e., younger brother of her father Arun Kumar, PW2), and his wife Veera.

3. About a year before the marriage of Kamini Verma with Anmol Verma, Deepak Verma, appellant-accused no.2 had approached Arun Kumar PW2 (father of Kamini Verma) with a marriage proposal for Kamini Verma, with his younger brother Dheeraj Verma appellant-accused no.1. Kamini Verma's father, Arun Kumar did not accept the proposal. Thereafter, Kamini Verma was married to Anmol Verma on 6.2.2003. Earlier, Dheeraj Verma and Deepak Verma, were tenants in the house of Arun Kumar (PW2, father of Kamini Verma). The two accused were originally residents of Gurdaspur in the State of Punjab. The father of the accused, namely, Shyam Lal, a goldsmith, had moved to Chamba in the State of Himachal Pradesh, and had started to reside in the

house of Arun Kumar PW2. Shyam Lal has reportedly now gone back to the State of Punjab. The affinity between the family of Arun Kumar (PW2, father of Kamini Verma) and Shyam Lal (father of appellants-accused Dheeraj Verma and Deepak Verma) was also based on the fact, that Deepak Verma, appellant-accused no.2, had been giving home tuitions to Kamini Verma and her brother Deepak Kumar (PW1).

4. Kamini Verma reached Chamba from Pathankot on 28.7.2003 at about 05:30 hrs. Dheeraj Verma, appellant-accused no.1 and Deepak Verma, appellant-accused no.2 came to the house of Arun Kumar (PW2, father of Kamini Verma) at Mohalla Sultanpur, Chamba at about 10:30 hrs. They had come on a scooter. Dheeraj Verma, appellant-accused no.1, had in his possession, a double barrel gun. According to the case of the prosecution, after taking breakfast, Kamini Verma went to the kitchen to clean utensils. Having cleaned the utensils she came out into the courtyard. As she stepped into the courtyard, Dheeraj Verma, appellant-accused no.1 fired one shot at her from his double barrel gun. This shot hit her in the abdomen. Dheeraj Verma, appellant-accused no.1, then fired another shot at Kamini Verma. The second shot hit her on the left shoulder. Sumitri Devi (PW4, grandmother of Kamini Verma) who had also come into the courtyard, tried to catch the two accused who were making good their escape. Dheeraj Verma, appellant-accused no.1 hit Sumitri Devi PW4 in her abdomen, chest and on her right wrist, with the butt of his double barrel gun. Later, when she was medically examined (on 3.8.2003), she was found to have suffered multiple bruises, but the nature of injuries was found to be simple. Even though, Sumitri Devi PW4 had picked up a stone and had thrown it at the appellant-accused no.1, but she had missed her mark.

5. According to the prosecution story, after two shots had been fired by Dheeraj Verma, appellant-accused no.1, Deepak Verma, appellant-accused no.2 handed over two cartridges to Dheeraj Verma, appellant-accused no.1. The appellant-

accused no.1 then reloaded his gun and shot at Rakesh Kumar (maternal uncle of Kamini Verma) who had by then come into the courtyard, and was trying to lift Kamini Verma. The shot fired at Rakesh Kumar (maternal uncle of Kamini Verma) hit him on the left side of the lower abdomen. The two accused then fled away. At the time of occurrence, Sonia (PW3, wife of Rakesh Kumar, maternal uncle of Kamini Verma) on hearing the first shot had also rushed to the courtyard. She tried to assist her husband Rakesh Kumar and her niece Kamini Verma.

6. Both Kamini Verma and Rakesh Kumar were taken to the Zonal Hospital, Chamba immediately after the occurrence. Rakesh Kumar was declared dead at the said Hospital at 12:30 hours on the date of the occurrence itself (i.e., on 28.7.2003). He was stated to have died due to a gun shot injury causing rupture of major vessels and visceral organs leading to hemorrhagic shock and death.

7. The police post, Sultanpur was informed of the occurrence telephonically, leading to the recording of Daily Diary No.4 at 10:30 a.m. on 28.7.2003. ASI Jog Raj PW26 along with other police personnel, on receipt of aforesaid information, proceeded to Zonal Hopital, Chamba. ASI Jog Raj moved an application to the Senior Medical Officer, Zonal Hospital, Chamba for seeking medical opinion whether Kamini Verma alias Doli was fit to make a statement. In the first instance Dr. D.P. Dogra PW11 gave a report at 12:20 hrs. (on 28.7.2003) to the effect that Kamini Verma was not fit to make her statement. The said opinion was tendered as her pulse rate and blood pressure, at that time, were not recordable, and also because, she had no control over her speech. Subsequently, at 13:00 hrs. on 28.7.2003 itself, Dr. D.P. Dogra PW11 declared her medically fit. It was thereafter, that the statement of Kamini Verma came to be recorded by ASI Jog Raj in the presence of Dr. D.P. Dogra. The statement recorded was then read out to Kamini Verma, whereupon, in token of its correctness, she affixed her right thumb impression on the same. Both Dr. D.P. Dogra PW11 and ASI Jog Raj PW26

recorded their endorsements on the statement of Kamini Verma. The statement of Kamini Verma was the basis of registering FIR No.182 of 2003 at Police Station Sadar, Chamba on 28.7.2003. Kamini Verma repeated the same version of the incident to her father Arun Kumar PW2 on her way to Amritsar (from Chamba).

8. Kamini Verma, who was originally taken to Zonal Hospital, Chamba, was referred to Zonal Hospital, Dharamshala. However, on her discharge from Zonal Hospital, Chamba, she was taken for treatment to Ram Saran Dass, Kishori Lal Charitable Hospital, Amritsar (Kakkar Hospital, Amritsar) in the State of Punjab. Kamini Verma died at Kakkar Hospital, Amritsar on 1.8.2003 at 04:00 hrs. In the post-mortem report of Kamini Verma (Exh.PW13/C) it was opined, that she had died due to gun short injuries leading to injuries to her abdominal viscera and disseminated intravascular bleeding leading to shock and death.

9. The pellets, recovered from the wounds of Kamini Verma and from the dead body of Rakesh Kumar at Zonal Hospital, Chamba, were handed over to the police. Inspector Khub Ram PW27, went to the place of occurrence for inquest. From the spot, i.e., courtyard of the house of Arun Kumar (PW2, father of Kamini Verma) he collected blood samples from the floor, two plastic caps, 35 pellets lying on the floor, besides 3 pellets embedded in a door of the house. Two empty cartridges were also recovered from outside the gate of house of Arun Kumar PW2.

10. On the date of occurrence itself, i.e., on 28.7.2003, the scooter, on which the appellant-accused nos.1 and 2 had made good their escape was stopped at Bhatulun Morh at a police "nakka" while they were proceeding towards Khajjiar from Chamba. Dheeraj Verma and Deepak Verma, appellant-accused nos.1 and 2 were identified. A double barrel gun, which was in their possession, was found with one live cartridge and one spent cartridge. The gun, the live as well as spent

cartridges, and the scooter on which they were apprehended, bearing registration no.PB-58-A-0285 were taken into possession by the police. Both the accused were also taken into custody. On the personal search of both the accused, four live cartridges were recovered from the pocket of Dheeraj Verma, appellant-accused no.1. Based on a disclosure statement made on 31.7.2003 by Dheeraj Verma appellant-accused no.1, 13 more live cartridges beside four empty cartridges were recovered from a cupboard in his bedroom. The licence of the double barrel gun was also recovered from their residence.

11. The double barrel gun recovered from the appellant-accused nos.1 and 2 was sent to the Forensic Science Laboratory, Bharari, Shimla, Himachal Pradesh. In his report, the Assistant Director opined; firstly, that the double barrel gun recovered from the accused was capable of firing; secondly, that 3 empty cartridges recovered from the place of occurrence may have been fired from the recovered gun; and thirdly, that the pellets recovered may have been fired from the empty cartridges recovered from the spot.

12. On the completion of investigation, the prosecution presented a challan in the court of Chief Judicial Magistrate, against both the accused, under sections 302 and 323 read with section 34 of the Indian Penal Code, besides section 27 of the Indian Arms Act. The Chief Judicial Magistrate committed the case for trial to the Court of Sessions on 22.10.2003. On 12.1.2004 the Sessions Judge, Chamba, framed the charges, as were proposed by the prosecution. In order to bring home the charges, the prosecution examined as many as 27 witnesses. The cumulative effect of the statement of witnesses examined by the prosecution has been narrated in the foregoing paragraphs. After recording the prosecution evidence, the statements of Dheeraj Verma, appellant-accused no.1 and Deepak Verma, appellant-accused no.2 were recorded under Section 313 of the Criminal Procedure Code. The accused,

besides denying the correctness (or knowledge) of the factual position, with which they were confronted, alleged that a false case has been registered against them due to business rivalry. It is pertinent to mention, that the father of the deceased Kamini Verma, i.e., Arun Kumar PW2, as also, the father of the appellant-accused Dheeraj Verma and Deepak Verma, namely, Shyam Lal, were admittedly goldsmiths, and were engaged in the said business.

13. Sessions Trial No.55 of 2003 came to be disposed of on 30.12.2005 whereby the Sessions Judge, Chamba convicted the accused Dheeraj Verma and Deepak Verma for offences punishable under section 302 and 323 read with section 34 of the Indian Penal Code, as also, under section 27 of the Arms Act. On the date of their conviction, i.e., on 30.12.2005 itself, after affording an opportunity of hearing, the appellants-accused nos.1 and 2 were sentenced under Section 302 read with Section 34 of the Indian Penal Code, to imprisonment for life and to pay fine of Rs.25,000/- each (in default of payment of fine, they were to undergo further simple imprisonment for two years). The appellants-accused nos.1 and 2 Dheeraj Verma and Deepak Verma were also sentenced under Section 323 read with Section 34 of the Indian Penal Code, to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1000/- each (in case of default of payment of fine, they were to undergo further simple imprisonment for one month). The appellants-accused Dheeraj Verma and Deepak Verma were sentenced to undergo two years rigorous imprisonment, for the offence punishable under Section 27 of the Arms Act. The Sessions Judge, Chamba also ordered, that all the substantive punishments were to run concurrently.

14. Dissatisfied with the order rendered in Sessions Trial No.55 of 2003 by the Sessions Judge, Chamba on 30.12.2005, the appellants-accused nos.1 and 2 Dheeraj Verma and Deepak Verma preferred Criminal Appeal No.27 of 2006

before the High Court of Himachal Pradesh. Criminal Appeal No.27 of 2006 was, however, dismissed by the High Court on 2.9.2009, on merits, as well as, on the quantum of sentence imposed on the appellants-accused.

15. Dissatisfied with the order dated 30.12.2005 passed by the Sessions Judge, Chamba in Sessions Trial No.55 of 2003, as well as, the order dated 2.9.2009 passed by the High Court of Himachal Pradesh in Criminal Appeal No.27 of 2006, the appellants-accused nos.1 and 2 Dheeraj Verma and Deepak Verma have approached this Court by filing the instant appeals.

16. The first and foremost contention advanced at the hands of the learned counsel for the appellants was, that the case set up by the prosecution was false and fabricated. It was submitted, that the facts brought forth by the prosecution clearly lead to the inference, that there was no involvement whatsoever of the two accused Dheeraj Verma and Deepak Varma. In so far as the instant aspect of the matter is concerned, it was the contention of the learned counsel for the appellants that the statements of Deepak Kumar PW1, Arun Kumar PW2, Sonia PW3 and Sumitri Devi PW4 reveal, that the two accused were well-known to the members of the family of the deceased Kamini Verma. In this behalf it was sought to be asserted, that according to the prosecution version, the two accused Dheeraj Verma and Deepak Verma had come to reside in the house of Arun Kumar PW2 along with their father Shyam Lal, as tenants. According to the learned counsel, it is also the case of the prosecution, that Deepak Verma, appellant-accused no.2 had been giving home tuitions to the deceased Kamini Verma and her brother Deepak Kumar PW1. Inspite of being in an effective position to identify both the accused on account of their long past relationship, it was submitted, that the names of the two accused Dheeraj Verma and Deepak Verma came to be disclosed, for the first time at 13:00 hrs., through the statement of the deceased Kamini Verma, which was recorded by the ASI

Jog Raj PW26. Stated in other words, it is the contention of the learned counsel for the appellants, that even though the two accused were well-known to the entire family of the deceased Kamini Verma, yet all the family members of the deceased Kamini Vemra remained tight-lipped till the eventual disclosure of the names of the two accused by Kamini Verma herself, at the Zonal Hospital, Chamba. It is, therefore, the contention of the learned counsel for the appellant, that the statements of all the eye-witnesses (Deepak Kumar PW1, Sonia PW3 and Sumitri Devi PW4) who were close family members of the deceased Kamini Verma and Rakesh Kumar, and had known the two accused for a long time, should not be relied upon. It is sought to be suggested, that all these close relations of the deceased Kamini Verma must be deemed to have been tutored, to make false statements against the appellants Dheeraj Verma and Deepak Verma at the instance of the investigating officers. It is submitted that the crime in question came to be committed at 10:30 hrs., on 28.7.2003, and yet none of the aforesaid eye-witnesses disclosed the names of the offenders. It is sought to be suggested, that the names would have been disclosed only if they had actually witnessed the occurrence. It is therefore, submitted that none of the aforesaid eye witnesses actually witnessed the occurrence. It is, accordingly, the submission of the learned counsel for the appellant, that the prosecution version deserves to be rejected outright, and the appellants-accused Dheeraj Verma and Deepak Verma deserve to be acquitted.

17. We have given our thoughtful consideration to the first and the foremost contention advanced at the hands of the learned counsel for the appellants, as has been noticed in the foregoing paragraph. The facts, as they unfold from the prosecution story reveal, that the occurrence took place at 10:30 hrs. on 28.7.2003. Both Kamini Verma and Rakesh Kumar were taken to the Zonal Hospital, Chamba immediately after the occurrence. Rakesh Kumar was declared dead at 12:30 hrs. on the date of occurrence, i.e., on 28.7.2003 itself.

The condition of Kamini Verma was critical at that juncture. This is evident from the fact that Dr. D.P. Dogra PW11 gave a report at 12:20 hrs., (on 28.7.2003) to the effect, that Kamini Verma was not fit to record her statement. The attending doctor had recorded, that her pulse rate and blood pressure were not recordable. In the peculiar facts, as have been noticed hereinabove, it is evident that the first endeavour of all close family members would have been, to have the two injured Kamini Verma and Rakesh Kumar treated at the Zonal Hospital, Chamba. None of the close family members could have been expected to proceed to the police station to lodge a report when both the injured were critical. Full attention for the welfare of the two close family members would have been the expected behaviour of all family members. The action to be taken against the assailants, would have been a matter of secondary concern. The contention of their not having made any statements at that juncture to the police, cannot therefore, be considered unnatural. Kamini Verma was declared medically fit at 13:00 hrs., on 28.7.2003 by Dr. D.P. Dogra PW11. She specifically identified the two accused Dheeraj Verma and Deepak Verma as the perpetrators of the occurrence. There is no reason whatsoever to doubt the dying declaration made by Kamini Verma. Besides, the dying declaration of Kamini Verma, the prosecution endeavoured to establish the guilt of the accused, by producing three eye-witnesses. Deepak Kumar PW1, (aged 14 years at the time of occurrence), who was in the courtyard itself at the time of occurrence was the younger brother of the deceased Kamini Verma. In his deposition, he reiterated the factual position recorded by Kamini Verma in her dying declaration. The grand-mother of the deceased, namely, Sumitri Devi PW4, aged 61 years, is a stamped witness. At the time of occurrence she was hit by Dheeraj Verma, appellant-accused no.1, in her abdomen, chest and on her right wrist with the butt of his double barrel gun. She also identified the accused in her statement. On medical examination she was found to have suffered multiple bruises, which could have been

caused by the butt of a double barrel gun. Additionally, Sonia PW3 is also an eye-witness whose statement was recorded. She was the wife of the deceased Rakesh Kumar. She had come into the courtyard on hearing the first shot fired at Kamini Verma. The dying declaration of Kamini Verma was supplemented by Sonia PW3 as well. The aforesaid three witnesses, a young boy, the wife of the deceased and an old grandmother are natural witness, whose presence at the place of occurrence, does not cast any shadow of doubt. The prosecution was able to establish the motive of the appellants-accused in having committed the crime. In so far as the instant aspect of the matter is concerned, the alleged motive of declining the marriage proposal of the appellant-accused no.1, at the hands of his elder brother, appellant-accused no.2 Deepak Verma was reiterated by Deepak Kumar PW1, Arun Kumar PW2, Sonia PW3 as also Sumitri Devi PW4, as well as, by Kamini Verma in her statement recorded by ASI Jog Raj PW26. It is only on account of the rejection of the aforesaid marriage proposal that Dheeraj Verma and Deepak Verma, the appellants-accused nos.1 and 2, as an act of retaliation and vengeance, jointly committed the offence in question. It is also necessary to notice, that no reason whatsoever emerges from the evidence produced before the Trial Court why the family of the deceased Kamini Verma and/or Rakesh Kumar would falsely implicate the accused-appellants nos.1 and 2. The cumulative effect of all the factors mentioned above, clearly negate the suggestions/ submissions advanced by the learned counsel for the appellants as a part of his first contention. It is, therefore, apparent that there is no merit in the first contention advanced at the hands of the counsel for the appellants.

18. The second contention advanced at the hands of the learned counsel for the appellants was limited to the appellant-accused no.2 Deepak Verma. In so far as the second submission is concerned, it was sought to be asserted that no role whatsoever has been attributed to appellant-accused no.2 Deepak Verma. It was pointed out, that as per the prosecution

witnesses, the double barrel gun which came to be fired at Kamini Verma and Rakesh Kumar, had remained in possession of Dheeraj Verma, appellant-accused no.1 throughout the occurrence. All the shots were fired by Dheeraj Verma, appellant-accused no.1. It was pointed out, that as per the prosecution story, it was Dheeraj Verma, appellant-accused no.1 alone, who had allegedly fired shots, in the first instance at Kamini Verma, and thereafter, at Rakesh Kumar. It was submitted, that none of the shots was fired by Deepak Verma appellant-accused no.2. It is submitted, that even if the prosecution story is examined dispassionately, it would emerge that Deepak Verma, accused-appellant no.2 was a mere by-stander, and had no role whatsoever in the commission of the crime in question. In order to buttress the aforesaid contention, learned counsel for the appellants, in the first instance, placed reliance on *State of Uttar Pradesh vs. Sahrunnisa & Anr.* (2009) 15 SCC 452, wherefrom he placed emphatic reliance on the following observations:

> "18. There can be no dispute that these two respondents were present and indeed their mere presence by itself cannot be of criminal nature in the sense that by their mere presence a common intention cannot be attributed to them. Indeed, they have not done anything. No overt act is attributed to them though it was tried to be claimed by one of the witnesses that when the police party reached there they were standing on one leg. This also appears to be a tall claim without any basis and the High Court has rightly not believed this story which was tried to be introduced."

Additionally, reliance was placed on *Aizaz & Others vs. State of Uttar Pradesh* (2008) 12 SCC 198. In so far as the instant judgment is concerned, our attention was invited to the following observations:

> "11. ...It is a well-recognised canon of criminal jurisprudence that the courts cannot distinguish between co-conspirators, nor can they inquire, even if it were

possible, as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object, each and every person becomes responsible for the act of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment only. In a combination of this kind a mortal stroke, though given by one of the parties, is deemed in the eye of the law to have been given by every individual present and abetting. But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. The leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. (*See Ramaswami Ayyangar vs. State of T.N. (1976) 3 SCC 779).* The participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case. Before a man can be held liable for acts done by another, under the provisions of this section, it must be established that: (i) there was common intention in the sense of a prearranged plan between the two, and (ii) the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

12. 'Common intention' implies prearranged plan and acting in concert pursuant to the prearranged plan. Under this section a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a prearranged plan and prior concert. (*See Krishna Govind Patil v. State of Maharashtra* – AIR 1963 SC 1413). In *Amrik Singh v. State of Punjab* [(1972) 4 SCC (N) 42] it has been held that common intention presupposes prior concert. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bonds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. To constitute common intention, it is necessary that intention of each one of them be known to the rest of them and shared by them. Undoubtedly, it is a difficult thing to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. But however difficult may be the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered. In *Maqsoodan v. State of U.P.* [(1983) 1 SCC 218] it was observed that the prosecution must lead evidence from which the common intention of the accused can be safely gathered. In most cases it has to be inferred from the act, conduct or other relevant circumstances of the case in hand. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit an offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts

involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law. In *Bhaba Nanda Sarma v. State of Assam* [(1977) 4 SCC 396] it was observed that the prosecution must prove facts to justify an inference that all participants of the acts had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. Mere presence of a person at the time of commission of an offence by the confederates is not, in itself sufficient to bring his case within the purview of Section 34, unless community of designs is proved against him (*See Malkhan Singh v. State of U.P.* (1975) 3 SCC 311). In the Oxford English Dictionary, the word 'furtherance' is defined as 'action of helping forward'. Adopting this definition, Rusell says that: 'it indicates some kind of aid or assistance producing an effect in future' and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken, for the purpose of 'effecting that felony'. (*Russel on Crime, 12th Edn., Vol.I, pp. 487 and 488*). In *Shankarlal Kacharabhai v. State of Gujarat* [AIR 1965 SC 260] this Court has interpreted the word 'furtherance' as 'advancement or promotion."

Based on the observations recorded in the judgments relied upon it was submitted, that the appellant-accused no.2 Deepak Verma had no role in the crime, except that he was present at the place of occurrence. It is therefore submitted, that his mere presence along with Dheeraj Verma accused-appellant no.1, cannot be a valid basis for his conviction.

19. It is not possible for us to accept the contention advanced at the hands of the learned counsel for the appellant to the effect, that the appellant-accused no.2 Deepak Verma was not an active participant in the crime in question. The evidence produced by the prosecution clearly establishes that the two accused-appellants nos.1 and 2 Dheeraj Verma and

Deepak Verma had come to the house of Arun Kumar PW2 to commit the crime in question on a scooter. It is also apparent that at one juncture only two cartridges can be loaded in a double barrel gun. With the cartridges loaded in the gun, the appellant-accused no.1 Dheeraj Verma had fired the first two shots at Kamini Verma. Thereafter, there were no live cartridges in the gun. Sumitri Devi, while appearing as PW4, pointed out, that after the appellant-accused no.1 Dheeraj Verma had fired two shots at Kamini Verma, the appellant-accused no.2 Deepak Verma provided two live cartridges to the appellant-accused no.1 Dheeraj Verma. Dheeraj Verma then reloaded his double barrel gun with the two live cartridges furnished by appellant-accused no.2 Deepak Verma, and fired one further shot at the deceased Rakesh Kumar. After the commission of the crime, Dheeraj Verma and Deepak Verma, jointly made good their escape on a scooter bearing registration no. PB-58-A-0285. When the two accused were apprehended at Bataluan Morh at a police "naka" the appellant-accused no.2 Deepak Verma was driving the scooter, whereas, appellant-accused no.1 Dheeraj Verma was pillion riding with him. It, accordingly emerges, that after having committed the crime, the appellant-accused no.2 Deepak Verma, also helped his brother appellant-accused no.1 Dheeraj Verma to make good his escape from the place of occurrence. It is, therefore, not possible for us to conclude that appellant-accused no.2 Deepak Verma was merely a by-stander, who was incidentally present at the place of occurrence. In our considered view both Dheeraj Verma and Deepak Verma jointly planned and committed the crime. The judgments relied upon by the learned counsel for appellants are inapplicable to the facts and circumstances of this case. Various eye-witnesses had identified the two accused who had committed the offence. The dying declaration of Kamini Verma and the statements of her relations, who had appeared as prosecution witness, duly establishes the commission of the crime, as well as, the common motive for the two accused to had joined hands in committing the crime. The handing over of two live cartridges

by the appellant-accused no.2 Deepak Verma to his brother Dheeraj Verma, after he had fired two shots from the double barrel gun with which the crime in question was committed, completely demolishes the contention advanced at the hands of the learned counsel for the appellants, in so far as the participation of the appellant-accused no.2 Deepak Verma in the crime is concerned. For the reasons recorded herein above, we find no merit even in the second contention advanced at the hands of the counsel for the appellants.

20. The third contention advanced at the hands of the learned counsel for the appellants was, that there was no motive whatsoever for the appellant-accused no.2 Deepak Verma to have committed the offence in question. It is the submission of the learned counsel for the appellants, that insult on account of non acceptance of the marriage proposal already referred to above, may have been felt by appellant-accused no.1 Dheeraj Verma. There was no question of the appellant-accused no.2 Deepak Verma to have felt any insult, or to have any motive to commit the offence in question. On account of lack of motive to commit the crime on the part of appellant-accused no.2 Deepak Verma, learned counsel emphatically submits, that the appellant-accused no.2 Deepak Verma deserves acquittal. In order to supplement his instant contention, learned counsel placed reliance on a judgment rendered by this Court in *State of Uttar Pradesh v. Rajvir,* (2007) 15 SCC 545, wherein the State had approached this Court against the acquittal of the respondent. The High Court, while hearing the appeal against the respondent had re-appreciated the evidence by re-evaluating the statement of witnesses. While two of the accused were found to be guilty of murder, and accordingly, the sentence passed by the Trial Court against them was upheld; the High Court was doubtful of the participation of the respondent in the murder of the deceased, according to learned counsel, solely on the ground that there was no motive for the respondent to commit the murder of the deceased. Adopting a cautious approach, the High Court had acquitted the respondent by

giving him the benefit of doubt. This Court found merit in the determination of the High Court, and accordingly, upheld the decision of the High Court by recording the following observations:

> "8. We have carefully considered the submissions made by the learned counsel for the parties. It is the case of the prosecution that the other two accused, namely, Chander and Chhotey had motive against the deceased and the respondent had no motive whatsoever against the deceased; all the three accused were friendly among them. It is true that PWs 1 to 3 have supported the prosecution case that all the three accused went to the house of the deceased on the date of the incident and the respondent called the deceased to attend a patient immediately. PWs 1 to 3 also stated that all the three accused assaulted the deceased but the evidence of PWs 1 to 3 is specific and consistent as to the assault by the accused Chander on the deceased with a knife. As to the assault by the respondent, the statements of the witnesses are general and vague. No specific overt act is attributed to the respondent. It may also be mentioned here that there was no recovery of knife from the respondent. There was recovery of bloodstained clothes from the accused Chander. It is possible that on the accused Chander and Chhotey asking the respondent to accompany them to the house of the deceased to show a patient or the respondent himself might have taken a patient also for examination by the doctor. Mere presence of the respondent on the spot when the incident took place was not sufficient to hold that the respondent had shared the common intention to kill the deceased; particularly so when the respondent had no motive whatsoever. PW1, the brother of the deceased himself has stated that the respondent had no ill-will or motive against the deceased. It is under these circumstances, the motive aspect assumed importance. There is no dispute as to the legal position that in the

> absence of motive; or the alleged motive having not been established; an accused cannot be convicted if the prosecution is (sic not) successful in establishing the crime said to have been committed by an accused by other evidence. At any rate, a doubt definitely arose in the case in hand as to what was the reason or motive for the respondent to commit the murder of the deceased. In *State of U.P. v. Hari Prasad* [(1974) 3 SCC 673] this Court dealing with the aspect of motive has stated thus: (SCC pp. 674-75, para 2):
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> > "This is not to say that even if the witnesses are truthful, the prosecution must fail for the reason that the motive of the crime is difficult to find. For the matter of fact, it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by the motive. But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive."
>
> The present case is not the one where the prosecution has successfully proved the guilt of the respondent beyond reasonable doubt by other evidence on record to say motive aspect was immaterial."

Based on the aforesaid factual and legal position, it is submitted, that the appellant-accused no. 2 Deepak Verma deserved acquittal.

21. We have examined the third submission canvassed at the hands of the learned counsel for the appellants, based on the plea of motive. While dealing with the second contention, advanced at the hands of the learned counsel for the appellants, we have already concluded hereinabove, that there was sufficient motive even for the appellant-accused no.2 Deepak

Verma to commit the crime in question, in conjunction with his younger brother Dheeraj Verma, appellant-accused no.1. Be that as it may, it would be relevant to indicate, keeping in mind the observations recorded by this Court as have been brought to our notice by the learned counsel for the appellants (which we have extracted hereinabove), that proof of motive is not a sine qua non before a person can be held guilty of the commission of a crime. Motive being a matter of the mind, is more often than not, difficult to establish through evidence. In our view, the instant contention advanced by the learned counsel for the appellant is misconceived in the facts and circumstances of the case. In the present case, there is extensive oral evidence in the nature of the statements of three eye-witnesses out of which one is a stamped witness, that appellant-accused no.2 Deepak Verma was an active participant in the crime in question. There is also the dying declaration of Kamini Verma implicating both the accused. In the case relied upon by the learned counsel for the appellant, the oral evidence produced by the prosecution to implicate the respondent with the commission of the crime, was not clear. Accordingly, in the absence of the prosecution having been able to establish even the motive, the High Court (as well as, this Court) granted the respondent the benefit of doubt. That is not so, in so far as the present controversy is concerned. The oral evidence against the appellant-accused no.2 Deepak Verma is clear and unambiguous. Besides, motive of appellant-accused no.2 Deepak Verma is also fully established. We are therefore satisfied, that the judgment relied upon by the learned counsel for the appellant has no relevance to the present case. We, therefore, find no merit even in the third contention advanced at the hands of the learned counsel for the appellants.

22. The last contention advanced at the hands of the learned counsel for the appellant was, that the dying declaration of Kamini Verma which became the basis of registering the First Information Report itself, was forged and fabricated. Learned counsel for the appellants, vehemently contended that

the very foundation of the prosecution story itself being shrouded in suspicious circumstances, must lead to the inevitable conclusion, that the appellants-accused have been falsely implicated in the crime in question. In so far as the instant aspect of the matter is concerned, it was the vehement contention of the learned counsel for the appellants, that Kamini Verma was declared medically unfit to make a statement by Dr. D.P. Dogra PW11 at 12:20 hrs., on 28.7.2003. Pointing out to Exhibit PW11/B, it was the submission of the learned counsel for the appellants, that the medical report, showing that Kamini Verma was not fit to make a statement, had been made on the ground that her pulse rate and blood pressure were not recordable. According to the learned counsel, within just 40 minutes, the same Dr. D.P. Dogra PW11 gave a report at 13:00 hrs., that Kamini Verma was fit to record her statement. Learned counsel for the appellants, also invited the court's attention to Exhibit PW11/C, PW23/A and PW26/A so as to point out a number of discrepancies. It was submitted, that there are a number of cuttings/overwritings, of the time at which the endorsements on dying declaration of Kamini Verma were recorded. It is submitted, that the time has been altered from 12:20 p.m. to 1:00 p.m. This, according to the learned counsel was done, to match with the time given by Dr. D.P. Dogra PW11. Pointing to the endorsement of Dr. D.P. Dogra, it was submitted that Dr. D.P. Dogra had endorsed the dying declaration at 13:00 hrs. It was pointed out, that the time of the endorsement made by ASI Jog Raj PW26 (under the dying declaration of Kamini Verma) was recorded at 1:30 p.m., which was subsequently altered to 1:00 p.m. to match with the time recorded in the endorsement made by Dr. D.P. Dogra PW11. Additonally, it was the contention of the learned counsel for the appellants, that the language of the dying declaration itself shows, that the same was not a voluntary statement made by Kamini Verma, but actually the handiwork of ASI Jog Raj PW26, who had recorded the aforesaid statement. In this regard learned counsel for the appellants pointed out, that various words and observations were used in the dying

declaration, which are in use of police personnel (and/or advocates), but not in the use of common persons. It is, therefore, sought to be submitted that the dying declaration of Kamini Verma, allegedly recorded at 13:00 hrs., on 28.7.2003 at Zonal Hospital, Chamba not being her own voluntary statement, was liable to be discarded from the prosecution version. In case the same is ignored, the entire prosecution story, according to the learned counsel for the appellants, would crumble like a house of cards.

23. We have considered the last submission advanced at the hands of the learned counsel for the appellants. There can be no doubt that there are certain discrepancies in the time recorded in the dying declaration. A dditionally, there can also be no doubt that certain words which are not in common use have found place in the dying declaration made by Kamini Verma. Despite the aforesaid, we find no merit in the submission advanced at the hands of the learned counsel for the appellant. It is not possible for us to accept, that Kamini Verma was not fit to make her statement when she actually recorded the same in the presence of ASI Jog Raj PW26 and Dr.D.P. Dogra PW11. The very medical report, relied upon by the learned counsel for the appellants, which depicted that the pulse rate and blood pressure of Kamini Verma was not recordable, also reveals, that on having been given treatment her blood pressure improved to 140/70 and her pulse rate improved to 120 per minute. This aspect of the medical report is not subject matter of challenge. The fact that the incident occurred on 28.7.2003 and Kamini Verma eventually died on 1.8.2003, i.e., 4 days after the recording of the dying declaration also shows that she could certainly have been fit to make her dying declaration on 28.7.2003. Her fitness was actually recorded on the dying declaration by Dr. D.P. Dogra PW11. A number of prosecution witnesses reveal that she was conscious and was able to speak. Kamini Verma after having recorded her statement before ASI Jog Raj PW26, also repeated the same version of the incident (as she had narrated

while recording her dying declaration) to her father Arun Kumar PW2, when she was being shifted from Chamba to Amritsar for medical treatment. Moreover, Dr. D.P. Dogra PW11 appeared as a prosecution witness, and affirmed the veracity of her being in a fit condition to make the statement. There is no reason whatsoever to doubt the statement of Dr. D.P. Dogra PW11. The question of doubting the dying declaration made by Kamini Verma could have arisen if there had been other cogent evidence to establish any material discrepancy therein. As already noticed hereinabove, three eye witnesses, namely, Deepak Kumar PW1, Sonia PW3 and Sumitri Devi PW4 have supported the version of the factual position depicted in the statement of Kamini Verma. It is, therefore, not possible for us to accept, that the statement of Kamini Verma was either false or fabricated, or that, the statement was manipulated at the hands of the prosecution to establish the guilt of the appellants-accused nos.1 and 2 Dheeraj Verma and Deepak Verma, or that she was not medically fit to make a statement. The discrepancies in recording time, as well as, the overwriting pointed out are too trivial to brush aside the overwhelming oral evidence produced by the prosecution, details whereof have been repeatedly referred to by us, while dealing with the various submissions advanced at the hands of the learned counsel for the appellants. We, therefore, find no merit even in the last contention advanced at the hands of the counsel for the appellants.

24. In view of the above we hereby affirm the order passed by the Trial Court dated 30.12.2005 (in Sessions Trial No.55 of 2003) and also, the order passed by the High Court dated 2.9.2009 (in Criminal Appeal No.27 of 2006). Both the appeals preferred by appellants-accused nos.1 and 2, Dheeraj Verma and Deepak Verma are, accordingly, dismissed.

D.G. Appeal dismissed.