H. SIDDIQUI (DEAD) BY LRS.
v.
A. RAMALINGAM
(Civil Appeal No. 6956 of 2004)

MARCH 4, 2011

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

Specific Relief – Appellant filed suit for specific performance alleging that the defendant-respondent did not execute sale deed after his brother, power of attorney holder, entered into an agreement for sale with the plaintiff – Respondent specifically denied execution of power of attorney in favour of his brother – Trial court decreed the suit holding that inasmuch as photocopy of the power of attorney was shown to the respondent in his cross-examination and he had admitted his signature, it was evident that the respondent had authorized his brother to alienate the suit property – High Court set aside the decree – On appeal, held: Trial court had proceeded in an unwarranted manner – Respondent merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof – More so, admissibility of a document or contents thereof may not necessarily lead to drawing any inference unless the contents thereof have some probative value – Appellant, without being asked by the respondent, had enhanced the consideration amount as agreed in the agreement to sell – Conduct of the appellant was most improbable – Trial court erred in rejecting the contention of respondent, that the appellant had changed the terms of agreement unilaterally, without any explanation from the appellant – High Court also failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order XLI Rule 31 of CPC and once the issue of alleged power of attorney was also raised, the Court should not have

proceeded to another issue – More so, none of the courts below took into consideration the clause contained in the agreement to sell which provided that in the event of any default on the part of the vendors in completing the sale, the appellant could get refund of earnest money with liquidated damages for breach of contract – Both the courts below did not proceed to adjudicate upon the case strictly in accordance with law – Matter remitted to High Court for decision afresh.

Evidence Act, 1872 – s.65 – Secondary evidence relating to contents of a document – Admissibility of – Held: Secondary evidence relating to contents of a document is inadmissible, until non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section – The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original – Mere admission of a document in evidence does not amount to its proof – The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

Code of Civil Procedure, 1908 – Order XLI, Rule 31 – Guidelines for the appellate court as to how the court has to proceed and decide the case – Discussed – Held: It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points – Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court – Thus, the entire evidence must be considered and discussed in detail.

The appellant filed suit for specific performance of contract against the respondent alleging that the

defendant-respondent did not execute sale deed after his brother, power of attorney holder, entered into an agreement for sale with the appellant. The respondent denied the execution of any power of attorney in favour of his brother with regard to alienation of the property. The trial court decreed the suit holding that inasmuch as photocopy of the power of attorney was shown to the respondent in his cross-examination and he had admitted his signature, it was evident that the respondent had authorized his brother to alienate the suit property. Respondent preferred appeal before the High Court. The High Court set aside decree of trial court in appeal.

In the instant appeal, the appellant submitted that there can be no justification for not giving effect to the registered agreement to sell and further that he had paid a sum of Rs.65,500/-, though the consideration as per the agreement had been only to the extent of Rs.40,000/-.

The respondent, on the other hand, contended that he had never executed the power of attorney in favour of his brother enabling him to transfer the suit property; that the power of attorney had never been filed before the trial court nor had it been proved; that the photocopy of the same was shown to the respondent during the time of his cross-examination wherein he has admitted his signature thereon only; that the respondent had never admitted its contents or genuineness of the same and therefore, the power of attorney itself had not been proved in terms of Sections 65 and 66 of the Indian Evidence Act, 1872 and, thus the question of proceeding further by the trial court could not arise. The respondent further contended that it was not probable that the appellant paid a sum of Rs.65,500/- instead of Rs.40,000/- as consideration fixed in the agreement to sell.

Disposing of the appeal, the Court

HELD:1. The provisions of Section 65 of the Evidence Act, 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. [Para 10] [599-C-F]

The Roman Catholilc Mission & Anr. v. The State of Madras & Anr., **AIR 1966 SC 1457 = 1966 SCR 283;** *State of Rajasthan & Ors. v. Khemraj & Ors.,* **AIR 2000 SC 1759;** *Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen,* **(2010) 4 SCC 491 = 2010 (3) SCR 438 and** *M. Chandra v. M. Thangamuthu & Anr.,* **(2010) 9 SCC 712 = 2010 (11) SCR 38 – relied on.**

2.1. The trial court decreed the suit observing that as the parties had deposed that the original power of attorney was not in their possession, question of laying any further factual foundation could not arise. Further, the Trial Court took note of the fact that the respondent has specifically denied execution of power of attorney authorising his brother to alienate the suit property, but brushed aside the same holding that the photocopy of

the power of attorney was shown to the respondent in his cross-examination and he had admitted his signature. The trial court held that thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother (second defendant in the suit) and therefore, there was a specific admission by the respondent having executed such document and so it was evident that the respondent had authorised the second defendant to alienate the suit property. [Para 11] [599-H; 600-A-D]

2.2. The trial court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value. [Para 12] [600-D-E]

State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors., **AIR 1983 SC 684 = 1983 (2) SCR 808 and** *Madan Mohan Singh & Ors. v. Rajni Kant & Anr.,* **AIR 2010 SC 2933 = 2010 (10) SCR 30 – relied on.**

3. The trial court rejected the contention of the respondent that the appellant/plaintiff had paid more than what had been agreed in the agreement to sell, and hence changed the terms of agreement unilaterally, observing that in such a fact-situation it cannot be said that the terms of the agreement had been unilaterally altered by the appellant/plaintiff. Such a remark/observation could not have been made without any explanation furnished by the appellant, as under what circumstances the appellant-purchaser, without being asked by the respondent-seller, to enhance the consideration amount has paid more and it cannot be held to be natural human

conduct in public and private business. Such conduct of the appellant remains most improbable. [Para 15] [601-E-G]

4. The High Court failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order XLI Rule 31 of CPC and once the issue of alleged power of attorney was also raised as is evident from the point (a) formulated by the High Court, the Court should not have proceeded to point (b) without dealing with the relevant issues involved in the case, particularly, as to whether the power of attorney had been executed by the respondent in favour of his brother enabling him to alienate his share in the property. [Para 17] [602-E-G]

5. The provisions of Order XLI, Rule 31 CPC provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on

each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. [Para 18] [602-H; 603-A-E]

Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr., **AIR 1963 SC 146 = 1963 SCR 733;** *Girijanandini Devi & Ors. v. Bijendra Narain Choudhary,* **AIR 1967 SC 1124 = 1967 SCR 93;** *G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.,* **(2006) 3 SCC 224 = 2006 (2) SCR 899;** *Shiv Kumar Sharma v. Santosh Kumari,* **(2007) 8 SCC 600 = 2007 (10) SCR 17;** *Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.,* **AIR 2007 SC 2380 = 2007 (7) SCR 201 and** *B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy,* **JT (2010) 10 SCC 551= 2010 (11) SCR 784 – relied on.**

6. More so, none of the courts below had taken into consideration Clause 11 of the agreement to sell which provided that in the event of any default on the part of the vendors in completing the sale, the earnest money paid shall be refunded to the purchasers together with a like amount of Rs.5,000/- (Rupees five thousand only) as liquidated damages for breach of contract. Thus, in case of non-execution of the sale deed, the appellant could get the earnest money with damages. [Para 20] [604-D-F]

7. The courts below have not proceeded to adjudicate upon the case strictly in accordance with law. In the facts and circumstances of the case, the matter is remitted to the High Court and the High Court is requested to decide the same afresh in accordance with law. [Paras 22 and 23] [605-B-D]

Chand Rani (Smt.) (dead) by Lrs. v. Kamal Rani

(Smt.)(dead) by Lrs., **AIR 1993 SC 1742;** *Nirmala Anand v. Advent Corporation (P) Ltd. & Ors.,* **(2002) 8 SCC 146 = 2002 (2) Suppl. SCR 706;** *P. D'Souza v. Shondrilo Naidu,* **(2004) 6 SCC 649 = 2004 (3) Suppl. SCR 186;** *Jai Narain Parasrampuria (dead) & Ors. v. Pushpa Devi Saraf & Ors.,* **(2006) 7 SCC 756 = 2006 (5) Suppl. SCR 325;** *Pratap Lakshman Muchandi & Ors. v. Shamlal Uddavadas Wadhwa & Ors.,* **(2008) 12 SCC 67 = 2008 (1) SCR 854 and** *Laxman Tatyaba Kankate & Anr. v. Taramati Harishchandra Dhatrak,* **(2010) 7 SCC 717 = 2010 (8) SCR 310 – referred to.**

Case Law Reference:

1966 SCR 283	relied on	Para10
AIR 2000 SC 1759	relied on	Para 10
2010 (3) SCR 438	relied on	Para 10
2010 (11) SCR 38	relied on	Para 10
1983 (2) SCR 808	relied on	Para 13
2010 (10) SCR 30	relied on	Para 14
1963 SCR 733	relied on	Para 18
1967 SCR 93	relied on	Para 18
2006 (2) SCR 899	relied on	Para 18
2007 (10) SCR 17	relied on	Para 18
2007 (7) SCR 201	relied on	Para 18
2010 (11) SCR 784	relied on	Para 19
AIR 1993 SC 1742	referred to	Para 21
2002 (2) Suppl. SCR 706	referred to	Para 21

2004 (3) Suppl. SCR 186	**referred to**	**Para 21**
2006 (5) Suppl. SCR 325	**referred to**	**Para 21**
2008 (1) SCR 854	**referred to**	**Para 21**
2010 (8) SCR 310	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6956 of 2004.

From the Judgment & Order dated 3.2.2004 of the High Court of Karnataka at Bangalore, in Regular First Appeal No. 265 of 1999.

K.K. Mani, Abhishek Krishna, Mayur R. Shah for the Appellants.

Rajiv Dutta, G. Sivabalamurugan, Anis Mohd, L.K. Pandey for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 3.2.2004 passed by the High Court of Karnataka at Bangalore in Regular First Appeal No. 265 of 1999.

2. **FACTS:**

(A) The Appellant who had been inducted as a tenant at an initial stage filed suit No. 30/1981 on 1.1.1981 for specific performance of contract in the City Civil Court, Bangalore alleging that the power of attorney holder of the respondent entered into the agreement dated 25.6.1979 to sell the suit property i.e. 1/3rd share of the respondent in the property being No.43, Mission Road, Shanti Nagar, Bangalore-27 to him for a consideration of Rs.40,000/- by receiving an advance of Rs.5,000/-.

(B) The said agreement was duly registered and according to the terms incorporated therein, the sale deed was to be executed on or before 30.12.1980. The respondent failed to take necessary steps to act according to the agreement. Thus, the appellant/plaintiff issued notice to the respondent on 5.3.1980 through his lawyer.

(C) The appellant/plaintiff allegedly paid the balance amount on 15.5.1980. As the time limit for the execution of the sale deed had expired, and the sale deed was not executed, the appellant/plaintiff filed the suit for specific performance.

(D) The respondent denied the execution of any power of attorney in favour of his brother with regard to alienation of the property. In fact the power of attorney had been given only for management of the property and not creating any right to transfer the same.

(E) In view of the pleadings, the Trial Court framed issues and after conclusion of the trial decreed the suit vide judgment and decree dated 3.11.1998.

3. Being aggrieved, the respondent preferred Regular First Appeal No. 265 of 1999 before the High Court of Karnataka which has been allowed by the impugned judgment and decree dated 3.2.2004. Hence, this appeal.

4. Shri K. K. Mani, learned counsel appearing for the appellant has submitted that as the appellant had proved that the agreement to sell dated 25.6.1979 was not obtained by the appellant through any kind of fraud, there was no justification for the High Court to set aside the judgment and decree of the Trial Court for specific performance on the grounds: the property was situated in Bangalore; the sale consideration was inadequate; and as a result of a long lapse of time on account of pendency of the case before the courts there has been a steep rise in the market value of the property. There can be no justification for not giving effect to the registered agreement to

sell. The appellant had paid a sum of Rs.65,500/-, though the consideration as per the agreement had been only to the extent of Rs.40,000/-. The judgment and order of the High Court is liable to be set aside for the reasons that geographical location of the property or inadequate consideration and rise/escalation of price during the pendency of the case in court cannot be the grounds for reversal of the judgment and decree of the Trial Court.

5. On the contrary, Shri Rajiv Dutta, learned senior counsel appearing for the sole respondent has vehemently opposed the appeal contending that the respondent never executed the power of attorney in favour of his brother enabling him to transfer the suit property. Power of attorney had never been filed before the Trial Court nor had it been proved. The photocopy of the same was shown to the respondent during the time of his cross-examination wherein he has admitted his signature thereon only. The respondent had never admitted its contents or genuineness of the same. Therefore, the power of attorney itself had not been proved in terms of Sections 65 and 66 of the Indian Evidence Act, 1872 (hereinafter called Act 1872) and, thus the question of proceeding further by the Trial Court could not arise. More so, it is not probable that the appellant paid a sum of Rs.65,500/- instead of Rs.40,000/- as consideration fixed in the agreement to sell. The agreement dated 25.6.1979 contained clause 11 according to which if the sale deed was not executed, the earnest money of Rs.5,000/- received by alleged power of attorney holder would be refunded to the purchaser together with the like amount of Rs.5,000/- as liquidated damage for breach of contract. Thus, at the most, the appellant was entitled to receive a sum of Rs.10,000/- but the question of decreeing the suit could not arise. The appellant had been a tenant. He never paid any consideration. Earlier there has been a prior sale of 1/3rd share in the same property (share of the brother of the respondent) in favour of D. Narendra and the appellant had filed the suit against him also claiming that the said part of the property could have been sold to him.

The alleged payment of Rs.65,500/- or Rs.40,000/- as a sale consideration is nothing but mis-representation by showing forged receipts prepared by the appellant in collusion with the son of the alleged power of attorney holder at the time of litigation with D. Narendra. The appeal lacks merit and is liable to be dismissed.

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

7. Admittedly, there had been litigation between the appellant and other co-sharers when 1/3rd share of the said property was sold in favour of D. Narendra by the brother of the respondent. Appellant herein has lost the said case. Before the Trial Court, the appellant while filing the suit has impleaded the respondent and his brother, R. Viswanathan, the alleged power of attorney holder. In the First Appeal, before the High Court, both of them had been the parties. However, before this Court the alleged power of attorney holder, R. Viswanathan, has not been impleaded as respondent for the reasons best known to the appellant.

8. The Trial Court taking into consideration the pleadings had framed the following issues:-

"1. Whether the defendants prove that the agreement of sale dated 25.6.1979 was taken by the plaintiff by practicing fraud on the II defendant as per the written statement of D1 and D2?

2. Whether the plaintiff proves payment of amount as alleged in the plaint?

3. To what relief the plaintiff is entitled to.

Additional Issues:

1. Whether the suit is bad for non-joinder of necessary parties?

2. Whether the agreement dated 25.6.1979 is unenforceable?"

9. In view of the pleadings, as the respondent has specifically denied the execution of a power of attorney in favour of R. Viswanathan, defendant No.2 in the suit (not impleaded herein), the main issue could be as to whether the power of attorney had been executed by the respondent in favour of R. Viswanathan enabling him to alienate the suit property and even if there was such power of attorney whether the same had been proved in accordance with law.

10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: *The Roman Catholilc Mission & Anr. v. The State of Madras & Anr.,* AIR 1966 SC 1457; *State of Rajasthan & Ors. v. Khemraj & Ors.,* AIR 2000 SC 1759; *Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen,* (2010) 4 SCC 491; and *M. Chandra v. M. Thangamuthu & Anr.,* (2010) 9 SCC 712).

11. The Trial Court decreed the suit observing that as the parties had deposed that the original power of attorney was not

in their possession, question of laying any further factual foundation could not arise. Further, the Trial Court took note of the fact that the respondent herein has specifically denied execution of power of attorney authorising his brother R. Viswanathan to alienate the suit property, but brushed aside the same observing that it was not necessary for the appellant/ plaintiff to call upon the defendant to produce the original power of attorney on the ground that the photocopy of the power of attorney was shown to the respondent herein in his cross-examination and he had admitted his signature. Thus, it could be inferred that it is the copy of the power of attorney executed by the respondent in favour of his brother (R. Viswanathan, second defendant in the suit) and therefore, there was a specific admission by the respondent having executed such document. So it was evident that the respondent had authorised the second defendant to alienate the suit property.

12. In our humble opinion, the Trial Court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the power of attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value.

13. In *State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors.,* AIR 1983 SC 684, this Court considered the issue in respect of admissibility of documents or contents thereof and held as under:

> "Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil."

14. In *Madan Mohan Singh & Ors. v. Rajni Kant & Anr.,*

AIR 2010 SC 2933, this Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt. Shakuntala, second wife of the father of the contesting parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years of age.

Therefore, it is the duty of the court to examine whether documents produced in the Court or contents thereof have any probative value.

15. The Trial Court rejected the contention of the respondent that the appellant/plaintiff had paid more than what had been agreed in the agreement to sell, and hence changed the terms of agreement unilaterally, observing that in such a fact-situation it cannot be said that the terms of the agreement had been unilaterally altered by the appellant/plaintiff. Such a remark/observation could not have been made without any explanation furnished by the appellant, as under what circumstances the appellant-purchaser, without being asked by the respondent-seller, to enhance the consideration amount has paid more and it cannot be held to be natural human conduct in public and private business. Such conduct of the appellant remains most improbable.

16. The High Court while dealing with the First Appeal has

framed only the following two issues:

> "(a) Whether the findings and reasons recorded on issue Nos. 1 and 2 and Addl. Issue Nos. 1 & 2 by the Trial Court in holding that defendants have not proved that they have not executed agreement of sale in favour of plaintiff and the same has been obtained by the plaintiff by making use of power of attorney holder of second defendant which amounts to fraud and mis-representation warrant interference with the same by this court in exercise of its Appellate power and jurisdiction?
>
> (b) Whether the Trial Court was right in not exercising its discretionary power under sub-section (2) of Section 20 while granting judgment and decree for specific performance in favour of plaintiff if it has not exercised its power under the above provisions of the Act, whether, this Court has to remand the case to the trial court after setting aside the judgment and decree for the consideration regarding this aspect of the case?"

17. The High Court failed to realise that it was deciding the First Appeal and that it had to be decided strictly in adherence with the provisions contained in Order XLI Rule 31 of the Code of Civil Procedure, 1908 (hereinafter called CPC) and once the issue of alleged power of attorney was also raised as is evident from the point (a) formulated by the High Court, the Court should not have proceeded to point (b) without dealing with the relevant issues involved in the case, particularly, as to whether the power of attorney had been executed by the respondent in favour of his brother enabling him to alienate his share in the property.

Order XLI, Rule 31 CPC:

18. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to

require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: *Thakur Sukhpal Singh v. Thakur Kalyan Singh & Anr.,* AIR 1963 SC 146; *Girijanandini Devi & Ors. v. Bijendra Narain Choudhary,* AIR 1967 SC 1124; *G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.,* (2006) 3 SCC 224; *Shiv Kumar Sharma v. Santosh Kumari,* (2007) 8 SCC 600; and *Gannmani Anasuya & Ors. v. Parvatini Amarendra Chowdhary & Ors.,* AIR 2007 SC 2380)

19. In *B.V. Nagesh & Anr. v. H.V. Sreenivasa Murthy,* JT (2010) 10 SCC 551, while dealing with the issue, this Court held as under:

> "The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of

> fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put- forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide *Santosh Hazari vs. Purushottam Tiwari,* (2001) 3 SCC 179 and *Madhukar and Others vs. Sangram and Others,* (2001) 4 SCC 756]"

20. More so, none of the courts below had taken into consideration Clause 11 of the agreement dated 30.6.1979 which reads as under:

> "11. In the event of any default on the part of the vendors in completing the sale the earnest money paid herewith shall be refunded to the purchasers together with a like amount of Rs.5,000/- (Rupees five thousand only) as liquidated damages for breach of contract."

Thus, in case of non-execution of the sale deed, the appellant could get the earnest money with damages.

21. So far as the issues of inadequate consideration and rise in price are concerned, both the parties have argued the same at length and placed reliance on a large number of judgments of this Court, including: *Chand Rani (Smt.) (dead) by Lrs. v. Kamal Rani (Smt.)(dead) by Lrs.,* AIR 1993 SC 1742; *Nirmala Anand v. Advent Corporation (P) Ltd. & Ors.,* (2002) 8 SCC 146; *P. D'Souza v. Shondrilo Naidu,* (2004) 6 SCC 649; *Jai Narain Parasrampuria (dead) & Ors. v. Pushpa Devi Saraf & Ors.,* (2006) 7 SCC 756; *Pratap Lakshman*

Muchandi & Ors. v. Shamlal Uddavadas Wadhwa & Ors., (2008) 12 SCC 67; and *Laxman Tatyaba Kankate & Anr. v. Taramati Harishchandra Dhatrak,* (2010) 7 SCC 717.

22. In view of the above, as we are of the considered opinion that the courts below have not proceeded to adjudicate upon the case strictly in accordance with law, we are not inclined to enter into the issue of inadequate consideration and rise in price.

However, the judgment impugned cannot be sustained in the eyes of law.

23. In the facts and circumstances of the case, we remit the matter to the High Court setting aside its judgment and decree (impugned) and request the High Court to decide the same afresh in accordance with law, as explained hereinabove. As the case has been pending for three long decades, we request the High Court to decide it expeditiously. However, it is clarified that any observation made herein shall not adversely affect the cause of either parties.

24. With the above observations, the appeal stands disposed of. There shall be no order as to costs.

B.B.B. Appeal disposed of.

DELHI DEVELOPMENT AUTHORITY
v.
RAM PRAKASH
(Special Leave Petition (C) No.27278 of 2009)

MARCH 15, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Deeds and Documents – Leasehold property – Demand of misuser charges from lessee – Legality of – Respondent purchased leasehold property in an open auction conducted by Delhi Development Authority (DDA) and entered into a lease deed with it in respect of such property – From 1983 onwards, the Petitioner-DDA sent a series of show-cause notices to respondent alleging that he was misusing the property for office purposes and that he had also raised unauthorized construction on the terrace of the property in direct violation of the terms and conditions of the lease deed – Respondent denied the alleged misuse in part and as regard the other part of alleged misuse took the stand that such violations had been done by his tenants without obtaining his sanction and consequently he had initiated eviction proceedings against them – No action was taken by DDA on the basis of the said show-cause notices – However, in 2004 when respondent applied to DDA for mutation of the property, DDA demanded arrears of misuse charges from the respondent – Respondent filed writ petition – High Court quashed the demand – On appeal, held: Respondent took prompt steps against the tenants for their transgression and one of the tenants has already vacated the premises occupied by him – Further, DDA did not take any follow-up action after issuance of the show-cause notices – Instead, after a lapse of 25 years the DDA set up a claim on account of misuser charges for the entire period – It would be inequitable to allow the DDA which had sat over the matter to take advantage of

its inaction in claiming misuser charges – Though no limitation was prescribed for making a demand of arrear charges, the statutory Authority is required to act within a reasonable time – What would construe a reasonable time, depends on the facts and circumstances of each case, but it would not be fair to the respondent if such demand is allowed to be raised after 25 years, on account of the inaction of the DDA.

The respondent purchased leasehold property in an open auction conducted by the Delhi Development Authority (DDA). A lease deed in respect of the said plot/ property was executed by the DDA in favour of the respondent in 1972.

According to DDA, contrary to the terms of the lease deed, the respondent misused the premises for running an office and also raised construction on the terrace which was unauthorized and in direct violation of the lease deed. Starting from 1983 onwards, the DDA issued a number of show-cause notices to the respondent for the said alleged misuse. While according to the DDA, a portion of the premises was being used for office premises, according to the respondent the said portion of the premises was being used only to store computers. As regards the other part of alleged misuse relating to construction raised on the terrace of the premises is concerned, it was stated on behalf of the respondent that such construction had been raised by the tenants of respondent without obtaining his sanction and consequently, the respondent had initiated action against the said tenants for their eviction therefrom. No decision was taken by the DDA against the respondent on basis of the said Show-Cause Notices. Ultimately in 2004, when respondent applied to DDA for mutation of the property, the DDA issued a notice to respondent for 1,78,85,001/-, on account of arrears of misuser charges against which

the respondent filed a writ petition which was allowed by the Single Judge and the demand of misuser charges raised by the DDA was quashed. The DDA filed Letters Patent Appeal against the said order of the Single Judge which was dismissed by the Division Bench. Hence the present Special Leave Petition by the DDA.

Dismissing the special leave petition, the Court

HELD:1.1. Having considered the submissions made on behalf of the DDA and by the respondent appearing in-person, and also having considered the reasoning of the Single Judge and the Division Bench in repudiating the claim of misuser charges by the DDA, this Court is unable to convince itself that the decisions rendered by the High Court, both by the Single Judge as also the Division Bench, require any interference in these proceedings. The materials on record show that the respondent took prompt steps against the tenants for their transgression. During arguments it was indicated that, in fact, one of the tenants had already vacated the portion of the premises occupied by him. It is also very clear that after issuing the Show-Cause Notices, the petitioner-DDA did not take any follow-up action thereupon. Instead, after a lapse of 25 years, the petitioner set up a claim on account of charges for the entire period. It would be inequitable to allow the petitioner which had sat over the matter to take advantage of its inaction in claiming misuser charges. [Para 21] [616-C-F]

1.2. Even as to the contention raised on behalf of the petitioner-DDA that there was no limitation prescribed for making a demand of arrear charges, the Division Bench observed that even where no period of limitation is indicated, the statutory Authority is required to act within a reasonable time. What would construe a reasonable time, depends on the facts and circumstances of each case, but it would not be fair to the respondent if such

demand is allowed to be raised after 25 years, on account of the inaction of the petitioner-DDA. [Para 22] [616-G-H; 617-A-D]

State of Punjab & Ors. vs. Bhatinda District Cooperative MilkProducers Union Ltd. **(2007) 11 SCC 363: 2007 (11) SCR 14, referred to.**

Case Law Reference:

2007 (11) SCR 14 referred to Para 22

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 27278 of 2009.

From the Judgment & Order dated 02.05.2008 of the High Court of Delhi at New Delhi in L.P.A. No. 22 of 2008.

A. Sharan, Vishnu B. Saharya (for Saharya & Co.) for the Petitioner.

Ram Prakash Respondent-In-Person.

THe Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The Delhi Development Authority, hereinafter, referred to as "DDA" is the petitioner in this Special Leave Petition, which is directed against the judgment and order dated 2.5.2008 passed by the Delhi High Court in L.P.A. No.22 of 2008.

2. The respondent herein, along with his mother and wife, purchased a property in No.7, Community Center, East of Kailash, New Delhi, in an open auction conducted by the DDA on 10.8.1969. Possession of the plot was made over to the purchasers on 5th March, 1972, and a lease deed in respect of the said plot was executed on 5th April, 1972. In terms of the Lease Deed, the auction purchasers were required to construct the building upon the demised plot within two years from the date of delivery of possession.

3. It appears that on a routine inspection by the petitioner's staff on 8th August, 1983, it was noticed that the respondent was using the basement of the building for office purposes which was in contravention of the prescribed usage. A Show-Cause Notice was issued on the same day calling upon the respondent to Show-Cause within 10 days as to why action for cancellation of lease should not be taken for violation of clause II(13) of the Lease Deed. The respondent replied to the said Show-Cause Notice on 10th August, 1983, denying misuse of the property. No further action was taken on the said Show-Cause Notice till seven years later when on 28th June, 1990, another Show-Cause Notice was issued stating as to why the lease should not be determined for violation of clause II(13) of the Lease Deed on the ground that the basement of the building was being misused as an office for Frooti/Atash Industry, instead of storage, and the mezzanine floor was being used for the office of M/s Ferrow Alloys Forging & M/s Green Land, instead of storage.

4. In response to the second Show-Cause Notice the respondent replied stating that the portion in question had been leased to the above-named companies for storage purposes and their failure to abide by the terms of the lease has been brought to the notice of the tenants for taking appropriate steps.

5. Since the reply was not found to be satisfactory, further Show-Cause Notices were issued to the respondent on 3.9.1990 and 11.12.1990 in relation to the violation of the provisions of the Lease Deed and to remove the breaches which had been pointed out, in default whereof the lease would be determined. The respondents replied to the Show-Cause Notice dated 3.9.1990 on 5.11.1990 stating that the tenant was using the basement for storage of Frooti juices and was not operating any office therefrom. It was also mentioned that the tenant in the mezzanine floor had not yet replied to the notice which had been issued to him.

6. However, on the basis of another inspection of the premises conducted in December, 1990, where it was noticed that both the floors were still being misused, notices were issued for joint inspection which was fixed for 18.2.1991, 12.3.1991 and 22.4.1991. However, the respondents did not join the inspection and ultimately an inspection was carried out on 24.4.1991 and another Show-Cause Notice was issued to the respondents on 8.5.1991. In response to the said Show-Cause Notice the respondents wrote back on 21.5.1991 that they have no control over the tenants, except to inform them of their violations. Ultimately, the respondents in its letter dated 9.7.1991 stated that the mezzanine floor was being used as offices. In reply to the said letter written on behalf of the respondent the petitioner informed the respondent that as per architectural design the mezzanine floor could be used only for storage and unless the misuse was stopped the lease would have to be determined. In response on 13.11.1991 the respondent once again asserted that the mezzanine floor in the Community Centre was not being misused.

7. Thereafter, there was a series of correspondence exchanged on the same subject. In the meanwhile, Smt. Kamla Ahluwalia, the wife of the respondent, died on 23.4.1994, as did Smt. Saraswati Devi on 6.8.1994.

8. On 20.5.2004 the respondent applied to the DDA for mutation of the property in favour of the legal heirs of the deceased co-auction purchasers. In response thereto the respondents were asked by a letter dated 20.5.2004 to pay misuser charges and were called upon to clear the dues in respect thereof. Aggrieved by the said demand notice the respondents filed a Writ Petition, being W.P.No. 8464 of 2006, in the High Court for quashing the demand of misuser charges amounting to Rs. 1,78,85,001/-. The same was allowed by the High Court on 17.8.2007 and the demand of misuser charges raised by the DDA, by its letter dated 20.5.2004, was quashed.

9. The DDA filed Letters Patent Appeal, being LPA No.22 of 2008 on 12.12.2007, challenging the order of the learned Single Judge dated 17.8.2007, which was dismissed on 2.5.2008.

10. It is against the said order of dismissal of the LPA by the Delhi High Court that this Special Leave Petition has been filed by the DDA.

11. Appearing for the DDA, Mr. A. Sharan, learned Senior Advocate, submitted that, although, under the terms of the lease deed, the respondent was allowed to use the premises for commercial purposes, he had misused the same and that the premises was being used for running an office. Furthermore, a construction had been raised on the terrace which was unauthorized and in direct violation of the lease agreement. It was submitted that the misuser of the property came to the notice of the DDA during inspection, as such misuser of the demised premises had been carried on without notice to and the leave of the DDA. Mr. Sharan also submitted that as many as 14 Show-Cause Notices had to be issued to the respondent on account of such misuser. Since the respondent failed to comply with the requisitions contained in the said notices, the DDA issued a notice for Rs. 1,78,85,001/-, on account of misuser charges against which the respondent filed a writ petition, being W.P.(C)No.8464 of 2006, which was allowed by the learned Single Judge and the demand of misuser charges raised by the petitioner by its letter dated 20th May, 2004, was quashed.

12. The DDA filed Letters Patent Appeal No.22 of 2008 against the said order of the learned Single Judge before the Division Bench which dismissed the same on the ground that while according to the petitioner-Authority, a portion of the premises was being used for office premises, according to the respondent the said portion of the premises was being used only to store computers. There was no office as such, but a small establishment was maintained by the tenant for accounting purposes of the goods brought to the premises for

storage purposes only. It was not as if a regular office was being run from the said premises.

13. As far as the other part of alleged misuse relating to construction raised on the terrace of the premises is concerned, it was stated on behalf of the respondent that such construction had been raised by the tenant without obtaining the sanction of the lessee and consequently, the respondent had initiated action against the said tenants for their eviction therefrom.

14. What also weighed with the Judge is the fact that the first Show-Cause Notice issued to the petitioner was in regard to alleged misuse of the basement from 30th July, 1983, the mezzanine floor from 20th June, 1990, and the terrace from 7th September, 1992, till 13th January, 2003. However, although, the first Show-Cause Notice was issued to the respondent on 8th August, 1983, regarding misuse of the basement and a reply was also submitted by the respondent on 10th August, 1983, no decision was taken by the DDA on the said Show-Cause Notice. On the other hand, in June 1990, upon an alleged inspection by the DDA, another Show-Cause Notice was issued to the respondent on 28th June, 1990, only in respect of the alleged misuse of the basement and the mezzanine floor. Despite a reply being sent, again no action was taken by the DDA except for issuing Final Notices to the respondent on 3rd September, 1990 and 11th December, 1990, requiring him to stop violation of the conditions of the lease deed, failing which it would be terminated. The respondent sent a reply to the first Final Notice on 5th November, 1990, but again no decision was taken on any of the two Final Notices which had been sent to the respondent. Periodical inspection was thereafter carried out, but no action was at all taken by the DDA and its authorities against the respondent for alleged misuse of the premises in question.

15. Ultimately, on a question of limitation being raised in respect of the demand of misuser charges, the Division Bench observed that where no period of limitation is prescribed, action

has to be taken by the authorities within a reasonable period of time, but by no stretch of imagination, could it be said that after a lapse of almost 25 years that the DDA had not acted arbitrarily or at least unfairly in so far as the respondent is concerned. In addition, the respondent was never informed by the DDA that he was required to pay any misuser charges. On the basis of such reasoning, the Division Bench of the High Court dismissed the appeal and upheld the order of the learned Single Judge.

16. Mr. Sharan submitted that both the learned Single Judge and the Division Bench had misconstrued the principles relating to limitation in holding that the DDA had acted arbitrarily and unfairly in so far as the respondent was concerned, and, in any event, the respondent was never informed by the DDA that he was required to pay misuse charges.

17. Mr. Sharan urged that both the Single Judge and the Division Bench of the High Court failed to consider the core issue relating to the user of the premises in keeping with paragraph 13 of the lease deed executed by the DDA in favour of the respondent on 5th April, 1972. In this regard Mr. Sharan referred to paragraph 13 of the lease deed which reads as follows :

> "13) The lessee shall not without the written consent of the lessor carry on or permit to be carried on, on the plot or in any building thereon any trade or business of manufacture which in opinion of the lessor may be noisy, noxious or offensive or the same or permit the same to be used for any purpose other than those specified or do or suffer to be done therein any act or thing whatsoever which in the opinion of the lessor may be a nuisance annoyance or disturbance to the lessor or the person living in the neighbourhood.
>
> Provided that, if the lessee is desirous of using the said plot or the building thereon for a purpose other than those

specified the lessor may allow such change or user on such terms and conditions including payment of additional premium and additional rent, as the lessor may in his absolute discretion determine."

18. Mr. Sharan submitted that having regard to the above, the respondent was not entitled to use the demised premises in a manner which was contrary to paragraph 13 of the lease deed. It was contended that the respondent was carrying on a business in the demised premises in respect whereof there was no feed back whatsoever from the lessee. Mr. Sharan urged that the order of the learned Single Judge dated 17th August, 2007, could not be sustained and the same was liable to be set aside, along with the order of the Division Bench impugned in the Special Leave Petition.

19. Appearing in person, the respondent, on the other hand, submitted that after the Show-Cause Notices were issued no action whatsoever was taken on the basis thereof and all of a sudden the exorbitant misuser charges, amounting to Rs. 1,78,85,001/- was demanded from him. Professor Ram Prakash submitted that from 1983, nothing had been done by the DDA on the basis of the Show-Cause Notices which had been issued, to which the respondent had promptly replied stating that the construction on the terrace had been effected by the tenants and not by him and in respect whereof proper proceedings had been initiated for their eviction from the premises. The respondent submitted that it is only under severe compulsion, that he had to move the Writ Court for relief in relation to the demand of misuser charges of Rs. 1,78,85,001/-. The respondent submitted that for the last 25 years he had been made to face various problems and uncertainties, but that it was entirely unjustified on the part of the DDA to raise the claim of alleged misuser charges of Rs. 1,78,85,001/-. The respondent submitted that after a long period of 25 years, a quietus was required to be given to the matter.

20. The respondent submitted that after issuance of Show-

Cause Notices, the DDA should have taken further steps in the matter within a reasonable time and that too relating to misuser chargers where he was not at fault. The respondent submitted that he had taken prompt steps not only to reply to the Show-Cause Notices issued to him, but to initiate action against the tenants who had used the property in a manner which was different from the purpose for which the property had been let out. The respondent submitted that this was a case where both the learned Single Judge and the Division Bench decided the matter in the crucible of events peculiar to the facts of this case, having particular regard to the length of the period for which the misuser charges had been demanded.

21. Having considered the submissions made on behalf of the DDA and by the respondent appearing in-person, and also having considered the reasoning of the learned Single Judge and the Division Bench in repudiating the claim of misuser charges by the DDA, we are unable to convince ourselves that the decisions rendered by the High Court, both by the learned Single Judge as also the Division Bench, require any interference in these proceedings. The materials on record will show that the respondent took prompt steps against the tenants for their transgression. During arguments it was indicated that, in fact, one of the tenants had already vacated the portion of the premises occupied by him. It is also very clear that after issuing the Show-Cause Notices, the petitioner did not take any follow-up action thereupon. Instead, after a lapse of 25 years, the petitioner set up a claim on account of charges for the entire period. It would be inequitable to allow the petitioner which had sat over the matter to take advantage of its inaction in claiming misuser charges.

22. Even as to the contention raised on behalf of the petitioner that there was no limitation prescribed for making a demand of arrear charges, the Division Bench relying on the decision of this Court in *State of Punjab & Ors. Vs. Bhatinda District Cooperative Milk Producers Union Ltd.* [(2007) 11

SCC 363], observed that even where no period of limitation is indicated, the statutory Authority is required to act within a reasonable time. In our view, what would construe a reasonable time, depends on the facts and circumstances of each case, but it would not be fair to the respondent if such demand is allowed to be raised after 25 years, on account of the inaction of the petitioner.

23. We do not, therefore, find any reason to interfere with the judgment either of the learned Single Judge or of the Division Bench of the High Court and the Special Leave Petition is, accordingly, dismissed.

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

B.B.B. Special Leave Petition dismissed.

THDC INDIA LTD.
v.
VOITH HYDRO GMBH CO. AND ANR.
(Civil Appeal No. 2572 of 2011)

MARCH 17, 2011

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

Contract – Tender – Tehri Pump Storage Plant, a project for additional electricity generation – Appellant (THDC), a corporation under the Government of India, handling the project right from August, 2007 – However, tender not finalized due to legal battle between the two bidders, respondent No.1 and respondent No.2 – Respondent no.1 filed writ petition – High Court passed interim order staying the whole tender process – Justifiability – Held: Not justified – Since the whole process was absolutely transparent, there is no scope to stall the whole process by finding fault with the tendering process and insisting that THDC could not invite fresh pricing bids – In inviting the fresh pricing bids, particularly after conveying the deficiencies or non-conformities to both the respondents and making it clear to them, it cannot be said that any change was made in the bidding conditions – There was nothing wrong in THDC treading its course with utmost care – THDC acted in favour of the national interest by trying to prevent the exorbitant prices for the project and further trying to go to the realistic and minimum price – Contractual rights of competing parties like respondent no.1 and respondent no.2 not more important than the national interest – Stay order of High Court set aside – Parties to submit fresh price bids – THDC to accordingly take decision in respect of the grant of contract.

The Tehri Pump Storage Plant, a project for additional electricity generation, involved technical issues. The appellant (THDC), a corporation under the Government of India, has been handling the project right from August,

2007. However the tender was not finalized due to legal battle between the two bidders, respondent No.1 and respondent No.2. Respondent no.1 filed writ petition. The High Court, by the impugned order, passed an interim order staying the whole tender process.

Allowing the appeal, the Court

HELD:1. In an earlier round of litigation, by judgment and order dated 26.3.2010 passed by this Court, this Court had clearly expressed that the contractual rights of the competing parties like Voith GMBH (respondent No. 1) and Alstom (respondent No.2) were not more important than the national interest. If in pursuance of the national interest, which was so explicitly mentioned in this Court's judgment dated 26.3.2010, the THDC by adopting a fair and transparent procedure, provided a level playing field to both the parties to get a proper idea of costs that it would have to pay to the party winning the contract, no complaint could be made of the breach of the contractual rights. [Para 24] [637-A-C]

2. Since the whole process was absolutely transparent and since the issues raised by way of the Writ Petition, were not even argued before the Court in the first round, there is no scope to stall the whole process by finding fault with the tendering process and insisting that THDC could not invite the fresh pricing bids. In inviting the fresh pricing bids, particularly after conveying the deficiencies or non-conformities to both the respondents and making it clear to them that they would have to comply with the same as first stage, it cannot be said that any change is being made in the bidding conditions. This Court had left discretion in THDC to take the decision in the light of Panel of Experts' report. The Panel of Experts had gone into the exercise not once but twice. However, the close examination of the second report of the Panel

of Experts would suggest that everything was not alright even with the bid of Voith GMBH (respondent No.1) and there were in fact some non-conformities, which were required to be considered by THDC before a final decision was taken. There is nothing wrong in that. [Para 23] [636-C-F]

3. There is no breach of the contractual rights or the terms of Instructions to Bidders (ITB). After all, it could not be said that the rights of the parties were crystallized. According to Voith GMBH (respondent No. 1), the crystallization of the rights was even prior to passing of the judgment of this Court dated 26.3.2010, as the bid of Alstom (respondent No.2) was found to be non-responsive and the only bid which was found to be responsive was that of Voith GMBH (respondent No. 1). Even accepting this, Voith GMBH (respondent No. 1) could not insist upon the grant of contract in its favour on that ground alone. In the light of peculiar facts of this case, it must be stated that even if the bid of Voith GMBH (respondent No. 1) was found to be responsive, that did not end the matter. After all, THDC, which was going to come out with the huge expenditure running into thousands of crores of rupees, was bound to safeguard the national interest. That was the tone of this Court's judgment dated 26.3.2010 also. Otherwise, this Court could have straightaway awarded the contract in favour of Voith GMBH (respondent No. 1). But that was not found feasible in national interest. Instead, it was found proper to give fair opportunities to both the parties and it was only with that objective that the matters were referred to the Panel of Experts. If the facts are viewed from this angle, then it will be clear that there was nothing wrong in THDC treading its course with utmost care and it must be said that the facts show that THDC appears to have acted in favour of the national interest by trying to prevent the exorbitant prices for the project and further

trying to go to the realistic and minimum price. That was the spirit of this Court's judgment dated 26.3.2010 too. [Para 24] [637-C-H; 638-A-B]

3. In that view, it cannot be said that the High Court was right in passing the stay order as it did. This was a clear effort on the part of Voith GMBH (respondent No. 1) to put the spoke and to bring to halt the motion of the process which was ordered by this Court in its judgment dated 26.3.2010. [Para 25] [638-C]

4. It is only to save the precious time that this Court has entertained the instant appeal and cleared the obstacles in the whole tendering process. The order of the High Court granting stay is set aside. The parties will now proceed to submit their price bids. THDC (appellant) shall take the decision in respect of the grant of the contract thereafter. [Paras 26, 27] [638-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2572 of 2011.

From the Judgment & Order dated 01.02.2011 of the High Court of Uttaranchal at Nainital in WP No. 212 of 2011.

G.E. Vahanvati, AG, H. Rawal, ASG, Pratap Venugopal, Purushottam Kumar Jha, Namrata Sood and Anuj Sarma (K.J. John & Co.) for the Appellant.

Ashok Desai, Shyam Divan and A.M. Singhvi, Jai Munim, Anu Bindra, Amit Anand Tiwari, Ashutosh Jha, Prashant Mehta and Abhinav Mukharji for the Respondents.

The Judgment of the Court was delivered by

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

2. This case is a classic example of the whole nation suffering on account of the fight between two multi-national

companies in respect of each other's rights. There is no dispute that the Tehri Pump Storage Plant project is of utmost importance to the State of Uttarakhand particularly, and to the nation generally. Substantial electricity generation is the object of that project. It is only with that objective that a dam was constructed on river Bhagirathi involving crores of rupees for the construction as also for the rehabilitation of the persons who were displaced on account of the construction of dam. Tehri Pump Storage Plant is a project within the larger picture of Tehri Dam and would prove to be a boon for the additional electricity generation. It is a project involving technical issues. The appellant which is a corporation under the Government of India has been at this project right from August, 2007. Considering the tremendous importance of the project, it has yet not been able even to finalize the tender. Three and a half years have rolled by and yet no progress has been made, thanks to the legal battles in between the two giants called Voith GMBH (respondent No.1) and Alstom (respondent No.2).

3. It is not for the first time that this Court has to deal with the matter. Even about a year back, this Court was required to deal with the matter extensively and while dealing with the matter, the Court, in its order dated 26.3.2010 observed:

> "We are pained to note that a very important project like the present one is being held up in a legal battle between the two multinational companies. Till today, even the contract has not been finalized. All this would invariably cause loss to the nation. After all, contractual rights of these companies are not more important than the national interest."

4. In spite of these observations, we are extremely sorry to note that the matter has not reached its finality as yet and, therefore, we are constrained to interfere against an interim order passed by the High Court. The issue of national interest is our prime concern, the importance of which cannot be undermined.

5. Before we take up the issue for consideration, a short resume regarding the progress (?) would be worth seeing. The notice inviting tender on the prime turn-key execution was issued on 31.8.2007. Bids were received on 29.12.2007 in all from four companies, the respondents being a part of them. After opening the pre-qualification bids, two of the tendering parties were found to be dis-qualified leaving only the two respondents in the fray. On 15.1.2009, financial bids were opened in respect of the offers made by the two respondents. Obviously, on the basis of the fact that offers of the two respondents were found to be responsive, respondent No.2 approached the Court by way of a writ petition challenging the validity of the two bids submitted by respondent No.1. The High Court of Uttarakhand issued a stay order and ultimately on 29.6.2009 though it held that the objection raised by respondent No.2 against respondent No.1 regarding its lack of experience was not valid, the bidding documents themselves were not clear as to the manner in which the bids were to be made. It, therefore, directed the appellant to invite fresh bids. Special Leave Petition No.15779 of 2009 came to be filed before this Court and the respondent No.1 also filed an intra-court appeal being Appeal No.131 of 2009 before the High Court of Uttarakhand. With the sole objective of giving quietus to the issues and to provide the motion for the project, this Court transferred the said appeal filed by respondent No.1 and tagged it along with the Special Leave Petition. Since the Attorney General had offered to abide by the operative order of the High Court, this Court directed the appellant herein to invite fresh price bids by its order dated 11.09.2009. Thus, bids were examined by the appellant and it was found that the bid filed by Alstom, respondent No.2 was substantially lower. However, there were certain deviations in the fresh bids offered by the respondent. Respondent No.2, therefore, objected to the report dated 8.11.2009 and took exceptions to some of the observations and insisted that there were no deviations in the techno-commercial part of the bid. By their another letter dated 16.1.2010, respondent No.2 again reiterated their objections

and insisted upon the grant of contract in their favour. In order to maintain transparency and objectivity, the appellant offered to send the fresh bidding process for consideration by a panel of experts of national repute. They were to examine objections raised by the consortium of respondent No.2. They submitted their report on 8.2.2010 and observed that the fresh bid of M/s Alstom was non-responsive. In this backdrop, the Court heard both the parties as also the appellants all over again and ultimately passed an order on 26.03.2010.

6. The Court considered the question framed by the panel of experts which was to the following effect:

> "whether the examination of report of THDC declaring the bid of the consortium of M/s Alstom is OK or the objections raised by the consortium of M/s Asltom are justified with reference to the terms and conditions of the tender, techno-commercial bid submitted in October, 2008 and fresh price bid submitted in October, 2009 and their bid can be considered as responsive."

The Court also noted the conclusion drawn by the panel of experts which was to the following effect:

> "based upon the views outlined, POE is of the opinion that fresh price bid of consortium of M/s Alstom is not non-responsive. Their quoted price of partnership basis even though non-responsive is, however, lower by 84.5 crores (M/s Voith Rs. 21,551,245,304.00, M/s Alstom Rs.20,705,840,090.00). Similarly, the quoted price on assignee basis though non-responsive is lower by 108.7 crores (M/s Voith Rs.22,343,174,985.00 M/s Alstom Rs.21,256,007,413.00). The unconditional offer of the consortium of Alstom to take care of the THDC observations without any extra costs was that the bid becomes responsive and in accordance with the employers' requirements is not acceptable as this is not permissible under bidding document of this tender."

7. During the hearing, respondent No.2 had urged that panel of experts had not given any fair deal to respondent No.2 and it prayed that the matter should be sent to the Government of India. This was obviously opposed by the Attorney General as well as M/s Voith and, therefore, this Court took note of the contentions that the nature of objections to the report was of technical character and the bona fides of panel of experts was not questioned. The Court further took note of the stand taken by the Attorney General that the respondent No.1 could still address the panel of experts and further hearing could be given to M/s Alstom. The Court found the offer given by the Attorney General to be a fair offer and, therefore, one more opportunity was directed to be given to the parties for appearing before the panel of experts and, therefore, a report was directed from the panel of experts. The Court fixed the end of April 2010 for this purpose. It was observed in paragraph 11:

> *"the appellant herein would then, without loss of time, take decision, considering the report of the panel of experts regarding the award of contract.*" (emphasis supplied)

In view of this, the Court disposed of all the pending matters including the appeal filed by M/s Voith, respondent No.1 herein. The Court observed:

> "The exercise of bidding before this Court was ordered with the sole objective of saving time and to give the transparency to the whole exercise. Once the fresh bids were allowed to be given the old controversies before the High Court would naturally become extinct. In our opinion it would be in the interest of the project which has already been dragged by more than a year that the Panel of Experts should be allowed to consider the objections and express their opinion. That opinion shall then be considered by the appellant which would take the final decision on that basis. We must reiterate here that it is not for this Court to award the contracts by accepting or rejecting the tender bids. It is exclusively for the appellant herein to do that. Once all this exercise is over, nothing would remain for us to decide in these appeals."

8. What followed thereafter is more interesting. On 17.4.2010, detailed written submissions file by both the respondents before the panel of experts wherein respondent No.2 pointed out that there were several technical deviations in the bid of M/s Voith which were not considered so far by the appellant. Several technical issues were raised and it was pointed out that the bid of M/s Voith was not in accordance with the technical requirements. It was stated that the bid of M/s Voith, respondent No.1 had more than 40 commercial deviations and more than 90 technical deviations. It was, therefore, requested that panel of experts should look into the above referred matters and to look into all these aspects including the deviations of the bidding on the part of the respondent No.1. This was reiterated by subsequent letter dated 27.4.2010. On 29.4.2010 after going into the details of the contentions raised by both respondent Nos. 1 and 2 the panel of experts went into the details regarding the deviations and non-conformities in M/s Alstom, respondent No.2's fresh bids but did not give any finding regarding the deviations pointed out by it in respect of respondent No.1, M/s Voith. It, however, expressed in the following terms:

> "M/s Alstom during hearing have pointed some specific issues relating to bid of M/s Voith Siemens regarding sourcing and supply of Turbine Shaft and Rotor from Germany/ Italy/ Czech/ Spain/ Korea. In respect of Rotor they have also included Poland (Reference written submissions dated 17.4.2010, Volume-II A).
>
> they also pointed out regarding supply of Spherical Valve from Voith, USA. M/s Alstom Consortium in their rejoinder (15.4.2010) under "overall conclusions" (page 46) they also requested to enquire that both bids have been evaluated at par and cross checked in details that Voith's bid is not containing hidden deviations as was the case for MIV.

THDC will have to look into these issues along with all other issues particularly with regard to clause 9.4.4 of employer's requirements (amendment No.9 at Annexure 17) before taking a decision if M/s Voith's bid is responsive or non-responsive. (emphasis supplied)

9. Again respondent No.2, M/s Alstom filed letters dated 12.7.2010 and 23.7.2010 to the appellant and to the Ministry of Power. The matter was then taken up on the basis of the report of the panel of experts by tender committee. Tender committed again went into the exercise and submitted its report on 2.8.2010 wherein it was observed that the fresh price bids of consortium of M/s Asltom both as the partner and as the assignee were not responsive. It recommended further that negotiations would have to be undertaken with the respondent No.1, M/s Voith for considering the downward trend in prices and to much with the quoted prices of respondent No.2. It was also observed that the deviations of bids of respondent No.1 should be discussed with it. The matter then went the higher level of Executive Director, Contracts. He observed in his note dated 8.9.2010 "*if a minute scrutiny is carried out in respect of the bids of both the bidders, both the bids cannot be said to be fully responsive to the tender conditions"*. It was observed that even the bid of respondent No.1, M/s Voith could not be said to be fully complying and it was observed:

If an impartial and independent scrutiny of tender is carried out, it may appear that THDC has been too stringent on M/s Alstom and quite lenient in case of M/s Voith Siemens. In a true stricter sense, it appears that there have been some non-conformities in the bid of M/s Voith Siemens also."

It was then suggested in the note that *the tender committee should identify the non-conformities in respect of both the bidders and bidders should be asked to submit their fresh price bids after fully complying with the tender conditions without deviations.* *(emphasis supplied)*

10. The competent authority, therefore, took a decision on 1.10.2010 to call for the fresh bids after due identification of the non-conformities. Both the bids were, therefore, scrutinized in great details. Even the deliberations were held between 2.11.2010 and 14.12.2010 and ultimately a report was submitted by the tender committee on 14.12.2010 in relation to the non-conformities of both the bidders. The report contained two annexures being annexures 1A and 1B detailing the non-conformities in respect of respondent No.2 and respondent No.1, respectively. Therefore, a communication dated 21.12.2010 was sent to both the respondents that it is only after the unqualified and unconditional compliance to the employer's requirements in respect to the non-conformities pointed out in annexures 1A and 1B and on the respondents agreeing to comply with the objections raised as regards the non-confirmities that the respondents would submit fresh price bids.

11. In this letter all the earlier correspondence and the techno-commercial bids including all earlier letters sent by both the respondents were referred to. The report of the panel of experts was also referred to. It was stated that the techno-commercial offers of both the bidders were reviewed at length and it was decided to invite fresh price bids from both the bidders. The letter went on to clarify that these bids were invited in two stages. In the first stage both the bidders were required to convey their unqualified and unconditional compliance with the employer's requirements with respect to the shortcomings observed in their respective bids, so as to resolve all the inconsistencies and thereby ensuring compliance with the tender conditions (In terms of the annexure 1A for consortium of M/s Alstom and annexure 1B for the consortium of M/s Voith). It was clarified that subsequent to such unqualified and unconditional confirmation by the respective bidders, the bidders were to put their fresh price bids in the second stage. Seven pre-conditions were then put and it was clarified that the stage of price bidding i.e. regarding the un-conditional

compliance the bidders were to submit the documents latest by 7.1.2011, 4 p.m. IST. The validity of the bid was limited to 180 days from the date of submission of the fresh price bid.

12. This letter dated 21.12.2010 was challenged by the respondent No.1 by way of a writ petition No.212 of 2011. But before that respondent No.1 had addressed a letter to the compliance dated 24.12.2010 that inviting fresh price bids was not in accordance with the bidding documents and was contrary to the legal position. In that letter it was stated that it reserved the right to challenge the decision to invite fresh price bids and therein also sought time on any day after 18.01.2011 to seek certain clarifications in respect to the THDC's letter dated 21.12.2010. It also sought for extension of the compliance of first stage of price bidding. This request of extension was acceded to by the appellant THDC and it fixed a meeting on 19.1.2011. In the letter sent by THDC dated 4.1.2011 THDC refuted the contention raised by respondent No.1 regarding the invitation of fresh price bids. Yet another objection was raised by a letter on 15.1.2011 on behalf of respondent No.1. for inviting the fresh price bids. In addition to this notice, fresh report of the panel of experts dated 29.4.2010 and further recommendations/reports of the tender committee were also sought for. The meeting took place on 19.1.2011 when in addition to the appellant THDC officials, representatives of respondent Nos.1 and 2 were present wherein the same stand was allegedly reiterated by respondent No.1. A further letter dated 20.1.2011 was sent by the respondent No.1 calling upon THDC:

> "(1) to respond to the points raised in the letter dated 15.1.2011;
>
> (2) requesting for a copy of the fresh report of the panel of experts dated 21.4.10;
>
> (3) requesting for the copy of the subsequent report/ recommendations of the tender committee."

13. This letter was responded to by THDC wherein it reiterated its stand dated 21.12.2010 and further conveyed that it was not obliged to provide fresh reports of the panel of experts or reports of the tender committee.

14. On this basis, respondent No.1 proceeded to file a Writ Petition in the High Court of Uttarakhand challenging the letter dated 21.12.2010. This Writ Petition seems to have been filed on 27.1.2011 and was placed before the Learned Vacation Judge of the High Court of Uttarakhand. The High Court then passed the following order:

> "After hearing rival contentions of learned counsel for the parties, this Court is of the view that the opinion/ recommendation made by panel of experts should be placed on record along with the objections raised by the parties and the report of the tender committee and recommendations of the Executive Director.
>
> Mr. Rawal learned Additional Solicitor General of India stated at Bar that the petitioner must also comply with the letter of respondent No.1 though annexure P-1. to which learned counsel for the petitioner stated that without prejudice to the rights of the petitioner, he shall comply with the same within a week if the date of compliance is so extended as the date has expired on 31.1.2011.
>
> Mr. Rawal learned counsel for respondent No.1 prays for and is granted time to file counter affidavit. The counter affidavit may be filed by 8th February, 2011. Respondent No.2 may also file counter affidavit, if any, within the same period. Copy of the counter affidavit be supplied to the petitioner well before the fixed, who shall also file his reply to this Court on or before 11th February, 2011.
>
> Adjourned to 17.2.2011.
>
> In the meanwhile, no further proceedings shall be undertaken by respondent No.1."

15. It seems that by their letter dated 12.2.2011, respondent No.1 have sent their compliance to annexure 1B of the letter dated 21.12.2010. It has been stated in that letter at the outset, and as recorded in the aforesaid order dated 1.2.2011, we have to state and emphasize that compliance by the Voith Hydro Consortium with the order dated 1.2.2011 passed by the High Court is strictly without prejudice to the rights and contentions of the Voith Hydro Consortium as well as without prejudice to the contentions and grounds raised in Writ Petition No.212 of 2011. Added to this is annexure signifying compliance with the question raised by the THDC as regards to the non-conformities.

16. In the Writ Petition, amongst the other prayers, a direction was sought against the appellant to award the contract in respect of Tehri Pump Storage Plant. The main attack in the Writ Petition was on the letter dated 21.12.2010 on the ground that the decision therein was ex-facie illegal, unreasonable, arbitrary, unfair and biased and that the said decision was taken with a sole and ulterior motive of benefiting Alstom (respondent No.2) and giving Alstom (respondent No.2) yet another opportunity to rectify or supplement its admittedly non-responsive fresh price bids. It was further urged in the Writ Petition that such action on the part of the appellant was contradictory to the tender conditions, more particularly, Clause 25.3 of the Instructions to Bidders (ITB), which prohibited a non-responsive bid from being made responsive at the instance of the bidder by introducing corrections or withdrawing the non-conforming deviation or reservation. It was also urged that in inviting the fresh pricing bids, the provisions of the bidding documents were selectively changed and had resulted in reopening techno commercial bids after the price bids of both the respondents had been opened and evaluated. It was further urged that after passing of the judgment dated 26.3.2010 by this Court, the scope of the Panel of Experts was restricted, in the sense that it could only examine the price bid by Alstom (respondent No.2) and could not go into the merits of the bid

given by Voith GMBH (respondent No. 1). On that basis, it was urged in the Writ Petition that once the techno commercial bid of Voith GMBH (respondent No. 1) was finally accepted, there was no question of introducing the subject of deviations and then insisting upon the compliance with those deviations and thereafter, inviting fresh price bids. Strong words like 'bias', 'discrimination', 'nepotism' and 'fairness' have also been used in the Writ Petition. In short, the actions on the part of the appellant have been interpreted to be with the sole objective to confer benefit to Alstom (respondent No.2) to the detriment of Voith GMBH (respondent No. 1). It was further urged in the Writ Petition that once Envelope Nos. 3 and 4 were opened and evaluated, there was no provision in any of the bidding documents permitting the appellant to revisit or reopen or reconsider the technical bid contained in Envelope No. 3. Referring to the earlier correspondence and various letters by the appellant, as also the contents of various documents, it was contended that the appellant was stopped from contending to the contrary. It was suggested that after the judgment dated 26.3.2010 passed by this Court, the only course left open to THDC (appellant herein) was to proceed further and award contract to Voith GMBH (respondent No. 1 herein) in view of Clause 28.1 of ITB. It was urged that THDC (appellant) ought to have abided by the observations made by the Panel of Experts in their first report dated 8.2.2010. Contentions were also raised about the bidding process as also ITB.

17. It is obvious that the High Court, on the basis of this plea, as also the plea of non-supply of the necessary documents, chose to stay the whole process after hearing both the sides.

18. We have intentionally chartered the whole course of this tender, which began in August, 2007. When the matter came for the first time after the final judgment of the High Court was passed, requiring the appellant THDC to invite fresh price bids, it was felt by this Court that the legal battle between these two

multi-national companies was resulting in delaying of the whole process. The importance of the project as also the tremendous financial implications, were realized. The project undoubtedly was going to cause very heavy expenditure on the part of THDC (appellant). It was in that spirit that this Court proceeded to pass the judgment and order dated 26.3.2010, and it was, therefore, that the price bids were directed to be given before the officer of this Court. The monetary implications were tremendous and, therefore, this Court felt the need for transparency on the part of THDC (appellant) as also the objectivity. It was, therefore, directed that the price bids should be got examined by the Panel of Experts. This was done not only once but twice to ensure that both the sides should get equal opportunities and treatment of fairness.

19. What strikes us initially is that all the arguments and the insistence for award of contract in favour of Voith GMBH (respondent No. 1) could have been argued before us in that very first round. That was not done and even if that was haltingly done, it was not found feasible to straightaway award a contract in favour of Voith GMBH (respondent No. 1). Considering the national interest, the matter was referred to the Panel of Experts. Again, it was made very clear that the report of the Panel of Experts was not going to be be all and end all of the matter. In the last paragraph of the judgment, it was made very clear that the ultimate decision regarding awarding of the contract would have to be given by THDC (appellant) and not by this Court. Therefore, there was enough discretion and play left in THDC (appellant) to act on the report of the Panel of Experts and as such THDC could have adhered to its own procedure and decide upon the award of contract.

20. It was argued before us by the Shri Vahanvati, learned Attorney General that there are hierarchies in the working of THDC. The report of the Panel of Experts had to be first analyzed by the Tender Committee and even the decision of the Tender Committee was not final and the same was subject

to the decisions of the Executive Director and ultimately the competent authority. It was pointed out by the learned Attorney General that after the final report of the Panel of Experts came, it was heavily deliberated by the Tender Committee. The Tender Committee made a few comments in terms of the report. The Panel of Experts had already, in para 8 of its report, expressed what we have reproduced in para 8 of this judgment. Therefore, even if the bid of Alstom (respondent No.2) was found to be non-responsive by the Panel of Experts, it was clear that the ultimate decision was to be taken by THDC after looking into number of issues. When the matter was considered further by the Tender Committee, the Tender Committee came to the conclusion which is to be found in para 12 of the recommendations. This report of the Tender Committee is dated 2.8.2010. The Tender Committee, under the working pattern of THDC (appellant), could not have finalized the grant of award. It could only make the recommendations. It held that the fresh price bids of Alstom (respondent No.2) were non-responsive. However, it is clear from the record that the report of the Tender Committee was to be considered at various higher levels in the hierarchical structure of the decision making of the appellant. In this report, as pointed out by the learned Attorney General, the Tender Committee had pointed out certain deviations/non-conformities in respect of the bid of Voith GMBH (respondent No. 1) also and, therefore, it had suggested discussion for resolving certain deviations and price negotiations and had also recommended the award of contract to Alstom (respondent No.2). All these aspects were bound to be considered and were actually considered at the higher levels and thereafter the report of the Executive Director came. We have already made a reference to the decision of the Executive Director, who found, by his note dated 8.9.2010, that the bid of Voith GMBH (respondent No. 1) was also not fully complied with. It was found that on an impartial and independent scrutiny, the attitude of THDC (appellant) was found to be too stringent to Alstom (respondent No.2) and quite lenient to Voith GMBH (respondent No. 1). The Executive

Director had also noted the non-conformities of the bids. The actual observations have been pointed out and mentioned in para 9 of this judgment. It was in view of this that the decision was taken on 1.10.2010 by the competent authority to call for fresh bids. The matter was again examined by the Tender Committee and by its report dated 14.12.2010, the Tender Committee fixed the deviations which were reported in Annexure 1 A and Annexure 1 B to its report. It is these non-conformities which were mentioned in the letter dated 21.12.2010. Now, it was clear that these deviations or non-conformities, as the case may be, were located and both the respondents were asked to comply with these deviations/non-conformities with the sole objective of bringing them on the same level playing field, so that thereafter there would be only one task to decide as to whose price bid was lower and as such acceptable by THDC (appellant).

21. We do not find anything amiss in this whole exercise. Shri Desai, learned senior counsel appearing on behalf of Voith GMBH (respondent No. 1), invited our attention to the allegations of bias, discrimination etc. It cannot be forgotten that at a point of time, the Executive Director felt that in fact, THDC (appellant) was showing a tilt in favour of Voith GMBH (respondent No. 1). When the documents and the correspondences are examined, we do not find any tilt in favour of either party and in our opinion, there is no scope to accept the allegation that THDC wanted to favour Alstom (respondent No.2) and had, therefore, changed the rules of the game. That contention is clearly without any merits. The allegations of mala fides and bias are directed towards THDC as a whole without naming any individual person. Such allegations are easy to be made but very difficult to justify. Precisely that has happened here also. The extremely general nature of allegations would desist us from accepting the same. Particularly, when there is hardly any material justifying the same.

22. It has already been pointed out that it is only when all

the exercise was taken in pursuance of this Court's judgment dated 26.3.2010 that the respondent No. 1 chose to raise the issue about the non-responsive bid of Alstom (respondent No.2). It went on with the whole exercise including the arguments before the Panel of Experts not once but twice and thereafter, also took part in the negotiations. But its stance changed only after the final decision was taken by the competent authority on 1.10.2010 and more particularly, after the Tender Committee had finalized the report on 14.12.2010.

23. In our opinion, since the whole process was absolutely transparent and since these issues, which were raised by way of the Writ Petition, were not even argued before the Court in the first round, there is no scope to stall the whole process by finding fault with the tendering process and insisting that THDC could not invite the fresh pricing bids. In our opinion, in inviting the fresh pricing bids, particularly after conveying the deficiencies or non-conformities to both the respondents and making it clear to them that they would have to comply with the same as first stage, we do not think that any change is being made in the bidding conditions. We must note, at this juncture, that this Court had left discretion in THDC to take the decision in the light of Panel of Experts' report. The Panel of Experts had gone into the exercise not once but twice. However, the close examination of the second report of the Panel of Experts would suggest that everything was not alright even with the bid of Voith GMBH (respondent No. 1) and there were in fact some non-conformities, which were required to be considered by THDC before a final decision was taken. We do not find anything wrong in that. It was earnestly urged by Shri Desai, learned senior counsel that the unfairness was clear enough from the fact that even the documents were not supplied by THDC to Voith GMBH (respondent No. 1) though they were insisted upon from time to time. While the debate was going on before us, all the documents were supplied. But, even otherwise, we do not think that any serious prejudice would have

been caused to Voith GMBH (respondent No. 1) on that account.

24. We may reiterate at the cost of repetition that by judgment and order dated 26.3.2010 passed by this Court, this Court had clearly expressed that the contractual rights of the competing parties like Voith GMBH (respondent No. 1) and Alstom (respondent No.2) were not more important than the national interest. If we find that in pursuance of the national interest, which was so explicitly mentioned in this Court's judgment dated 26.3.2010, the THDC by adopting a fair and transparent procedure, provided a level playing field to both the parties to get a proper idea of costs that it would have to pay to the party winning the contract, no complaint could be made of the breach of the contractual rights. In our opinion, firstly, there is no breach of the contractual rights or the terms of ITB. After all, it could not be said that the rights of the parties were crystallized. According to Shri Desai, learned senior counsel arguing on behalf of Voith GMBH (respondent No. 1), the crystallization of the rights was even prior to passing of the judgment of this Court dated 26.3.2010, as the bid of Alstom (respondent No.2) was found to be non-responsive and the only bid which was found to be responsive was that of Voith GMBH (respondent No. 1). Even accepting this, Voith GMBH (respondent No. 1) could not insist upon the grant of contract in its favour on that ground alone. In the light of peculiar facts of this case, it must be stated that even if the bid of Voith GMBH (respondent No. 1) was found to be responsive, that did not end the matter. After all, THDC, which was going to come out with the huge expenditure running into thousands of crores of rupees, was bound to safeguard the national interest. That was the tone of this Court's judgment dated 26.3.2010 also. Otherwise, this Court could have straightaway awarded the contract in favour of Voith GMBH (respondent No. 1). But that was not found feasible in national interest. Instead, it was found proper to give fair opportunities to both the parties and it was only with that objective that the matters were referred to the Panel of Experts.

If the facts are viewed from this angle, then it will be clear that there was nothing wrong in THDC treading its course with utmost care and it must be said that the facts show that THDC appears to have acted in favour of the national interest by trying to prevent the exorbitant prices for the project and further trying to go to the realistic and minimum price. That was the spirit of this Court's judgment dated 26.3.2010 too.

25. In that view, we do not think that the High Court was right in passing the stay order as it did. This was a clear effort on the part of Voith GMBH (respondent No. 1) to put the spoke and to bring to halt the motion of the process which was ordered by this Court in its judgment dated 26.3.2010.

26. Even at the beginning of this judgment, we had pointed out as to why this Court is interfering against the interim order passed by the High Court. It is only to save the precious time that we have entertained this appeal and cleared the obstacles in the whole tendering process.

27. The appeal succeeds. The order of the Uttarakhand High Court granting stay is set aside. The parties will now proceed to submit their price bids in the light of the observations made by us. The said price bids shall be submitted within three weeks from the date of this judgment. THDC (appellant) shall take the decision in respect of the grant of the contract within three weeks thereafter. With these observations, the appeal is disposed of. No costs.

B.B.B. Appeal allowed.

KOKA SURYANARAYANA RAO AND ORS.

v.

LAND ACQUISITION OFFR. AND REV. DIV. OFFCR., A.P.

(Civil Appeal Nos.2565-2571 of 2011)

MARCH 17, 2011

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

Land Acquisition – Land belonging to appellants acquired on basis of requisition made by Andhra Pradesh State Road Transport Corporation (APSRTC) – Compensation awarded – Claimants-appellants filed execution petitions – APSRTC filed application in the execution petitions for impleading itself as the second respondent – Application dismissed, which order was upheld upto the level of Supreme Court – In the execution petitions, calculations made by decree holders-appellants regarding the decretal amount was accepted by the Executing Court and the Land Acquisition Officer was directed to deposit the amounts in terms of the calculations made by the decree holders – APSRTC filed civil revisions against the order of Executing Court – Revision petitions dismissed by High Court, which order was upheld by the Supreme Court – Revision petitions filed by Land Acquisition Officer against the very same order of the Executing Court – Allowed by High Court – Justification of – Held: Not justified – The Land Acquisition Officer was trying to fight a battle of APSRTC which APSRTC had already lost – All through, the respondent-Land Acquisition Officer was a party to all the proceedings including the Civil Revision Petitions filed by the APSRTC, firstly, for its impleadment and, secondly, against the order passed by the Executing Court accepting the calculation memos – It is only when all the controversies were closed that the Land Acquisition Officer chose to file the Civil Revision Petitions – This course cannot be approved as the Land Acquisition Officer could not have, at this juncture, filed the Civil Revision

Petitions and even if those Civil Revisions were filed and could be entertained, all the questions regarding the correctness of the calculation memos had also been finally closed, firstly, by the judgment in civil revision petitions filed by the APSRTC and lastly by dismissal of the Special Leave Petition filed challenging the calculation memos – Order of the High Court set aside and that of the Executing Court restored.

Based on a requisition made by the Andhra Pradesh State Road Transport Corporation (APSRTC), the lands belonging to the appellants were acquired for the purpose of construction of a bus station. Possession was taken and compensation award was passed. The appellants made reference u/s. 18 of the Land Acquisition Act. The Reference Court enhanced the compensation. In appeal, the High Court confirmed the said judgment. The claimants-appellants filed execution petitions. While the execution petitions were pending, APSRTC filed application in the execution petitions for impleading itself as the second respondent. The application was dismissed, which order was upheld right up to the level of the Supreme Court.

In the execution petitions, the calculations made by the decree holder-appellants regarding the decretal amount were accepted by the Executing Court and the Land Acquisition Officer-judgment debtor was directed to deposit the amounts in terms of the calculations made by the decree holders.

APSRTC filed civil revisions against the order of the Executing Court. The revision petitions were dismissed by the High Court, which order was upheld by the Supreme Court.

Subsequently, the Land Acquisition Officer filed revision petitions against the very same order of the

Executing Court which were allowed by the High Court.

In the instant appeal, the appellants contended that the High Court was in complete error in allowing the civil revisions filed by the Land Acquisition Officer inasmuch as nothing was left in the said executions had become final against the APSRTC. It was contended that what could not be achieved by APSRTC was now being tried to be achieved by the Land Acquisition Officer.

Allowing the appeals, the Court

HELD:1.1. In the judgment of the High Court disposing of the Civil Revision Petitions filed by the APSRTC, the question of correctness of the calculation memos filed by the appellants-claimants was specifically raised. However, the High Court refuted that contention on the part of the APSRTC. To that petition, the Land Acquisition Officer was also a party. But as has been held by the High Court, no objections were raised by the Land Acquisition Officer at all. It is only thereafter that the respondent-Land Acquisition Officer seems to have woken up by filing the review applications. The judgment passed by the High Court was challenged by APSRTC up to the level of this Court wherein this Court confirmed that judgment by dismissing the Special Leave Petition. Even in those special leave petitions, the land Acquisition Officer was a party. At any rate, the Land Acquisition Officer even being a respondent in the Civil revision petitions filed by APSRTC could have at least supported APSRTC or independently filed a Special Leave Petition. But that was not done. Instead, the Land Acquisition Officer chose to file review petitions and further chose to withdraw them. There was no liberty sought while withdrawing the review petitions and, therefore, civil revisions came to be filed before the High Court against the very same order of the Executing Court which was

confirmed right up to this Court. All this obviously was not permissible. In that, the Land Acquisition Officer was only trying to fight a battle of APSRTC which APSRTC had already lost. By the impugned order of the High Court, the beneficiary party would be the APSRTC because it was for its cause that the land acquisition was done and even the compensation would come from APSRTC. The things are, thus, clear that once the APSRTC had chosen to challenge the calculation memos and had failed in that exercise right up to this Court, the Land Acquisition Officer is now trying to challenge the very same orders. This is not any more permissible. [Para 15] [650-D-H; 651-A-C]

1.2. The respondent-Land Acquisition Officer did not raise even its little finger against the calculation memos presented by the decree-holder-appellants. All through, the respondent-Land Acquisition Officer was a party to all the proceedings including the Civil Revision Petitions filed by the APSRTC, firstly, for its impleadment and, secondly, against the order passed by the Executing Court accepting the calculation memos. It is only when all the controversies were closed that the Land Acquisition Officer chose to file the Civil Revision Petitions. This course cannot be approved as the Land Acquisition Officer could not have, at this juncture, filed the Civil Revision Petitions and even if those Civil Revisions were filed and could be entertained, all the questions regarding the correctness of the calculation memos had also been finally closed, firstly, by the judgment in civil revision petitions filed by the APSRTC and lastly by the dismissal of the Special Leave Petition filed challenging the calculation memos. [Para 15] [651-D-F]

2. The APSRTC had clearly challenged the calculation memos at various stages. Therefore, it cannot

be said that the question of correctness of the calculation memos was not considered by the High Court or this Court. The contention raised by the respondent-Land Acquisition Officer regarding the calculation memos cannot be entertained now. The order of the High Court is set aside and that of the Executing Court is restored. [Paras 16, 17] [651-G-H; 652-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2565-2571 of 2011.

From the Judgment & Order dated 5.6.2009 of the High Court of A.P. at Hyderabad in CRP Nos. 273, 275, 276, 1514, 1580, 1697 and 1698 of 2008.

Guntur Prabhakr for the Appellants.

R. Venkataramani, G.N. Reddy, V. Pattabhiram and Aljo K. Joseph for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted in all special leave petitions.

2. By these appeals the judgment passed by the learned Single Judge of the Andhra Pradesh High Court allowing the civil revision petitions filed by the Land Acquisition Officer and Revenue Division Officer, Kakinada are in challenge. By the instant judgment, the said civil revision petitions were allowed and some directions were given to the Executing Court which was executing the decrees earned by the appellants herein. These civil revisions were filed against the order passed by the Court of IInd Additional Senior Civil Judge, Kakinada which was dealing with the execution petitions filed by the appellants herein. In those execution petitions, the calculations made by the decree holder-appellants herein regarding the decretal amount were accepted and the Land Acquisition Officer-

judgment debtor was directed to deposit the amounts in terms of the calculations made by the decree holders.

3. Lands belonging to the appellants were acquired for the purpose of construction of bus station complex at Pithapuram. This was done on the basis of a requisition made by Andhra Pradesh State Road Transport Corporation (hereinafter called 'APSRTC' for short). Possession was already taken of the land with building and trees on 29.1.1978 itself and award came to be passed on 1.6.1981 awarding compensation @ Rs.10 per square yard (48,400/- per acre) for the land, and Rs.97,930/- for permanent structures and Rs.740/- towards tress. A reference was made under Section 18 of the Act by the appellants herein and the reference Court by its order and decree dated 25.4.1984 enhanced the compensation @ Rs.40/- per square yard from Rs.10/- per square yard. It also increased the compensation for buildings as well as the trees. It also ordered the solatium @ 15% and interest @ 4 % per annum from the date of taking possession of the acquired land. Appeals came to be filed against this judgment. The High Court, however, confirmed the said judgment by its judgment dated 5.2.1992 in appeal No.1970 of 1985. While confirming the compensation awarded and the rate fixed by the reference Court, the High Court further held that in addition to the market value of the land, the claimants shall be entitled to the additional amount calculated @ 12 % per annum on such market value for the period commencing on and from date of publication of notification under Section 4(1) of the Act to the date of award of the Collector or the date of taking possession of the land, whichever was earlier as contemplated under Section 23(1)A of the Amendment Act No. 68 of 1984. It was also ordered that the claimants–appellants-decree holders would also be entitled to solatium @ 30 % and interest @ 9 % per annum from the date of taking possession till the date of payment.

4. The Land Acquisition Officer deposited the amount as awarded by the reference Court awarding 12 % additional

market value, solatium and interest by the High Court.

5. The claimants had filed execution petitions claiming compensation which was ordered by the Executing Court on 11.8.2005. The calculation made by the Court in the execution petitions suggested that apart from the market value, 30 % solatium and 12 % additional market value were also added for arriving at the proper compensation and on that amount interest @ 9 % per annum was also claimed from 29.1.1978 for a period of a year i.e. up to 28.1.1979 and thereafter @ 15 % per annum. The Executing Court also deducted the amount paid on 1.6.1981 and the interest was calculated on the balance amount including interest on the additional market value and accrued interest by deducting the compensation already paid under the award in compliance with the decree passed in OP. It is the case of the respondent that the compensation amount was deposited on 17.9.1984 and in one of the execution petitions and credited on 5.10.1984 to the full satisfaction of decree passed in OP No.113/1982 dated 25.4.84.

6. While these execution petitions were pending, APSRTC filed execution application No.424 of 1996 in execution petition No.279 of 1995 and OP No.113 of 1982 for impleading itself as the second respondent-judgment debtor. By that it wanted an opportunity to contest the execution petitions stating that they had deposited the amount under the threat of attachment. This execution petition was dismissed, and, therefore, the APSRTC filed a civil revision petition. This civil revision petition was also dismissed by the High Court by its order dated 10.8.2001. Therefore, APSRTC filed a writ petition being WP No.18813 of 2003 before the High Court. However, that Writ Petition No.18813 of 2003 also came to be dismissed by the High Court. The said judgment by the Single Judge was confirmed in writ appeal No.1190 of 2004. The APSRTC, not content with the judgment, approached this Court by way of a Special Leave Petition. However, even that Special Leave

Petition was dismissed by this Court on 21.2.2005.

7. After this, however, the APSRTC filed three civil revisions being CRP Nos. 601, 603 and 604 of 2006 with leave to file revisions against the order of the Executing Court dated 11.8.2005 passed in EP No.237 of 1992, 44 of 1993, 279 of 1992 and 83 of 1996. These revision petitions were also dismissed by the High Court by separate orders. Again, a Special Leave Petition was filed against the orders passed in the civil revision petitions. However, this Special Leave Petition was also dismissed by this Court on 20.8.2007.

8. So far so good, after the dismissal of CRP Nos.601-604 of 2006 referred to earlier, now the Land Acquisition Officer filed review petitions to revise the orders passed by the High Court in CRP Nos.601-604 of 2006. While these review petitions were pending, the Executing Court allowed the execution petitions and directed the Land Acquisition Officer to deposit the decretal amount by order dated 26.11.2007. Against this, three revisions again came to be filed by the Land Acquisition Officer vide CRP Nos.273, 275 and 276 of 2008. The review petitions filed earlier by the Land Acquisition Officer were then withdrawn, they being CRP Nos. 273, 275 and 276 of 2008. The Land Acquisition Officer then filed four revision petitions they being CRP Nos.1514, 1580, 1697 and 1698 of 2008 against the order of the Executing Court dated 11.8.2005 in EP Nos.83 of 96, 237 of 92, 279 of 92, 44 of 93 and OP 113 of 1982, respectively. The judgment of the High Court allowing the said civil revision petitions is challenged here.

9. The learned counsel appearing on behalf of the appellants brought to our notice that the High Court was in complete error in allowing the civil revisions inasmuch as nothing was left in the said executions and the said execution had become final against the APSRTC. It was pointed out that what could not be achieved by APSRTC was now being tried to be achieved by the Land Acquisition Officer. The learned counsel pointed out that the acquisition was for APSRTC and

the compensation would also flow from the APSRTC. It was pointed out that APSRTC having failed in achieving results in spite of the three earlier rounds of litigation, now the mantle has been taken over by the Land Acquisition Officer. The learned counsel took us through the list of dates and pointed out that after the final determination of principles of compensation, claimants filed execution petitions along with the calculation memos claiming the total decretal amount of Rs.15,87,833.61/-. This amount was directed to be deposited as per that calculation memo on or before 29.4.1996 by way of an order dated 2.4.1996. It was at that stage that the APSRTC who was the beneficiary filed the application for impleadment and that application failed throughout right up to the level of this Court. It was pointed out that when the civil revision petitions of impleadment were filed, a writ petition came to be filed being Writ Petition No.18813 of 2003 wherein the order of the Executing Court was challenged. The learned counsel pointed out that by its order dated 13.4.2004, that writ petition was dismissed. However, the learned Single Judge had given liberty to file an appeal against the order in CRP No.3894 of 2007 before this Court, if so advised. The learned counsel pointed out that this order of the learned Single Judge in WP No.18813 of 2003 was not challenged by way of special leave petition and instead the APSRTC filed a writ appeal against the judgment of the learned Single Judge. The Division Bench also dismissed the appeal and it is against that order regarding impleadment that APSRTC filed Special Leave Petition which was also dismissed.

10. The learned counsel then pointed out that the execution Court by its order dated 11.8.2005 considered the updated calculation memo up to 30.6.2005 and directed to deposit amount of Rs.32,14,328/- by 1.9.2005. Similar orders were passed in other execution petitions also. Against this order, the APSRTC again filed four civil revision petitions, they being CRP Nos.601-604 of 2006 which were dismissed by the Learned Single Judge. The Learned Single Judge in his judgment dated

28.4.2006 had deprecated the attitude on the part of the APSRTC.

11. It was then pointed out that this order of 28.4.2006 was sought to be reviewed by the Land Acquisition Officer by filing review petitions. The learned counsel pointed out that against the dismissal of the civil revision petitions filed by APSRTC, the APSRTC again approached this Court which Special Leave petition was also dismissed, though after notice to the respondent. However, the review petitions filed by the LAO challenging the calculations were also dismissed as withdrawn by the orders dated 29.8.2008 passed by the High Court. While these review petitions were withdrawn, the learned counsel pointed out that there was no liberty given to the Land Acquisition Officer while dismissing the review petitions.

12. After withdrawal of the review petitions the Land Acquisition Officer again filed fresh Civil Revision Petition Nos.1514, 1580, 1697 and 1698 of 2008 before the High Court against the order of the Executing Court which had passed the orders on 11.8.2005 in four execution petitions. Learned counsel pointed out that this very order was challenged by APSRTC in CRP Nos.601-604 of 2006 and the same were dismissed. He pointed out that in those civil revision petitions, even the Land Acquisition Officer was a party. He also pointed out that Land Acquisition Officer did not present any argument against those orders which could have been presented even if it was a party respondent and yet the High Court not only entertained the civil revision petitions, but also allowed them. The learned counsel pointed out that all this was clearly impermissible. The learned counsel was at pains to point out and rely upon the judgment of the High Court dealing with the civil revision petition No.601-604 of 2006 filed by APSRTC. He pointed out that in those civil revisions, the APSRTC had challenged the calculations approved by the Executing Court by its order dated 11.8.2005. The learned counsel relied on the following paragraph in the judgment:

"Now, the APSRTC files the present civil revision petition questioning the calculation made by the office of the Court below. It is to be further seen that the said calculation is based on the calculation memo filed by the claimants. Same is the calculation memo filed earlier under the Court below. The present calculation memo is on the same lines, of course, by updating. Absolutely, there is no deviation from the earlier calculation memo and furthermore the present calculation arrived at by the office of the Court below is matching with the calculation memo filed by the claimants."

It is pointed out that in this very judgment, it was observed in paragraph 10 as under:

"At this stage, the APSRTC files the present civil revision petition. No objections were taken *by any party of the execution petition EP No.237 of 1992 in EP No.113 of 1982 on the file of IInd Additional Subordinate Judge, Kakinada, including the Land Acquisition Officer, who is answerable party,* or the party to the execution petition, the present Civil Revision Petition is filed, of course, by obtaining leave of this Court."

(emphasis supplied)

13. From this, the learned counsel said and, in our opinion, rightly that there was no question of finding fault with the calculation memo which were approved by the High Court in its aforementioned judgment. It is further pointed out that the Special Leave Petition against this judgment was already dismissed by this Court on 20.8.2007. It was also argued that in view of this judgment, nothing was left to be considered in respect of the calculation memo. In view of all this, the learned counsel urged that there was no question of finding fault with the calculation memos ordered upon by the Executing Court.

14. As against this, Shri R. Venkataramani, learned senior

counsel appearing on behalf of the respondent-State tried to justify the order that the calculation of interest in the aforementioned calculation memo was not correct. It was tried to be pointed out by the learned senior counsel by filing the calculation sheet, that calculation of the claimants-appellants herein was excessive and in that the interest was calculated on the interest. The learned counsel tried to point out that in calculating the interest as per the calculation memo finalized by the Executing Court, the amounts of compensation which were already deposited were not taken into consideration and, therefore, the interest was swollen unnaturally. In short, the learned counsel tried to urge that the interest on interest was being claimed by the claimants, which was not correct.

15. It must be pointed out, at this juncture, that in the judgment of the High Court disposing of the Civil Revision Petition Nos. 601-604 of 2006 which were filed by the APSRTC, the question of correctness of the calculations was specifically raised almost on the similar lines. However, the High Court refuted that contention on the part of the APSRTC. It must be noted that, to that petition, the Land Acquisition Officer was also a party. But as has been held by the High Court, no objections were raised by the Land Acquisition Officer at all. It is only thereafter that the respondent Land Acquisition Officer seems to have woken up by filing the review applications. It has to be kept in mind that the judgment of 28.4.2006 passed by the Learned Single Judge was challenged by APSRTC up to the level of this Court wherein this Court confirmed that judgment by dismissing the Special Leave Petition. It has to be pointed out that even in those special leave petitions, the land Acquisition Officer was a party. At any rate, the Land Acquisition Officer even being a respondent in CRP Nos.601 to 604 of 2006 could have at least supported APSRTC or independently filed a Special Leave Petition. But that was not done. Instead, the Land Acquisition Officer chose to file review petitions and further chose to withdraw them. There was no liberty sought while withdrawing the review petitions and,

therefore, civil revisions came to be filed before the High Court against the very same order of the Executing Court which was confirmed right up to this Court. All this obviously was not permissible. In that, the Land Acquisition Officer was only trying to fight a battle of APSRTC which APSRTC had already lost. It goes without saying that by the impugned order of the High Court, the beneficiary party would be the APSRTC because it was for its cause that the land acquisition was done and even the compensation would come from APSRTC. The things are, thus, clear that once the APSRTC had chosen to challenge the calculation memos and had failed in that exercise right up to this Court, the Land Acquisition Officer is now trying to challenge the very same orders. We do not think that this is any more permissible. We have already pointed out that the respondent did not raise even its little finger against the calculation memos presented by the decree-holder-appellants herein. All through, the respondent herein was a party to all the proceedings including the Civil Revision Petitions filed by the APSRTC, firstly, for its impleadment and, secondly, against the order passed by the Executing Court accepting the calculation memos. Unfortunately, it is only when all the controversies were closed that the Land Acquisition Officer has chosen to file these four Civil Revision Petitions in 2008. We do not approve of this course as the Land Acquisition Officer could not have, at this juncture, filed the Civil Revision Petitions and even if those Civil Revisions were filed and could be entertained, in our opinion, all the questions regarding the correctness of the calculation memos had also been finally closed, firstly, by the judgment in CRP Nos.601 to 604 of 2006 and lastly by the dismissal of the Special Leave Petition filed challenging the calculation memos.

16. We have carefully seen the pleadings of the parties at various stages where the APSRTC had clearly challenged the calculation memos. Therefore, it cannot be said that the question of correctness of the calculation memos was not considered by the High Court or this Court. In our opinion,

therefore, the contention raised by Shri R. Venkataramani regarding the calculation memos not being correct cannot be entertained now.

17. The appeals, therefore, deserve to be allowed and are allowed. The order of the High Court is set aside and that of the Executing Court is restored. However, under the circumstances, there will be no orders as to costs.

B.B.B. Appeals allowed.

THE MUNICIPAL CORPORATION OF GREATER BOMBAY & ANR.

v.

YESHWANT JAGANNATH VAITY & ORS.

(Civil Appeal No. 2575 of 2011)

MARCH 17, 2011

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

Development Control Regulation for Greater Bombay, 1991 – Regulation 3(7) – Transfer development rights (TDR) – Amenity – Order by High Court directing Municipal Corporation of Greater Bombay (MCGB) to grant additional transfer development rights and to issue development rights certificate equivalent to 85 % of the area of a courtyard developed by the respondents in favour of MCGB – Correctness of – Held: As per the definition of 'amenity' under Regulation 3(7) asphalting the courtyard amount to an amenity – Clauses 5 and 6 in Appendix VII does not give a discretion to the Municipal Authorities to scale down the grantable TDR – Thus, the High Court was right in granting 100% TDR as against the development of courtyard by asphalting the same – The very stance on the part of the MCGB to provide 15% of additional TDR for asphalting the courtyard would contain an admission that asphalting of the courtyard would amount to an 'amenity' – Once it is held as an amenity, there is no question of refusing the right of equivalent TDR.

In the instant case, respondents filed writ petition claiming benefit of additional transfer development rights (TDR) from the Development Control Regulation for Greater Bombay, 1991 as they had developed not only the export office of the Municipal Corporation of Greater Bombay (MCGB) but also done the asphalating work of the courtyard in accordance with the Development

Control Regulation for Greater Bombay, 1991. The High Court allowed the petition.

The question which arose for consideration in this appeal was whether the High Court was right in directing the appellant-Municipal Corporation of Greater Bombay to grant additional transfer development rights and to issue further development rights certificate equivalent to 2646.14 sq. metres (85 % of the area of a courtyard) developed by the respondents in favour of the appellants.

Dismissing the appeal, the Court

HELD: 1.1 In view of the unequivocal declaration of law by this Court in the case of **Godrej & Boyce Manufacturing Co. Ltd. v. State of Maharashtra and Ors.* that construction of the road was undoubtedly an 'amenity'; that under the express language of Section 126(1)(b) of the Maharashtra Regional and Town Planning Act read with Para 6 of the Appendix VII, the use of the word 'equivalent' would entitle the owner of the building to 100% for the construction of an amenity at owner's cost; and that a subsequent circular would be of no consequence and would not have the effect of overriding the provisions of the Regulations as envisaged in Appendix VII and clauses 5 and 6, law seems to be fully settled against the appellants. The submission that asphalting of the courtyard could not be said to be an "amenity", cannot be accepted as the very stance on the part of the MCGB to provide 15% of additional TDR for asphalting the courtyard would contain an admission that asphalting of the courtyard would amount to an amenity. Had it not been so, the MCGB could have conveniently said that it would not provide even 1% of additional TDR to the respondents. Further, considering the definition of "amenity" under Regulation 3(7) of the Development Control Regulation for Greater Bombay, 1991, which includes open spaces, parks, recreational grounds, play

grounds etc., asphalting the courtyard would certainly amount to an amenity. The building offered to be constructed by the respondents was an export office. Considering the overall situation prevailing in Mumbai, the asphalting of the whole courtyard and thus, providing parking lot would certainly amount to an amenity. After all, the office, by its very nature, would attract trucks and other vehicles. In the absence of an asphalted large area, the office could possibly not be a feasible idea. [Para 17] [670-C-G]

1.2 The submission that the respondents had specifically agreed in the letter dated 22.2.1995 and more particularly in terms of Para 4 thereof that the Municipal Corporation would grant the benefit of TDR in respect of the concrete/asphalted surface area around the Export Office building as and when the quantum of such TDR is decided by the Municipal Commissioner; and that thereby the respondents had compromised their rights and had left it to the discretion of the Municipal Commissioner and, therefore, they could not turn around and say that it was not for the Municipal Commissioner to decide the quantum as per his own discretion, is clearly incorrect since the day when this letter was signed, the circular dated 09.04.1996 was nowhere in existence. Therefore, the respondents had no reason to believe that the Municipal Commissioner would decide to scale down the entitlement which they legitimately expected because of clauses 5 and 6 in Appendix VII. The said letter merely provided that the quantum could be decided in terms of the area of courtyard to be developed and the grant of TDR would depend upon as to whether that much area was fully developed as per the satisfaction of the Municipal Commissioner. The scope of Para 4 could not be taken beyond this. [Para 18] [671-A-E]

1.3 The appellant submitted that the land owner was

to get the TDR only on the land being levelled to the surrendering ground level and a 1.5 metres high compound wall was constructed with a gate, at the cost of the owner. That may be so; however, the agreement on the part of respondents to construct such a compound wall and gate and to do the levelling of the land before handing over the land admeasuring 3500 sq. metres, would be of no consequence in the instant case is concerned. The difference in the phraseology in clauses 5 and 6 i.e. the word 'equal' having been used in clause 5 and the word 'equivalent' having been used in clause 6 would also be of no consequence as the same has been concluded by the ruling of this Court in *Godrej & Boyce's case* against the appellants, and, therefore, the submission that it gives a discretion to the Municipal authorities to scale down the grantable TDR, cannot be accepted. More so, in *Godrej & Boyce's case* the Court clearly held that in a circular, the Corporation could not have created divisions in the total amenities in the sense that it could not have chosen to grant 100% of additional TDR in favour of some amenities and 15% in case of some others. [Paras 19, 20] [671-F-H; 672-A-C]

1.4 The submission regarding the value of construction vis-à-vis the grant of TDR, is not open in view of the unequivocal finding given on that question in the ruling in *Godrej & Boyce's case.* The suggestion that in asphalting of the courtyard there was no element of development as the term 'development' meant building, engineering, mining or other operations in, or over, or under land or the making of any material change in any building or land, is wholly incorrect, as had this not been development, the MCGB would not have agreed to provide even 15% of the TDR therefor. [Paras 21] [672-D-F]

1.6 In the instant case, the question was whether it was an amenity. Once it is held as an amenity, there

would be no question of refusing the right of equivalent TDR therefor. The circular dated 09.04.1996 was issued "*prior to*" completion of the construction of the export office by respondents 1 to 3 and asphalting of the courtyard and handing over of the possession by them. Under any circumstance, the circular dated 09.04.1996 was issued much after the compromise in the writ petition and the issuance of letter of intent dated 22.02.1995. [Para 22] [672-H; 673-A-C]

1.5 The High Court was right in allowing the writ petition and granting 100% TDR as against the development of courtyard by asphalting the same. There are no merits in the appeal. [Para 24] [673-D]

Godrej and Boyce Manufacturing Co. Ltd. v. State of Maharashtraand Ors.* **2009 (5) SCC 24; *Pune Municipal Corporation v. Promoters and Builders Assn.* **2004 (10) SCC 796 – referred to.**

Case Law Reference:

2009 (5) SCC 24	**Referred to.**	**Para 9**
2004 (10) SCC 796	**Referred to.**	**Par 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2575 of 2011.

From the Judgment and Order dated 18.6.2009 of the High Court of Bombay in WP No. 634 of 2004.

U.U. Lalit and Atul Yeshwant Chitale, Suchitra Atul Chitale, Sunaina Dutta, Snigdha Pandey, Nishtha Kumar, for the Appellants.

Ashok H. Desai and Krishnan Venugopal, Amit Dhingra, Kritika Chanderana and Aman Leekha (for Dua Associates) for the Respondents.

The Judgment of the Court was delivered by

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

2. Whether the High Court was right in directing the appellant The Municipal Corporation of Greater Bombay (hereinafter called "the MCGB" for short) to grant additional transfer development rights (hereinafter called "TDR" for short) and to issue further development rights certificate (hereinafter called "DRC" for short) equivalent to 2646.14 sq. metres (85 % of the area of a courtyard) developed by the respondents in favour of the appellants is a question that fall for consideration in this appeal.

3. By the impugned judgment, the Bombay High Court under Clause 6 of Appendix VII to the Development Control Regulation for Greater Bombay, 1991 (hereinafter called "the Regulations" for short) has issued such a direction in a writ petition filed by the respondents herein.

Factual panorama

4. The respondents herein owned 10,000 sq. yards of land in Mulund village. A development plan was sanctioned for Greater Bombay in the year 1957. Mulund comes within the area of Greater Bombay. The said land was shown as reserved for public purpose of construction of a godown. Ordinarily, such land is acquired under the provisions of Land Acquisition Act, 1894. However, the respondents and the four other co-owners entered into a private agreement to hand over possession of 10,000 sq. yards to the MCGB for the temporary use as a truck terminal. The land was also to be used as a town duty office. The possession was handed over on 18.9.1961. An agreement was entered into between the respondents and the other co-owners with the MCGB wherein it was agreed that the respondents and the other co-owners would receive compensation of Rs.90,000/-. The land, though, was given in possession much earlier and there was an agreement dated

16.12.1967, it was not put to any use much less for the public purpose for which it was intended to be acquired. The land was not put to any other use also right till November, 1998. Hence, the respondents filed a writ petition No.3437 of 1988 *inter alia* praying therein for a declaration that the land was not liable to be acquired. The writ petitioners demanded back the possession of 10,000 sq. yards. There was a compromise effected in this writ petition by order dated 10.3.1992 between the parties. Under the same, the MCGB agreed to acquire and retain the area of 3500 sq. metres for the purpose of establishing and constructing an export octroi office. The consent terms provided that appellant Nos.1 and 2, namely, MCGB and its Chief Engineer would hand over the remaining area to the respondents herein and the respondents herein would refund the amount of Rs.90,000/- with interest therein @ 10 % per annum from the date of payment till the date of re-payment to the MCGB. It was further provided in the consent terms that the respondents herein would be entitled to TDR to the extent provided in the Regulations in respect of 3500 sq. metres in lieu of the payment of Rs.90,000/- with interest. It was further provided in the consent terms that the MCGB would grant TDR in lieu of the said land measuring 3500 sq. metres subject to the compliance of various requirements by the petitioners as required under Regulation 34, Appendix VII of the Regulations. It was specifically provided by Clause 9 of the consent terms that if the petitioners constructed and developed export office for the MCGB on the aforementioned area of 3500 sq. metres and handed over the premises to the MCGB free of cost, the respondents would be entitled to the benefit of additional transferable development rights as per Regulation 6 of Appendix VII. The precise wordings of Clause 9 to the consent terms are as under:

> "9. The petitioners shall be entitled to the benefit of Additional Transferable Development Rights (hereinafter referred to as 'ATDR'), if the petitioners are asked by the respondent No.1 to construct and develop the Export Office for the Corporation on the land so surrendered at their own costs and as per the plans and designs and specifications of the respondent No.1 and hand over the premises so constructed to the respondent No1 free of costs as per the sub-regulation 6 of Appendix VII of the Development Control Rules for Greater Bombay, 1991."

5. A letter was addressed by the Constituted Attorney of the respondents dated 18.4.1992 calling for a joint survey and demarcation and the engineer of the MCGB was requested to inform the details and specifications of the work which the present respondents would have to carry on to claim the TDR as per paragraph 4 of the consent terms and the additional TDR as per paragraph 9 of the consent order quoted above. The respondents were informed on 25.4.1992 that they would have to carry out the work of leveling the plots, construction of compound wall on three sides with gates, development of yard with asphalting and the construction of an export office building as per the specifications submitted by the Deputy C.E.(P & D)/ Municipal Architect by his communication dated 20.9.1991. The Constituted Attorney was directed to approach the concerned authority.

On 25.5.1992, the Architect of the respondents made an application to the MCGB for grant of TDR in respect of 3500 sq. metres of area already surrendered by the respondents to appellant No.1. The petitioners also paid the sum of Rs.3 lakh 15 thousand (principal amount of Rs.90,000/- and the interest @ 10 % per annum) from the date of payment till the date of re-payment as agreed to in the consent terms.

On 22.01.1993, the respondents addressed a letter to the Assessor and Collector asking for further details relating to the work to be carried out on the said 3500 sq. metres of land. On 5.3.1993 the Assessor and Collector of the appellant No. 1 herein addressed a letter to the respondents herein enclosing

a sketch plan of for the proposed export office together with development of yard. It was informed in the said letter that as per the directions of the Municipal Commissioner, additional TDR in lieu of the development of export yard and construction of office would be granted to the respondents. The respondents were also requested to expedite the work of construction of export office.

On 7.6.1993, a letter was addressed by Municipal Architect to the respondents herein enclosing specifications for asphalting. It was mentioned that this work to be carried out under the supervision of Municipal engineer.

By a further letter dated 23.6.1993, the Chief Engineer informed the petitioners that the development right certificate would be issued after compliance with certain additional requirements contained in the said letter. On 13.9.1993, the respondents herein wrote a letter to the Assistant Engineer informing about the various compliances and requesting for issue of development right certificate in respect of 3500 sq. metres.

On 9.2.1994, it was informed by a letter that the respondents' right to grant development certificate would be considered after they commence the work of construction of the export office. Further on 22.2.1995, the Chief Engineer addressed a consent letter to the respondents certifying his no objection for constructing the export office building subject to the terms and conditions mentioned in the said letter. Condition Nos. 1 and 4 in the said letter are relevant for the issued involved. They are as under:-

> "1. That you will construct the Export Office building as per the plans & specifications of the Municipal Corporation enclosed herewith and the Municipal Corporation will grant the Transferable Development *Right equivalent to the builtup area of the Export Office.*

> 4. That you will concrete/ asphalt the portion of the Export Office Yard around the Export Office building as per the specifications of MCGB and as given by the Chief Engineer (Roads & SWD) of the MCGB. The work will be carried out under the Municipal supervision and certified by the Competent Authority. *The Municipal Corporation will grant the benefit of Transferable Development Right in respect of the concrete/asphalted surface area around the Export Office building as and when the quantum of such TDR is decided by the Municipal Commissioner."*

(emphasis supplied)

6. The petitioners constructed the export office and also developed the surrounding area. The possession of the export office and the courtyard was handed over to the the MCGB for which a possession receipt was also issued. Possession receipt mentioned the details of the constructed amenity as under:-

> "CTS No.137A Export Office Gr.Fl.293.13 sq. Electric of village & chowky for m. 1st Fl.170.15 fittings Mulund (East) octroi Deptt. sq.m. Exit. Fixtures as office 27.88 sq. advised by E.E.(Mech) & Water cooler- Total 491.16.sq.m.
>
> CTS No.137A Court yard of Area as shown by Electric of village Export office A B C D E F G H poles and Mulund (East) office I JK on the plan carriage duly certified by entrance to Roads Deptt. under plot & front No.DYCHE/ 1486/compound/ Rds.dt.23.2.96 wall."

7. An application was made by the respondents' Architect for DRC. On 19.1.1999, DRC for TDR in respect of export office being 491.16 sq. metres equivalent of the 100 per cent of the built up area of the export office was granted. However, insofar as the additional transferable rights in lieu of the development

of the export courtyard surrounding the export office was concerned, the same was restricted to 466.96 sq. metres being 15 per cent of the built up area of the courtyard. This was the first flash point. On 7.3.2000, the petitioners by their letter claimed that they were entitled to the additional transferable rights to the extent of 3113 sq. metres as against the development of the courtyard of export office on which they had done the asphalting work. On 27.6.2000, the Chief Engineer refused to grant further additional TDR contending therein that the TDR issued was in accordance with the BMC policy. Once again, a demand was made by communication dated 6.7.2000 for the balance area and also requested the MCGB for the particulars of the alleged policy. It was informed herein that there was a circular dated 9.12.1996 which formulated the policy. The respondents were invited for discussion. A contempt application was also filed by the respondents being Contempt Petition No.116 of 2000, contending therein that the consent order dated 10.3.1992 was violated. The said contempt petition was dismissed holding that there was no willful disobedience. On 23.12.2003, the respondents again addressed a letter to the MCGB calling them upon to grant further DRC for the remaining 85 per cent of the area of the courtyard and since the demand was not met, the writ petition came to be filed.

8. The writ petitioners-respondents mainly relied on the consent terms dated 10.3.1992 and, more particularly, on Clause 9 and contended that they were entitled to the benefit of additional TDRs as they had developed not only the export office of the MCGB but also done the asphalting work of the surrounding area, more particularly, in accordance with the Regulations. Appendix VII, Sub-Clause 6 of Regulation 34 of the Regulations were also reiterated in the letter issued by the Chief Engineer dated 22.12.1992. Further condition No. 4 provided that the MCGB will grant benefit of transferable development rights in respect of the agreed asphalted surface area, the export office building as and when the quantum of such TDR is decided by the Municipal Commissioner was also

relied upon. They pointed out that the Municipal Commissioner could not have relied on a subsequent circular dated 9.12.1996 and had to go strictly by the language of Clause 6 of Appendix VII of Regulation 34 of the Regulations under which they were entitled for an area equivalent 100 per cent of the area of the courtyard which they had developed. In short, they pointed out that limiting that area only to 15 per cent and granting DCR only in respect of that much of area was wholly illegal.

9. On the other hand, it was contended on behalf of the appellants herein that Regulations 33 and 34 of the Regulations were only enabling provisions and did not create any legal right to get additional TDR. The appellant also relied on the circular dated 9.12.1996 and it was contended that as per this circular various amenities were described where 100 per cent FSI was admissible in respect of some amenities and in respect of others only 15 per cent of additional development rights could be admissible. It was mainly contended that the courtyard and the development therein did not amount to an amenity within the meaning of Section 2 (7) of the Regulations. The High Court allowed the writ petition. It was held that the Regulations had statutory force and Clause 6 of Appendix VII of Regulation 34 of the Regulations provided for benefit to be enjoyed by a person who constructed the amenity. Relying on the plain language of Clause 6, it was held that the respondents herein were entitled to 100 per cent DCR rights. The High Court also held that the aforementioned circular dated 9.4.1996 was of no consequence vis-à-vis the specific language of Clause 6 of Appendix VII Regulation 34 of the Regulations. The High Court also relied on the judgment of this Court reported as *Godrej & Boyce Manufacturing Co. Ltd. v. State of Maharashtra & Ors.* [2009 (5) SCC 24]**.** The High Court came to the conclusion that the above mentioned decision of this Court applied on all fours to the present matter.

10. Shri Uday Lalit, learned senior counsel appearing on behalf of the appellants herein firstly contended that the above

mentioned decision was distinguishable. According to him, in that decision the Court was considering whether a road constructed by the owner would entitle the owner to additional TDR. He further argued that the road was undoubtedly an amenity under Maharashtra Regional and Town Planning Act (hereinafter called "the Act" for short) as also under the Regulations. Learned counsel further argued that in the present case the additional TDR was being claimed on the basis of the work of asphalting of the courtyard and, therefore, it could not be held to be an amenity entitling the owner to the additional TDR.

11. It was further submitted that the circular dated 9.4.1996 had no bearing in *Godrej & Boyce's case (cited supra)* since it was issued after the land owners had surrendered their plot of land after construction of the roads as required by the Municipal Council while in the present case the said circular was issued prior to the respondent Nos.1 and 3 completing the construction of an export office and asphalting of the courtyard and handing over the possession. The counsel further urged that the question arising in the present case was different in the sense that in the present case, the question was whether under sub-regulation 6 of Appendix VII of Regulation 34, it was mandatory for the Commissioner or the appropriate authority to grant 100 % TDR equivalent to the entire area of the courtyard. Lastly, it was contended that in *Godrej & Boyce's* case, the difference between Regulations 5 and 6 of Appendix VII was not noticed.

12. The learned senior counsel also urged that Clause 6 applied only to the developed or constructed amenity and asphalting the courtyard could not be covered under the same. Our attention was drawn to the definition of 'amenity' and it was contended that the courtyard could not be covered under the same. The learned senior counsel further urged that the High Court had not properly interpreted the consent terms as also Clause 4 of the letter dated 22.2.1995. It was urged that that

unlike sub-regulation 5, the wording in sub-regulation 6 confers a discretion on the authority. Our attention was drawn to the difference in language by contending that while in clause 5 the wording used is "*shall be equal to*" and in clause 6, the same was "*may be granted*". Our attention was also drawn to the phraseology used in the two clauses. While in clause 5, the wording used was *"equal*", in clause 6 it was "*equivalent*". It was also urged that by circular dated 9.4.1996, arbitrary exercise of discretion by the Commissioner was avoided and that was the main purpose of bringing in the circular. The same provided definite guidance in respect of the extent of TDR that was to be granted by the Commissioner /competent authority. Lastly, it was urged that asphalting of the courtyard was a separate activity. It had got nothing to do with the consent terms. As regards the letter dated 22.2.1995, and more particularly, clause 4 therein, it was urged that under the same the respondents had specifically agreed that the quantum of the TDR to be granted was to be decided by the Municipal Commissioner and, therefore, the respondents could not turn back and urge that they would be entitled to the 100% TDR.

13. As against this, Shri Ashok H. Desai, learned senior counsel appearing on behalf of the respondents pointed out that the matter was fully covered by the decision in the aforementioned case of *Godrej & Boyce (cited supra)*. The learned senior counsel pointed out that it was a misnomer to say that asphalting was not an amenity. He pointed out that unless the asphalting was done, the basic purpose of constructing the octroi duty office would have been frustrated as there would be no place for the large number of vehicles to be parked. The learned counsel also pointed out, relying on the provisions of DCR, that the courtyard, though was separately mentioned and explained in the Rules, the asphalting therein would certainly be an amenity. The counsel urged about the letter dated 22.2.1995, that even if it was the discretion to decide about the quantum of grantable TDR, the said discretion could not have been used in contravention of the

Regulations. He pointed out that on that date, the circular was nowhere which came much later and as such it could not have been made applicable with retrospective effect. The learned senior counsel also urged that the interpretation put forward by the appellants of Clauses 5 and 6 was incorrect and in fact there was very little or no difference. The learned senior counsel stressed the implication of Clause 6 and pointed out that there was no scope for the interpretation tried to be put forward by the appellant MCGB. Learned senior counsel wholly supported the High Court judgment.

14. It will be our task to examine as to whether the aforementioned ruling in *Godrej & Boyce's case (cited supra)* clinches the issue. The factual scenario in both the matters is almost identical. The only difference is that in that case, the land owners had developed the roads while in the present case, the land owners have developed the courtyard by asphalting the same. In *Godrej & Boyce's case (cited supra)*, the reliance was only on the same circular dated 9.4.1996 issued by the Municipal Commissioner of the MCGB. That was by far the only defence. In that case, the State had argued that the law provides for the grant of additional FSI or TDR commensurate to the value of the amenity constructed by the landowner and the meaning of Para 6 of Appendix VII to the Regulations would be clear by reading it alongwith other provisions of the Regulations and the parent Act. The State had argued that the said circular dated 9.4.1996 was clarificatory and fully applied to the claims of the appellants in that case which were even prior to the said circular being born. After taking the full resume of the provisions of the Act as also the Regulations, the Court went on to hold firstly that as per Regulation 2(2) of the Regulations, any terms and expressions not defined in the Regulations shall have the same meaning as in Bombay Municipal Corporations Act, 1888 and the Rules and Bye-laws framed thereunder, as the case may be, unless the context otherwise required. The Court then went on to hold that the term "amenity" which was defined under Regulation 3 Clause (7) was

much restricted than the one given under the Act, inasmuch as the sport complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals were not included in the definition of "amenity". The Court, however, found that the road was common to definitions, both, under the Act and the Regulations and it was defined in the widest possible terms in Clause (76) of Regulation 3.

15. After considering the concepts like "floor spare index (FSI)", "Additional FSI" and "TDRs", the Court considered Appendix VII referred to in Regulation 34 of the Regulations, the Court then took the stock of the argument that the envisaged grant of FSI or TDR was under two separate heads, one, for the land and the other for the construction of the amenity for which the land was designated in the development plan, at the cost of the owner. The Court referred to Section 2(9-A), as also to Section 126(1)(b). Taking note of Para 6 of Appendix VII of the Regulations, the Court noted that the additional DR for construction of the amenity for which the surrendered plot was designated in the development plan at the owner's cost provided for a further DR in the form of FSI "equivalent to the area of the construction/development". The Court also noted the argument that this grant of additional DR could not be on a sliding scale for construction/development of different kinds of amenities on the surrendered land and thus, it could not be reduced or curtailed. After taking into consideration the circular dated 9.4.1996 and noting, particularly, para 3 thereof, the Court also noted that in that case, the earlier granted TDR @ 15% was increased to 25%. The Court also noted the further argument that the Regulations framed under the Act had statutory force as held in *Pune Municipal Corporation Vs. Promoters and Builders Assn. [2004 (10) SCC 796]*. As against this, the circulars issued by the Municipal Commissioner were simply executive instructions and thus could not override or supersede the provisions of the Regulations. The Court also noted the argument that since the

Municipal authorities were fully aware and conscious of this legal position, they had requested to the State Government to suitably modify Para 6 of Appendix VII of the Regulations. The non-retrospectivity of the circular dated 9.4.1996 was also noted.

16. All these arguments were tried to be countered in that case, basically on the ground that the grant of additional TDR for construction of all different kinds of amenities equal to the area of the construction was illogical, unreasonable and discriminatory. It was also urged that the law contemplated grant of further additional TDR commensurate to the value of the land constructed/developed on the surrendered land. This argument was specifically refuted. In the present case, Shri U.U. Lalit also tried to argue the same aspect that as against the value or the expenditure spent for asphalting, the claim for TDR over the area would be an excessive claim if the values are to be compared. In short, the argument was that the value of asphalting would be nothing in comparison to the claim of 100% TDR for the whole courtyard. The Court did not accept this proposition which was accepted by the Bombay High Court in that case. Relying on the language of Section 126(1)(b) and the use of the word "against" therein in respect of the area of the land surrendered and the further use of the word "against" in respect of the development or construction of amenities of the surrendered land, the Court held that what was contemplated by law was to recompense the landowner. However, Para 5 of the Appendix VII to the Regulations used the words "equal to the gross area of reserved plot", and, therefore, there was no difficulty insofar as the bare land was concerned. The Court then went on to consider the effect of the words "equivalent to the area of the construction/development" in Para 6 of the Appendix and noted in paragraph 58 of the judgment to the effect that the argument on behalf of the Government, though not without substance, had to be rejected as it was not in keeping with the law as it stood and, therefore, the value of the development/construction could only be made

the basis for granting additional FSI or TDR by making suitable amendments in the law and not by an executive circular. In short, the Court came to the conclusion that (1) construction of the road was undoubtedly an "amenity", (2) under the express language of Section 126(1)(b) read with Para 6 of the Appendix VII, the use of the word "equivalent" would entitle the owner of the building to 100% for the construction of an amenity at owner's cost, and (3) a subsequent circular would be of no consequence and would not have the effect of overriding the provisions of the Regulations as envisaged in Appendix VII and clauses 5 and 6.

17. In view of this unequivocal declaration of law by this Court in the aforementioned case of *Godrej & Boyce (cited supra)*, in fact, law seems to be fully settled against the appellants. It is, however, argued that asphalting of the courtyard could not be said to be an "amenity". The argument must fail as the very stance on the part of the MCGB to provide 15% of additional TDR for asphalting the courtyard would contain an admission that asphalting of the courtyard would amount to an amenity. Had it not been so, the MCGB could have conveniently said that it would not provide even 1% of additional TDR to the respondents herein. Further, considering the definition of "amenity" under Regulation 3(7) of the Regulations, which includes open spaces, parks, recreational grounds, play grounds etc., we have no difficulty in holding that asphalting the courtyard would certainly amount to an amenity. The building offered to be constructed by the respondents herein was an export office. Considering the overall situation prevailing in Mumbai, the asphalting of the whole courtyard and thus providing parking lot would certainly amount to an amenity. After all, the office, by its very nature, would attract trucks and other vehicles. In the absence of an asphalted large area, the office could possibly not be a feasible idea. On this count, the argument of the appellants must fail.

18. Shri U.U. Lalit, learned senior counsel appearing on

behalf of the appellants then urged that the respondents herein had specifically agreed in the letter dated 22.2.1995 and more particularly in terms of para 4 thereof that the Municipal Corporation will grant the benefit of TDR in respect of the concrete/asphalted surface area around the Export Office building as and when the quantum of such TDR is decided by the Municipal Commissioner. It was very earnestly argued by the learned senior counsel that thereby the respondents had compromised their rights and had left it to the discretion of the Municipal Commissioner and, therefore, they could not turn around and say that it was not for the Municipal Commissioner then to decide the quantum as per his own discretion. The argument is clearly incorrect for the simple reason that on the day when this letter was signed, the aforementioned circular dated 9.4.1996 was nowhere in existence. The respondents, therefore, had no reason to believe that the Municipal Commissioner would decide to scale down the entitlement which they legitimately expected because of clauses 5 and 6 in Appendix VII. The aforementioned letter merely provided that the quantum could be decided in terms of the area of courtyard to be developed and the grant of TDR would depend upon as to whether that much area was fully developed as per the satisfaction of the Municipal Commissioner. The scope of Para 4 could not be taken beyond this.

19. Shri Lalit, learned senior counsel, relying on clause 15, also argued that the land owner was to get the TDR only on the land being levelled to the surrendering ground level and a 1.5 metres high compound wall was constructed with a gate, at the cost of the owner. That may be so; however, in our view, the agreement on the part of respondents to construct such a compound wall and gate and to do the levelling of the land before handing over the land admeasuring 3500 sq. metres, would be of no consequence insofar as the present controversy is concerned. The further argument of the learned senior counsel about the difference in the phraseology in clauses 5 and 6 i.e. the word "equal" having been used in clause 5 and

the word "equivalent" having been used in clause 6 would also be of no consequence as, in our opinion, the same has been concluded by the aforementioned ruling of this Court in *Godrej & Boyce's case (cited supra)* against the appellants, and, therefore, the argument that it gives a discretion to the Municipal authorities to scale down the grantable TDR, does not impress us.

20. That apart, in the aforementioned ruling in *Godrej & Boyce's case (cited supra)*, the Court has clearly held that in a circular, the Corporation could not have created divisions in the total amenities in the sense that it could not have chosen to grant 100% of additional TDR in favour of some amenities and 15% in case of some others.

21. Shri Lalit, learned senior counsel has also reiterated the argument regarding the value of construction vis-à-vis the grant of TDR, which question, in our opinion, is not open in view of the unequivocal finding given on that question in the aforementioned ruling in *Godrej & Boyce's case (cited supra)*.

It was tried to be suggested that in asphalting of the courtyard there was no element of development as, according to the learned senior counsel, the term "development" meant building, engineering, mining or other operations in, or over, or under land or the making of any material change in any building or land. The argument is wholly incorrect, as had this not been development, the MCGB would not have agreed to provide even 15% of the TDR therefor.

22. Lastly, Shri Lalit, learned senior counsel urged that the ruling in *Godrej & Boyce's case (cited supra)* was distinguishable inasmuch as under the said ruling what was considered was the construction of road which was not equivalent to asphalting of a courtyard. We have already pointed out that the question was not of the construction of a road or asphalting of a courtyard; the question was whether it was an amenity. Once it is held as an amenity, there will be no question

of refusing the right of equivalent TDR therefor. It was then urged that the circular dated 9.4.1996 in *Godrej & Boyce's case (cited supra)* was issued after the land owners had surrendered their plot of land and completed the construction of roads as required by the Municipal Corporation, whereas in the present matter, the circular was issued "*prior to*" completion of the construction of the export office by respondents 1 to 3 and asphalting of the courtyard and handing over of the possession by them. In our opinion, this cannot be the distinguishable feature, as under any circumstance, the circular dated 9.4.1996 was issued much after the compromise in the writ petition and the issuance of letter of intent dated 22.2.1995.

23. No other point was urged before us.

24. We are, therefore, of the clear opinion that the High Court was right in allowing the writ petition and granting 100% TDR as against the development of courtyard by asphalting the same. We find no merits in the appeal. The appeal is, therefore, dismissed. No costs.

N.J. Appeal dismissed.

DEUTSCHE POST BANK HOME FINANCE LTD.
v.
TADURI SRIDHAR AND ANR.
(Civil Appeal No. 2691 of 2011)

MARCH 29, 2011

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

Arbitration and Conciliation Act, 1996 – s.11 – Petition under – Impleadment of a non-party to arbitration agreement – Development agreement between second respondent-developer and owners of lands for constructing multi-storied apartments – First respondent wanted to purchase an apartment and for such purpose took housing loan from appellant – Land-owners and the developer executed a registered sale deed in favour of first respondent in respect of an unfinished apartment – First respondent entrusted construction of the unfinished apartment to the developer under a construction agreement dated 21-2-2008 containing an arbitration clause – Dispute between first respondent and developer – First respondent invoked arbitration clause contained in the construction agreement dated 21-2-2008 and later filed petition u/s. 11 – In the said petition, the appellant was also impleaded as a respondent along with the developer – Designate of the Chief Justice of High Court allowed the application u/s.11 and appointed a sole arbitrator – Whether the appellant, a non-party to the construction agreement dated 21-2-2008 containing the arbitration clause, could be roped in, as a party to such arbitration – Held, No – If a person who is not a party to the arbitration agreement is impleaded as a party to the petition u/s. 11, the court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the Arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement – In the instant case, the existence of an arbitration agreement

in a contract between appellant and first respondent did not enable the first respondent to implead the appellant as a party to an arbitration in regard to his disputes with the developer – Petition u/s.11 against the appellant was misconceived as it was not a party to the construction agreement dated 21-2-2008 – Order of the designate of the Chief Justice of High Court set aside in part, insofar as the appellant is concerned.

The second respondent-developer entered into a development agreement with owners of lands for constructing independent houses and multi-storied apartments. The first respondent wanted to buy an apartment. The appellant sanctioned housing loan to first respondent for purchase of the apartment in terms of a loan agreement. The land-owners and the developer executed a registered sale deed in favour of the first respondent in respect of an unfinished apartment. The first respondent entrusted the construction of the unfinished apartment to the developer under a construction agreement dated 21-2-2008 containing an arbitration clause.

In view of alleged delay in construction and delivery of the apartment, the first respondent made demand for damages against the developer. As the developer refused to comply, first respondent invoked the arbitration clause contained in the construction agreement dated 21-2-2008 and later filed petition u/s. 11 for appointment of Arbitrator. In the said petition, the appellant was also impleaded as a respondent along with the developer. The designate of the Chief Justice of High Court allowed the application u/s.11 and appointed a sole arbitrator.

In the instant appeal, the question which arose for consideration was whether the appellant, a non-party to the construction agreement dated 21-2-2008 containing

the arbitration clause, could be roped in, as a party to such arbitration.

Allowing the appeal, the Court

HELD:1.1. If 'X' enters into two contracts, one with 'M' and another with 'D', each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the ground that there is an arbitration clause in the agreement between 'X' and 'D'. [Para 12] [687-G-H; 688-A]

1.2. The existence of an arbitration agreement between the parties to the petition under section 11 of the Arbitration and Conciliation Act, 1996 and existence of dispute/s to be referred to arbitration are conditions precedent for appointing an Arbitrator under section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand. If a party to an arbitration agreement, files a petition under section 11 of the Act impleading the other party to the arbitration agreement as also a non-party to the arbitration agreement as respondents, and the court merely appoints an Arbitrator without deleting or excluding the non-party, the effect would be that all parties to the petition under section 11 of the Act (including the non-party to arbitration agreement) will be parties to the arbitration. That will be contrary to the contract and the law. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the Arbitrator

is appointed only to decide the disputes between the parties to the arbitration agreement. [Para 13] [688-B-E]

Jagdish Chander vs. Ramesh Chander **2007 (5) SCC 719: 2007 (5) SCR 720;** *Yogi Agarwal vs. Inspiration Clothes & U* **2009 (1) SCC 372: 2008 (16) SCR 895;** *S. N. Prasad vs. Monnet Finance Ltd* **(2011) 1 SCC 320: 2010 (13) SCR 207 – relied on.**

2.1. In the instant case, the arbitration agreement relied upon by the first respondent to seek appointment of arbitrator, is clause (7) of the construction agreement dated 21.2.2008. The appellant was not a party to the said construction agreement dated 21.2.2008 containing the arbitration agreement. It is no doubt true that the loan agreement dated 21.12.2006 between the first respondent as borrower, and the appellant as the creditor, also contains an arbitration clause (vide Article 11) providing for resolution of disputes in regard to the said loan agreement by arbitration. But the developer was not a party to the loan agreement. There is no arbitration agreement between the developer and the appellant. The disputes between the first respondent and the developer cannot be arbitrated under Article 11 of the Loan Agreement. The first respondent invoked the arbitration agreement contained in clause 7 of the construction agreement (between first respondent and developer) and not the arbitration agreement contained in clause 11 of the loan agreement (between appellant and first respondent). The existence of an arbitration agreement in a contract between appellant and first respondent, will not enable the first respondent to implead the appellant as a party to an arbitration in regard to his disputes with the developer. [Para 14] [688-F-H; 689-A-C]

2.2. The first respondent obviously cannot involve the appellant as a party to an arbitration in regard to his

disputes arising out of the claims made by him against the developer which are covered by clause (7) of the construction agreement. The disputes referred to in the petition under section 11 of the Act relate to the claims of the first respondent against the developer. It is however true that there is reference to the appellant in disputes (b), (e) and (f) and reference to collusion between the developer and the appellant in those 'disputes'. The first respondent has also alleged that the appellant by releasing the payments to the developer without verifying the ground realities about the progress and construction and without intimation to him, had committed breach of trust and therefore liable to pay compensation for the financial and mental suffering of the first respondent as also the legal and other expenses. No such claim was ever been made against the appellant before filing the petition under section 11 of the Act, nor did the first respondent at any time seek arbitration in regard to such claims against the appellant. The said claims against the appellant cannot be arbitrated in an arbitration in pursuance of clause (7) of the construction agreement between the first respondent and the developer. [Para 15] [689-C-G]

2.3. The first respondent did not issue any notice or demand making any claim against the appellant nor did he issue any notice claiming that the appellant is liable for the consequences of non-performance by the developer, of its obligations. Nor did the first respondent issue any notice to the appellant seeking reference of any disputes to arbitration. Therefore it could not be said that any dispute existed between the first respondent and appellant, when the petition under section 11 of the Act was filed. Even in the application under section 11 of the Act, there is no reference to clause No.(11) of the loan agreement which contains the arbitration agreement in

regard to disputes that may arise between the appellant as lender and the first respondent as the borrower. There is no claim or dispute in regard to the loan agreement. The first respondent has not invoked clause (11) of the loan agreement for deciding any dispute with the appellant. [Para 16] [689-H] [690-A-C]

2.4. If there had been an arbitration clause in the tripartite agreement among the first respondent, developer and the appellant, and if the first respondent had made claims or raised disputes against both the developer and the appellant with reference to such tripartite agreement, the position would have been different. But that is not so. The petition under section 11 of the Act against the appellant was therefore misconceived as the appellant was not a party to the construction agreement dated 21.2.2008. [Para 17] [690-D-E]

3. The order of the designate of the Chief Justice is set aside in part, in so far as the appellant is concerned. It is made clear that the appointment of arbitrator under the impugned order shall remain undisturbed in so far as the disputes between first respondent and the second respondent (developer) are concerned. It is further made clear that this order will not come in the way of first respondent making any claim or raising a dispute against the appellant or appellant making any claim or raising a dispute against the first respondent and either of them seeking recourse to arbitration in regard to such disputes. [Para 18] [690-F-G]

Case Law Reference:

2007 (5) SCR 720	**relied on**	**Para 12**
2008 (16) SCR 895	**relied on**	**Para 12**
2010 (13) SCR 207	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2691 of 2011.

From the Judgment & Order dated 12.4.2010 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Arbitration Application No. 91 of 2009.

R.K. Kapoor, Sanjana Bali, Harish Chandra Pant, Sweta Kapoor, Anis Ahmed Khan for the Appellant.

Keerthi Prabhakar, Aniruddha P. Mayee for the Respondents.

The Judgment of the Court was delivered by

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

2. The second respondent (referred to as the 'Developer') entered into a development agreement with the owners of certain lands at Bachupally village, Qutubullapur Mandal, Ranga Reddy District, for constructing independent houses and multistoried Apartment buildings with common facilities in a layout known as 'Hill County township'. The landowners as the first party, the developer as the second party and the first respondent who wanted to acquire an apartment therein as the third party entered into an agreement for sale dated 16.10.2006 under which the land-owners agreed to sell an undivided share equivalent to 87 sq.yds. out of a total extent of 16.95 acres to the first respondent and the developer agreed to construct a residential apartment measuring 1889 sq.ft. for the first respondent. The total consideration for the undivided share in the land, apartment and car parking space was agreed as Rs.55,89,368. The agreement contemplating the entire price being paid in instalments, that is 10% on booking, 85% in seven instalments upto 15.3.2008 and 5% at the time of delivery. Clause (14) of the said agreement dated 16.10.2006 provided for settlement of disputes by arbitration.

3. On the request of the first respondent, the appellant (earlier known as 'BHW Home Finance Ltd.') sanctioned a housing loan of Rs.52 lakhs to the first respondent for purchase of the said apartment in terms of a loan agreement dated 21.12.2006 entered into between the first respondent as the borrower and the appellant as the lender. The said loan agreement contained the terms of the loan, rate of interest, provisions for amortization, consequences of delay in payment of EMIs, security for repayment, and general covenants of borrower. Clause (11) thereof provided for settlement of all disputes (that is, all matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequences of breaches, termination or invalidity thereof or relating to the Agreement) by arbitration by the Managing Director of the appellant or his nominee as sole Arbitrator. The first respondent subsequently had entered into a supplemental loan agreement with the appellant on 29.10.2007 for reducing the loan amount from Rs.52 lakhs to Rs.49,78,527/-; and the said loan has been disbursed in terms of the said loan agreements.

4. It is alleged that a tripartite agreement was also executed on 21.12.2006 among first respondent as borrower, the developer as guarantor and the appellant as the lender, under which it was agreed that the loan amount should be disbursed by the appellant directly to the developer and such amounts paid to the developer shall be deemed to be disbursement of loan by the appellant to the first respondent.

5. In pursuance of the agreement of sale dated 16.10.2006, the first respondent paid the entire sale price to the developer through the appellant. Thereafter, the land-owners and the developer executed a registered sale deed dated 21.2.2008 for a consideration Rs.21,27,409/-, conveying to the first respondent, an undivided share in the land equivalent to 87 sq.yds. with the semi finished apartment bearing No.3E in the third floor of Nainital Block of Hill County with one reserved

parking space. On the same day the first respondent entrusted the construction of the unfinished flat to the developer under a construction agreement dated 21.2.2008, under which the developer acknowledged the receipt of the total cost of construction, that is Rs.33,22,226 from the first respondent and agreed to complete the construction of the apartment and deliver the same to the first respondent by 16.10.2008 with a grace period of three months. Clause 7 of the said construction agreement dated 21.2.2008 between the first respondent and the developer provided for arbitration and is extracted below :

" 7. *Arbitration*

a. In the event of any dispute between the parties in connection with the validity, interpretation, implementation or breach of any provision of this agreement or any other disputes including the question of whether there is proper termination of the agreement shall be resolved through arbitration by appointing a sole arbitrator by the Vice Chairman of the First Party. The decision of the Arbitrator shall be final and binding on both the parties.

b. The arbitration proceedings shall be in accordance with the provisions laid down in the Arbitration and Conciliation Act, 1996 and shall be governed by the laws in A.P. subject to the authorized arbitration clauses. The venue of the Arbitration proceedings shall be Hyderabad and the language shall be in English. All the proceedings are subject to the exclusive jurisdiction of the courts at Hyderabad limits."

On the execution of the sale deed dated 21.2.2008 and construction agreement dated 21.2.2008, the earlier agreement for sale dated 16.10.2006 apparently lost its relevance, as the land-owners went out of the picture on execution of the sale deed regarding the undivided share and a fresh construction agreement dated 21.2.2008 was executive regarding completion of the apartment by the developer.

6. The first respondent issued a notice dated 31.7.2009 to the developer, alleging delay in construction and delivery of the apartment and called upon it to pay Rs.54,778 per month as compensation for the period of delay, that is from the due date of completion (16.10.2008) till date of actual completion and delivery of the apartment. By another letter dated 15.9.2009 addressed to the developer, first respondent invoked the arbitration clause contained in clause (7) of the construction agreement dated 21.2.2008 and sought reference of the disputes between them to arbitration. There was no response from the developer.

7. Thereafter, the first respondent filed a petition under section 11 of the Arbitration and Conciliation Act, 1996 ("Act" for short) in the Andhra Pradesh High Court, for appointment of an Arbitrator. In the said petition, the appellant was brought into the dispute, for the first time, by impleading it as a respondent along with the developer. In the said petition, the first respondent alleged that the developer had failed to complete and deliver the apartment in terms of the construction agreement dated 21.2.2008. He also alleged that the developer had arranged the housing loan from the appellant; and that the appellant-lender had released the total loan amount to the developer without ensuring that there was sufficient progress of construction and without verifying the 'ground realities' and thereby failed to perform its minimum obligations and responsibilities as a lender. He contended that the circumstances disclosed collusion, fraud and misrepresentation on the part of the developer and the appellant. First respondent further alleged that the following disputes had arisen between him on the one hand, and the respondents therein (the developer and the appellant) on the other, which required to be decided by arbitration :

(a) The developer committed breach of contract in not fulfilling its part of contractual obligations and consequently was liable to refund all the amounts

collected from him and the appellant, together with interest thereon at 24% per annum with monthly rests from the date of its respective dates of collections till payment, besides the interest and damages that may be charged by the appellant.

(b) The appellant clandestinely and deliberately released the entire payments to the developer without verifying the ground realities about the progress of construction and without intimation to him (first respondent) and thus committed breach of trust and was liable for all consequences.

(c) In view of the breach of trust and non-fulfillment of the obligations, the developer was also liable to pay a sum of Rs.15 lakhs towards miscellaneous expenditure incurred and mental agony suffered by the petitioner.

(d) The developer was also liable to pay/reimburse whatsoever that may be demanded by the appellant in respect of the entire transaction.

(e) The developer and the appellant were liable to pay the first respondent all the expenditure incurred/to be incurred towards legal and other miscellaneous charges.

(f) The developer and the appellant were liable to compensate him for his financial and mental suffering.

(g) The developer and the appellant were liable to pay commercial rate of interest to the first respondent on the amounts found due from the due date till payment.

The first respondent relying upon clause (7) of the construction agreement dated 21.2.2008, sought appointment

of a sole arbitrator to adjudicate upon the disputes between him and the developer and the appellant in respect of purchase of the apartment.

8. The said petition was resisted by the appellant. The appellant contended that it had nothing to do with the dispute between first respondent and developer; that for the first time, the first respondent had chosen to make allegations against the appellant in the petition under section 11 of the Act, apparently in collusion with the developer, to avoid payment of EMIs due to the appellant; and that the petition under section 11 of the Act was not maintainable against it, as the dispute was between the first respondent and the developer (second respondent) and it was not a party to the arbitration agreement invoked by the first respondent (that is clause 7 of the construction agreement dated 21.2.2008).

9. The designate of the Chief Justice of Andhra Pradesh High Court by the impugned order dated 12.4.2010 allowed the said application under section 11 and appointed a retired Judge of High Court as the sole arbitrator. The learned designate referred to the construction agreement dated 21.2.2008 between the first respondent and second respondent and clause (7) therein providing for arbitration. The said order did not refer to the contention of the appellant that it was not a party to the dispute and therefore the petition under section 11 was not maintainable against it. In view of the impugned order, the appellant though not concerned with the disputes between the first respondent and the developer, is made a party to the arbitration.

10. The said order is challenged by the appellant urging the following contentions :

(i) As the first respondent and the developer were the only parties to the construction agreement dated 21.2.2008 containing the arbitration agreement, the appellant could not be dragged into a dispute

between them, by impleading it as a party to the petition under section 11 of the Act.

(ii) The designate of the Chief Justice ought to have examined whether both respondents in the petition under section 11 of the Act were parties to the arbitration agreement (clause 7 of the construction agreement dated 21.2.2008) before making an order appointing an arbitrator under section 11 of the Act.

On the contentions urged, the question that arises for our consideration is whether the appellant could be made a party to the arbitration, even though the appellant was not a party to the arbitration agreement contained in clause (7) of the construction agreement dated 21.2.2008.

11. In this case, the first respondent made a demand for damages against the developer in his notice dated 31.7.2009. As the developer refused to comply, the first respondent invoked the arbitration agreement contained in clause (7) of the Construction Agreement dated 21.2.2008 between him and the developer. Therefore, in so far as the disputes between the first respondent and the developer (second respondent) are concerned, the designate of the Chief Justice was justified in appointing an arbitrator. But the question is whether the appellant, a non-party to the construction agreement containing the arbitration agreement as per clause (7), could be roped in, as a party to such arbitration.

12. In *Jagdish Chander vs. Ramesh Chander* [2007 (5) SCC 719] this court held :

"The existence of an arbitration agreement as defined under Section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under Section 11 of the Act by the Chief Justice or his designate. It is not permissible to appoint an arbitrator to

adjudicate the disputes between the parties in the absence of an arbitration agreement or mutual consent."

In *Yogi Agarwal vs. Inspiration Clothes & U* [2009 (1) SCC 372], this court observed :

"When Sections 7 and 8 of the Act refer to the existence of an arbitration agreement between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute between the parties or the subject-matter of the suit. It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of Sections 7 and 8 of the Act, should satisfy two conditions. Firstly, it should be between the parties to the dispute. Secondly, it should relate to or be applicable to the dispute."

In *S. N. Prasad vs. Monnet Finance Ltd* – (2011) 1 SCC 320, this Court held:

"There can be reference to arbitration only if there is an arbitration agreement between the parties. If there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitration can be only with respect to the parties to the arbitration agreement and not the non-parties.....As there was no arbitration agreement between the parties, the impleading of the appellant as a respondent in the proceedings and the award against the appellant in such arbitration cannot be sustained."

Therefore, if 'X' enters into two contracts, one with 'M' and another with 'D', each containing an arbitration clause providing for settlement of disputes arising under the respective contract, in a claim for arbitration by 'X' against 'M' in regard to the contract with 'M', 'X' cannot implead 'D' as a party on the

ground that there is an arbitration clause in the agreement between 'X' and 'D'.

13. The existence of an arbitration agreement between the parties to the petition under section 11 of the Act and existence of dispute/s to be referred to arbitration are conditions precedent for appointing an Arbitrator under section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand. If a party to an arbitration agreement, files a petition under section 11 of the Act impleading the other party to the arbitration agreement as also a non-party to the arbitration agreement as respondents, and the court merely appoints an Arbitrator without deleting or excluding the non-party, the effect would be that all parties to the petition under section 11 of the Act (including the non-party to arbitration agreement) will be parties to the arbitration. That will be contrary to the contract and the law. If a person who is not a party to the arbitration agreement is impleaded as a party to the petition under section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the Arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement.

14. The arbitration agreement relied upon by the first respondent to seek appointment of arbitrator, is clause (7) of the construction agreement dated 21.2.2008. The appellant was not a party to the said construction agreement dated 21.2.2008 containing the arbitration agreement. It is no doubt true that the loan agreement dated 21.12.2006 between the first respondent as borrower, and the appellant as the creditor, also contains an arbitration clause (vide Article 11) providing for resolution of disputes in regard to the said loan agreement by arbitration. But the developer was not a party to the loan agreement. There is no arbitration agreement between the

developer and the appellant. The disputes between the first respondent and the developer cannot be arbitrated under Article 11 of the Loan Agreement. The first respondent invoked the arbitration agreement contained in clause 7 of the construction agreement (between first respondent and developer) and not the arbitration agreement contained in clause 11 of the loan agreement (between appellant and first respondent). The existence of an arbitration agreement in a contract between appellant and first respondent, will not enable the first respondent to implead the appellant as a party to an arbitration in regard to his disputes with the developer.

15. The first respondent obviously cannot involve the appellant as a party to an arbitration in regard to his disputes arising out of the claims made by him against the developer which are covered by clause (7) of the construction agreement. The disputes referred to in the petition under section 11 of the Act relate to the claims of the first respondent against the developer. It is however true that there is reference to the appellant in disputes (b), (e) and (f) and reference to collusion between the developer and the appellant in those 'disputes'. The first respondent has also alleged that the appellant by releasing the payments to the developer without verifying the ground realities about the progress and construction and without intimation to him, had committed breach of trust and therefore liable to pay compensation for the financial and mental suffering of the first respondent as also the legal and other expenses. No such claim was ever been made against the appellant before filing the petition under section 11 of the Act, nor did the first respondent at any time seek arbitration in regard to such claims against the appellant. The said claims against the appellant cannot be arbitrated in an arbitration in pursuance of clause (7) of the construction agreement between the first respondent and the developer.

16. The first respondent did not issue any notice or demand making any claim against the appellant nor did he

issue any notice claiming that the appellant is liable for the consequences of non-performance by the developer, of its obligations. Nor did the first respondent issue any notice to the appellant seeking reference of any disputes to arbitration. Therefore it could not be said that any dispute existed between the first respondent and appellant, when the petition under section 11 of the Act was filed. Even in the application under section 11 of the Act, there is no reference to clause No.(11) of the loan agreement which contains the arbitration agreement in regard to disputes that may arise between the appellant as lender and the first respondent as the borrower. There is no claim or dispute in regard to the loan agreement. The first respondent has not invoked clause (11) of the loan agreement for deciding any dispute with the appellant.

17. If there had been an arbitration clause in the tripartite agreement among the first respondent, developer and the appellant, and if the first respondent had made claims or raised disputes against both the developer and the appellant with reference to such tripartite agreement, the position would have been different. But that is not so. The petition under section 11 of the Act against the appellant was therefore misconceived as the appellant was not a party to the construction agreement dated 21.2.2008.

18. In view of the above, we allow this appeal and set aside the order dated 12.4.2010 of the designate of the Chief Justice, in part, in so far as the appellant is concerned. We make it clear that the appointment of arbitrator under the impugned order shall remain undisturbed in so far as the disputes between first respondent and the second respondent (developer) are concerned. We further make it clear that this order will not come in the way of first respondent making any claim or raising a dispute against the appellant or appellant making any claim or raising a dispute against the first respondent and either of them seeking recourse to arbitration in regard to such disputes.

B.B.B. Appeal allowed.

HARJIT SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 816 of 2011)

MARCH 30, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 2, 8 and 18 – Distinction between Opium and Morphine – Recovery of contraband – Conviction of accused-appellant – Whether when the entire substance recovered is opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance is relevant – Held: Morphine is one of the derivatives of the Opium – The requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with – If it is Opium as defined in clause (a) of s.2(xv) then the percentage of Morphine contents would be totally irrelevant – It is only if the offending substance is found in the form of a mixture as specified in clause (b) of s.2(xv), that the quantity of morphine contents becomes relevant – The instant case did not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances – The material so recovered from the appellant was opium in terms of s.2(xv) – In such a fact-situation, determination of the contents of morphine in the opium became totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity – The entire substance had to be considered to be opium as the material recovered was not a mixture – Percentage of morphine was not a decisive factor for determination of quantum of punishment, as opium is to be dealt with under a distinct and separate entry from that of morphine.

On 4-7-2003, a police party on patrol duty, being suspicious of the appellant, apprehended him. The appellant was carrying a plastic bag which was found to contain opium. He was convicted by the trial Court under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and sentenced to undergo RI for 10 years. The High Court affirmed the judgment passed by the trial court.

In the instant appeal, the appellant contended that as the opium recovered from him weighing 7.10 kgs. contained 0.8% morphine, i.e. 56.96 gms., the morphine content was below the commercial quantity, though more than the minimum quantity prescribed under the Notification issued in this respect, and thus the maximum sentence of 10 years as awarded by the court was unwarranted.

Per contra, the State Government submitted that as the entire substance recovered from the appellant was opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance could not arise.

Dismissing the appeal, the Court

HELD:1. Notification dated 18.11.2009 (as issued under the provisions of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985) has replaced the part of the Notification dated 19.10.2001. It is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment. However, this amendment, in fact, provides for a procedure which may enhance the sentence. It is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate

retrospectively. Its' application would be violative of restrictions imposed by Article 20 of the Constitution of India. The said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned. [Para 13] [700-C-H]

2. Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid substances like morphine, codeine, thebaine etc. Morphine is the primary alkaloid in opium. Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. Thus, it can be identified without subjecting it to any chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. In case opium is not mixed up with any other material, its chemical analysis is not required at all. An analysis, however, will always be necessary if there is a mixture and the quantity of morphine contained in mixture has to be established for the purpose of definition (of opium under the Opium Act). [Paras 14,15] [701-A-D]

Baidyanath Mishra & Anr. v. State of Orissa **1968 (34) CLT 1 (SC);** *State of Andhra Pradesh v. Madiga Boosenna & Ors.* **AIR 1967 SC 1550 = 1967 SCR 871 – relied on.**

3. Chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act. The NDPS Act defines 'opium' under Section 2(xv) as under: a) the coagulated juice of the opium poppy; and b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy, but does not include any preparation containing not more

than 0.2 per cent of morphine. Coagulated means solidified, clotted, curdled – something which has commenced in curdled/solid form. In case the offending material falls in clause (a) then the proviso to Section 2(xv) would not apply. The proviso would apply only in case the contraband recovered is in the form of a mixture which falls in clause (b) thereof. [Paras 16 to 18] [701-E-H; 702-A-B]

4. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity. [Para 21] [702-E-H; 703-A-B]

E. Micheal Raj v. Intelligence Officer, Narcotic Control

Bureau **(2008) 5 SCC 161: 2008 (4) SCR 644 and** *Amarsingh Ramjibhai Barot v. State of Gujarat* **(2005) 7 SCC 550: 2005 (3) Suppl. SCR 272 – distinguished.**

5. The Notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with Heroin, Entry 77 deals with Morphine, Entry 92 deals with Opium, Entry 93 deals with Opium Derivatives and so on and so forth. Therefore, the Notification also makes a distinction not only between Opium and Morphine but also between Opium and Opium Derivatives. Undoubtedly, Morphine is one of the derivatives of the Opium. Thus, the requirement under the law is first to identify and classify the recovered substance and then to find out under what entry it is required to be dealt with. If it is Opium as defined in clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of NDPS Act, that the quantity of morphine contents become relevant. [Para 24] [703-F-H; 704-A-B]

6. The instant case does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact-situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL Report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should be not less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine. [Para 25] [703-C-F]

Case Law Reference:

2008 (4) SCR 644	**distinguished**	**Paras 9, 10, 22, 25**
1968 (34) CLT 1 (SC)	**relied on**	**Para 15**
1967 SCR 871	**relied on**	**Para 15**
2005 (3) Suppl. SCR 272	**distiguished**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 816 of 2011.

From the Judgment & Order dated 19.5.2010 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 1711-SB of 2005.

R.S. Suri, V. Mukherjee, Suruchi Suri, Chanchal Kumar Ganguli for the Appellant.

Jayant K. Sud, AAG, Aman Raj G., Kuldip for the Respondent.

The Judgment of the Court was delivered by

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

2. This criminal appeal has been preferred against the judgment and order dated 19.5.2010 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 1711-SB/2005, by which the High Court has affirmed the judgment and order dated 2.9.2005 passed by learned Special Judge, Fatehgarh Sahib, in Sessions Case No. 72T/5.9.03/ 7.10.04, by which the appellant stood convicted for the offence

punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called as NDPS Act) and was sentenced to undergo RI for 10 years and to pay a fine of Rs.1,00,000/- in default whereof, to undergo further RI for 6 months.

3. Facts and circumstances giving rise to this appeal are that on 4.7.2003, a police party was proceeding from Focal Point, Mandi Gobindgarh to G.T. Road on patrol duty in a government vehicle. When the police party reached near the culvert of minor in the area of village Ambe Majra, the police party spotted the appellant who was coming on foot, from the side of Ambe Majra carrying a plastic bag in his right hand. On seeing the police, the appellant turned to the left side of the road. The police party apprehended the appellant, being suspicious of him. In the meantime, Ashok Kumar, an independent witness also came to the spot and joined the police party. The appellant was apprised of his right of being searched in the presence of a Gazetted Officer and in that respect his statement was recorded. Shri Dinesh Partap Singh, Assistant Superintendent of Police, was summoned to the spot by the Investigating Officer and in his presence, Amarjit Singh, Inspector (P.W.3) searched the plastic bag of the appellant and the substance contained therein was found to be opium. Two samples of 10 gms. each of the opium were taken. The remaining opium was found to be 7.10 Kgs. The samples and the remaining opium were sealed and taken into possession by the police party.

4. A formal FIR was registered against the appellant; on personal search, an amount of Rs. 510/- was found with the appellant; the arrest memo of the accused was prepared and he was formally arrested. After completion of investigation and on receipt of the report from the Forensic Science Laboratory, confirming the contents of the sample to be of opium, a charge-sheet was filed against him for the offence punishable under Section 18 of the NDPS Act. He did not plead guilty to the

charges and claimed trial.

5. The prosecution examined Manjinder Singh, Constable (P.W.1), Jagdish Singh, Head Constable (P.W.2), Amarjit Singh, Inspector (P.W.3), Dinesh Partap Singh, Assistant Superintendent of Police (P.W.4) and Dalip Singh, Sub Inspector (P.W.5). Ashok Kumar, an independent witness was not examined by the prosecution, as he had been won over by the appellant.

6. In his statement under Section 313 of the Code of Criminal Procedure, 1973, the appellant stated that the prosecution case was false; he had been taken by the police from his house and Rs.6,000/- had been snatched from him; he was not physically fit even to walk as he had met with an accident in 1999. The appellant also examined 6 witnesses in his defence.

7. The Trial Court after scrutinising the evidence held that the appellant was guilty of the offences charged with and was awarded the sentences as mentioned hereinabove. Being aggrieved, he preferred an appeal before the High Court which has been dismissed by the impugned judgment and order dated 19.5.2010. Hence, this appeal.

8. Shri R.S. Suri, learned senior counsel appearing for the appellant at an initial stage raised a large number of factual and legal issues. However, ultimately considering that there had been concurrent findings of fact against the appellant by the two courts, he primarily submitted that as the opium recovered from the appellant weighing 7.10 kgs. contained 0.8% morphine, i.e. 56.96 gms., the quantity was below the commercial quantity, however, more than the minimum quantity prescribed under the Notification issued in this respect, the maximum sentence awarded by the court was unwarranted.

9. Shri Suri has placed reliance upon the judgment of this Court in *E. Micheal Raj v. Intelligence Officer, Narcotic Control*

Bureau, (2008) 5 SCC 161, wherein the Court dealt with the case of recovery of heroin from a carrier, and held that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance (s), for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. Therefore, it will depend upon the morphine content and if this is less than the commercial quantity of morphine, the maximum sentence can not be awarded.

10. On the contrary, Shri Jayant K. Sud, learned Addl. Advocate General, appearing for the State of Haryana has submitted that as the entire substance recovered from the appellant was opium and not any kind of mixture, the question of determining the quantity or percentage of morphine in the substance could not arise. The opium itself is an offending material under the NDPS Act. Therefore, the court has to proceed in view of Entry No.92 in the Notification in this regard which deals with opium and any preparation containing opium and specifies that a small quantity is only 25 gms., whilst a commercial quantity is 2.5 kgs. In the instant case as it was 7.10 kgs, i.e. the appellant was carrying about three times the minimum amount required for a commercial quantity. The judgment of this Court in *E. Micheal Raj* (supra) has no application in this case as that was a case of heroin and not of opium. More so, the accused was merely a carrier and not a dealer.

11. It is further contended by Shri Sud that the Notification applicable in this case provides separate Entry No. 77 for morphine, wherein the minimum quantity is 0.5 gms. and commercial quantity is 250 gms. Entry No. 92 separately deals with opium. Entry No. 93 for opium derivatives provides that a minimum quantity is 5 gms. and a commercial quantity is 250 gms. The present case is to be dealt with under Entry No.92 and not Entry No.77 or any other Entry. More so, in view of the Notification dated 18.11.2009 under the provisions of Section

2 of NDPS Act, no consideration is required in respect of the material recovered from the appellant. Thus, the question of interference with the impugned judgment and order does not arise. The appeal is liable to be dismissed.

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

13. Notification dated 18.11.2009 has replaced the part of the Notification dated 19.10.2001 and reads as under:-

> "In the Table at the end after Note 3, the following Note shall be inserted, namely:-
>
> (4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

Thus, it is evident that under the aforesaid Notification, the whole quantity of material recovered in the form of mixture is to be considered for the purpose of imposition of punishment.

However, the submission is not acceptable as it is a settled legal proposition that a penal provision providing for enhancing the sentence does not operate retrospectively. This amendment, in fact, provides for a procedure which may enhance the sentence. Thus, its application would be violative of restrictions imposed by Article 20 of the Constitution of India. We are of the view that the said Notification dated 18.11.2009 cannot be applied retrospectively and therefore, has no application so far as the instant case is concerned.

14. Opium is essentially derived from the opium poppy plant. The opium poppy gives out a juice which is opium. The secreted juice contains several alkaloid substances like morphine, codeine, thebaine etc. Morphine is the primary alkaloid in opium.

15. Opium is a substance which once seen and smelt can never be forgotten because opium possesses a characteristic appearance and a very strong and characteristic scent. Thus, it can be identified without subjecting it to any chemical analysis. It is only when opium is in a mixture so diluted that its essential characteristics are not easily visible or capable of being apprehended by the senses that a chemical analysis may be necessary. In case opium is not mixed up with any other material, its chemical analysis is not required at all. "Of course, an analysis will always be necessary if there is a mixture and the quantity of morphine contained in mixture has to be established for the purpose of definition (of opium under the Opium Act)." (Vide: *Baidyanath Mishra & Anr. v. State of Orissa,* 1968 (34) CLT 1 (SC); and *State of Andhra Pradesh v. Madiga Boosenna & Ors.,* AIR 1967 SC 1550).

16. However, the aforesaid cases have been decided under the Opium Act and cannot be the authority so far as deciding the cases under the NDPS Act. Thus, chemical analysis of the contraband material is essential to prove a case against the accused under the NDPS Act.

17. The NDPS Act defines 'opium' under Section 2(xv) as under:

(a) the coagulated juice of the opium poppy; and

(b) any mixture, with or without any neutral material, of the coagulated juice of the opium poppy,

but does not include any preparation containing not more than 0.2 per cent of morphine.

18. Coagulated means solidified, clotted, curdled – something which has commenced in curdled/solid form.

In case the offending material falls in clause (a) then the proviso to Section 2(xv) would not apply. The proviso would apply only in case the contraband recovered is in the form of a mixture which falls in clause (b) thereof.

19. Relevant part of the chemical analysis made by the Forensic Science Laboratory, Punjab, Chandigarh in the instant case, reads as under:

"xx xx xx xx

On analysis of the substance kept in the bundle under reference, it is established that the substance is opium and percentage of morphine is 0.8%." (Emphasis added)

20. The amendment in 2001 was made in order to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in huge quantities of drugs are punished with deterrent sentences; on the other hand, the addicts and those who commit less serious offences are sentenced to lesser punishment.

21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 18(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive

factor, Entry No.92 becomes totally redundant. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity.

22. The judgment in *E. Micheal Raj* (Supra) has dealt with heroin i.e., Diacetylmorphine which is an "Opium Derivative" within the meaning of the term as defined in Section 2(xvi) of the NDPS Act and therefore, a 'manufactured drug' within the meaning of Section 2(xi)(a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

23. In *Amarsingh Ramjibhai Barot v. State of Gujarat,* (2005) 7 SCC 550, this Court dealt with a case where the black-coloured liquid substance was taken as an opium derivative. The FSL report had been to the effect that it contained 2.8% anhydride morphine, apart from pieces of poppy (Posedoda) flowers. This was considered only for the purpose of bringing the substance within the sweep of Section 2(xvi)(e) as 'opium derivative' which requires a minimum 0.2% morphine.

24. The Notification applicable herein specifies small and commercial quantities of various narcotic drugs and psychotropic substances for each contraband material. Entry 56 deals with Heroin, Entry 77 deals with Morphine, Entry 92 deals with Opium, Entry 93 deals with Opium Derivatives and so on and so forth. Therefore, the Notification also makes a distinction not only between Opium and Morphine but also between Opium and Opium Derivatives. Undoubtedly, Morphine is one of the derivatives of the Opium. Thus, the requirement under the law is first to identify and classify the recovered

substance and then to find out under what entry it is required to be dealt with. If it is Opium as defined in clause (a) of Section 2(xv) then the percentage of Morphine contents would be totally irrelevant. It is only if the offending substance is found in the form of a mixture as specified in clause (b) of Section 2(xv) of NDPS Act, that the quantify of morphine contents become relevant.

25. Thus, the aforesaid judgment in *E. Micheal Raj* (Supra) has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances. The material so recovered from the appellant is opium in terms of Section 2(xv) of the NDPS Act. In such a fact-situation, determination of the contents of morphine in the opium becomes totally irrelevant for the purpose of deciding whether the substance would be a small or commercial quantity. The entire substance has to be considered to be opium as the material recovered was not a mixture and the case falls squarely under Entry 92. Undoubtedly, the FSL Report provided for potency of the opium giving particulars of morphine contents. It goes without saying that opium would contain some morphine which should be not less than the prescribed quantity, however, the percentage of morphine is not a decisive factor for determination of quantum of punishment, as the opium is to be dealt with under a distinct and separate entry from that of morphine.

26. In view of the above, we do not find any substance in the appeal. It is devoid of any merit and, accordingly, dismissed.

B.B.B. Appeal dismissed.

MOHAMMAD AFTAB MIR

v.

STATE OF J & K & ORS.

(Civil Appeal No. 2815-2816 of 2011)

MARCH 31, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

Service Law – Promotion – Out of turn promotion / Accelerated promotion – State of Jammu & Kashmir – Shrine of Hazrat Shaikh Nooruddin Noorani in the town of Charare Sharif – Appellant was SHO, Chadoora Police Station, adjacent to the town of Charare Sharif – Destruction of Charare Sharif shrine in encounter between the Indian troops and armed militants who had laid siege to the shrine – Consequent violent attempts by unruly mobs to enter Charare Sharif through Chadoora – Claim of appellant that he displayed exemplary courage and patriotism as part of his official duties in containing the law and order situation – Placing reliance upon circular dated 6-3-1990 published by State of Jammu and Kashmir, he laid claim for out of turn promotion – Recommendations had been made by senior officers in respect of three police officials including the appellant – Appellant, however, denied out of turn promotion while the other two police officials given such promotion – Circular dated 6-3-1990 provided for accelerated promotion for Government employees whose performance in discharge of their duties and combating militancy was outstanding – Writ petition filed by appellant dismissed by High Court on the ground that the State Government vide subsequent Circular dated 6-1-2000 provided that out of turn promotion could be considered only for consistently exceptional performance on the anti-militancy front – Meanwhile appellant was granted promotion in routine course – Whether promotion should be given to appellant from retrospective effect from the date on

which the other two police officials had been given out of turn promotion – Held: The decision of the Single Judge was based on Circular dated 6-1-2000 while the appellant's claim was under the earlier Circular dated 6-3-1990, in relation to incidents which had taken place prior to the promulgation of the Circular dated 6-1-2000 – Hence, appellant's claim for out of turn promotion require reconsideration in the light of the Circular dated 6-3-1990 and not the Circular dated 6-1-2000 – Case of appellant directed to be reconsidered in accordance with the Circular dated 6-3-1990, for the purpose of granting retrospective effect to the promotion already granted to him in routine course, and if such retrospective effect is given, to consider such other benefits that he may, thereafter, become entitled to in accordance with law.

Appellant, a Sub-Inspector in the Jammu and Kashmir Police, was posted as the Station House Officer of Chadoora Police Station, adjacent to the town of Charare Sharif where the shrine of Hazrat Shaikh Nooruddin Noorani is situated. In 1995, armed militants laid siege to the aforesaid shrine whereafter a fierce encounter took place between the Indian troops and the militants, on account of which the entire town of Charare Sharif, including the aforesaid shrine and about 1500 residential houses, were gutted. This triggered off violent protests all over Kashmir and, in particular, in the nearby areas from where enraged citizens started marching towards Charare Sharif.

The appellant claims to have displayed exemplary courage and at the risk of his life prevented a temple from being desecrated and burnt by an unruly mob of about 3000 people and saved the city from being converted into a battle field. According to the appellant, he successfully resisted violent attempts by unruly mobs and processions of thousands of people to enter Charare

Sharif through Chadoora which was under his jurisdiction. In effect, according to the appellant, it was the exemplary courage and patriotism as displayed by him as part of his official duties which prevented the situation from going out of hand in the aftermath of the destruction of the Charare Sharif shrine. It is the appellant's case that in order to gear up its administrative machinery and to effectively deal with the law and order situation, the State of Jammu and Kashmir took a policy decision to provide for accelerated promotion for Government employees whose performance in discharge of their duties and combating militancy was outstanding. A Circular, being No.14-GR of 1990, dated 6th March, 1990, was published by the State of Jammu and Kashmir in this regard.

The Director General of Police gave only the S.H.O., Charare Sharif, and another police official out-of-turn promotion, even though recommendations had also been made in respect of the appellant for such out-of-turn promotion. The appellant filed Writ Petition, in the High Court, for a direction to the Authority concerned to consider and promote the appellant to the rank of Inspector in recognition of his excellent performance. The High Court through an interim order directed the authorities to examine the appellant's case and to inform the Court of the decision taken on the basis of such examination. However, nothing further materialized pursuant to the interim order passed by the High Court and in routine course, the Appellant was granted promotion. Ultimately, a Single Judge of the High Court dismissed the appellant's Writ Petition, and the Letters Patent Appeal was also dismissed by the Division Bench of the High Court.

In the instant appeal, it was contended by the appellant that he was duly covered by the Circular No.14-

GR of 1990 dated 6th March, 1990 and his claim to out-of-turn promotion was duly supported by the recommendations by the officers who were present when the Charare Sharif incidents took place. However, the appellant has already been promoted to the post of Inspector on 19th August, 2000, and the only question which survived for consideration before this Court was whether promotion should be given to the appellant with retrospective effect from the date on which S.H.O., Charare Sharif, and the other police official were given out of turn promotion.

Allowing the appeals, the Court

HELD:1. In the absence of any glaring discrepancy or bias in the decision-making process, ordinarily the Court does not normally take upon itself the task of making a subjective assessment of an officer's performance in relation to matters of promotion and that too of the nature contemplated in the present case. However, at the same time, the Court is also entitled to consider the materials placed before it in order to arrive at a conclusion as to whether an injustice has been caused to the concerned officer. In the present case, both the Superintendent and Senior Superintendent of Police had a chance to observe the Appellant's performance on the ground when the incident was actually taking place and they have recommended that the Appellant should be given out-of-turn promotion. The Director General of Police has also recognized the exemplary performance of the appellant. All such recommendations seemed to suggest that the performance of the Appellant merited special consideration. [Para 10] [715-D-G]

2. While considering the appellant's claim for out-of-turn promotion or accelerated promotion in the Writ Petition filed by him, the Single Judge took special note of the condition, procedure and norms which provided

that out-of-turn promotion would be considered only for consistently exceptional performance on the anti-militancy front. The Judge took note of the fact that except for two episodes, which, in any event, were performed in the usual course of duties, the same did not constitute any consistent exceptional performance on the part of the appellant which would entitle him to out-of-turn promotion. The said view was endorsed by the Division Bench while dismissing the Letters Patent Appeal filed by the appellant. Neither the Single Judge nor the Division Bench of the High Court appears to have given proper attention to the Circular No.14-GR of 1990 dated 6th March, 1990, in relation to the recommendations which had been made by the Superintendent and the Senior Superintendent of Police. [Paras 11, 12] [716-B-E]

3. However, from the materials on record it is quite clear that the claim of the appellant is covered by the policy decision of the Government contained in Circular No.14-GR of 1990 dated 6th March, 1990, which provided an incentive to all Government employees to give their best performance of duties in the service of the people and in meeting the challenge of the anti-national forces to disturb the law and order situation in the State. It is only subsequently that on 6th January, 2000, that a Government Order No.Home-3(P) of 2000 was published by the State in its Home Department regarding the procedure for out-of-turn promotion in the Police Department. It is in the said circular that it has been indicated that out-of-turn promotion could be considered only for consistently exceptional performance on the anti-militancy front and that the recommendations of the Director General of Police, along with the dossier of the concerned employee, along with other formalities and the extent of deviation from the seniority rule, would have to be placed before the Home Department Select Committee for consideration and recommendation which would then

be placed before the Chief Minister with the prior approval of the Minister of State, Home Department. [Para 13] [716-F-H; 717-A-C]

4. The circular dated 6th January, 2000, directly links up out-of-turn promotion with the concept of consistently exceptional performance on the anti-militancy front, which did not figure in the earlier Circular No.14-GR of 1990 dated 6th March, 1990. Both the Single Judge and the Division Bench appear to have overlooked the difference in the two different circulars and the decision of the Single Judge is based on the later Circular dated 6th January, 2000, while the Appellant's claim is under the earlier Circular of 6th March, 1990, in relation to incidents which had taken place prior to the promulgation of the Government Order dated 6th January, 2000. [Para 14] [717-C-E]

5. It is clear from the documentary evidence on record that the Respondent State of Jammu and Kashmir is also alive to the fact that the claim of the appellant has to be considered in the light of the earlier Circular dated 6th March, 1990, and not by the subsequent Circular dated 6th January, 2000. In these circumstances, the appellant's claim for out-of-turn promotion, on the basis of the facts disclosed, require reconsideration in the light of the Circular dated 6th March, 1990, and not the Circular dated 6th January, 2000, as has been sought to be done in his case. [Paras 15,16] [718-C-E]

6. The orders passed by the Single Judge and the Division Bench of the High Court are set aside and it is directed that the case of the Appellant be reconsidered by the concerned Respondents in accordance with the Circular No.14-GR of 1990 dated 6th March, 1990, for the purpose of granting retrospective effect to the promotion already granted to him on 19th August, 2000, and if such

retrospective effect is given, to consider such other benefits that he may, thereafter, become entitled to in accordance with law. [Para 17] [718-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2815-2816 of 2011.

From the Judgment & Order dated 23.7.2007 of the High Court of Jammu & Kashmir in L.P.A. No. 149 of 2007 and final order dated 24.9.2008 in Review Petition No. 4 of 2007 in L.P.A. No. 149 of 2007.

Manoj V. George, Rifat Ara, Mohd. Irshad Hanif for the Appellant.

Gaurav Pachananda, Sr. AAG, Sunil Fernandes, Sidhant Goel, Rahil Kohali for the Respondents..

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. In November, 1990, when militancy was at its height in the State of Jammu and Kashmir, the Appellant was selected for the post of Sub-Inspector in the Jammu and Kashmir Police. In February, 1995, he was posted as the Station House Officer of Chadoora Police Station, adjacent to the town of Charare Sharif in the district of Budgam, which is the convergence point for pilgrims and other visitors to the shrine of Hazrat Shaikh Nooruddin Noorani, situated in Charare Sharif in order to reach the shrine, people have to travel through Chadoora which is the gateway to the shrine. At the time of the Appellant's posting at Chadoora Police Station, his batch-mate, Shaikh Hamidulla, was already serving as the Station House Officer, Charare Sharif.

3. In between the months of February and May, 1995, armed militants laid siege to the aforesaid shrine prompting the Government to send two units of the army backed by the Border Security Force to flush out the militants from the shrine precincts. The Chadoora Police Station under the Appellant's

charge was saddled with the duty of ensuring that more militants and unruly mobs did not enter Charare Sharif town during the said period. On 10th and 11th of May, 1995, in a fierce encounter between the Indian troops and the militants, the entire town of Charare Sharif, including the aforesaid shrine and about 1500 residential houses, were gutted. This triggered off violent protests all over Kashmir and, in particular, in the nearby areas from where enraged citizens in processions and even in unruly mobs starting marching towards Charare Sharif, not only threatening further deterioration in the law and order situation therein, but also threatening to destroy the secular fabric of the Valley by resorting to communal violence. The Appellant claims to have displayed exemplary courage and at the risk of his life prevented a temple at Badipora from being desecrated and burnt by an unruly mob of about 3000 people and the action taken by the Appellant saved Badipora from being converted into a battle field. According to the Appellant, he successfully resisted violent attempts by unruly mobs and processions of thousands of people to enter Charare Sharif through Chadoora which was under his jurisdiction. In effect, according to the appellant, it was the exemplary courage and patriotism as displayed by him as part of his official duties which prevented the situation from going out of hand in the aftermath of the destruction of the Charare Sharif shrine.

4. It is the Appellant's case that in order to gear up its administrative machinery and to effectively deal with the law and order situation, the State of Jammu and Kashmir took a policy decision to provide for accelerated promotion for Government employees whose performance in discharge of their duties and combating militancy was outstanding. A Circular, being No.14-GR of 1990, dated 6th March, 1990, was published by the State of Jammu and Kashmir in this regard. The procedure for accelerated promotion entailed a special report to be obtained about the conduct and performance of the officer concerned which was to be considered by the Promotion Committee. It was also provided that the Government would consider the

grant of accelerated promotion where the special report brought out outstanding performance on the part of the officer concerned.

5. On 12th May, 1995, the day after the incident in Charare Sharif, the Inspector General of Police and the Senior Superintendent of Police visited the area to assess the situation. On 10th June, 1995, the Director General of Police gave only the S.H.O., Charare Sharif, Shaikh Hamidulla and Sub-Inspector Sonaullah, out-of-turn promotion, even though recommendations had also been made in respect of the Appellant for such out-of-turn promotion. The Appellant has referred to the Letters of Appreciation given by the Commanding Officer of the 12th Bn. Rashtriya Rifles, the Commandant of the 136th Bn. BSF, the Commanding Officer of the 7th Bn. Jat Regiment, Superintendent of Police, Jammu and Kashmir Police and the Senior Superintendent of Police, acknowledging the outstanding role of the Appellant in containing the law and order situation following the destruction of Charare Sharif and, in particular, the shrine of Hazrat Shaikh Nooruddin Noorani and recommending him for accelerated promotion.

6. On 7th August, 1996, the Director General of Police issued a Commendation Certificate with cash reward of Rs.2,000/- in recognition of the Appellant's exemplary performance. Thereafter, since nothing further materialized, the Appellant filed Writ Petition, being 5114 of 1996 in the High Court of Jammu and Kashmir, for a direction to the Authority concerned to consider and promote the Appellant to the rank of Inspector in recognition of his excellent performance. On 12th December, 1996, the High Court through an interim order directed the authorities to examine the Appellant's case and to inform the Court of the decision taken on the basis of such examination. Soon thereafter on 1st March, 1997, militants broke into the Appellant's house and killed his father. Recognising the fact that the Appellant had been discriminated against, the Superintendent of Police recommended that

retrospective promotion be given to the Appellant from the date of the order passed in respect of Shaikh Hamidulla and Sub-Inspector Sonaullah. However, nothing further materialized pursuant to the interim order passed by the High Court on 12.12.1996 and on 19th August, 2000, in routine course, the Appellant was granted promotion.

7. Ultimately, the learned Single Judge dismissed the Appellant's Writ Petition on 28th May, 2007, and the Letters Patent Appeal No.149 of 2007 was also dismissed by the Division Bench of the High Court on 23rd July, 2007.

8. On behalf of the Appellant it was urged that he was duly covered by the Circular No.14-GR of 1990 dated 6th March, 1990 and his claim to out-of-turn promotion was duly supported by the recommendations by the officers who were present when the Charare Sharif incidents took place. It was submitted that the task performed by the Appellant at Chadoora was no less significant than the task performed by the Police personnel in Charare Sharif itself and there was, therefore, no reason to discriminate between the Appellant and the Station House Officer of Charare Sharif, particularly when both had been recommended for out-of-turn promotion by the Superintendent of Police (Operations) and the Senior Superintendent of Police, Budgam District, Kashmir.

9. On the other hand, it was submitted on behalf of the Respondent-State that the case of the Appellant for out-of-turn promotion had been duly considered by the authorities at the highest levels and a decision was taken, considering the situation at the ground level on 10th and 11th May, 1995 when Charare Sharif town was gutted. It was contended that the situation in Charare Sharif town itself and in Chadoora were different, in that, within Charare Sharif town the Police were engaged with the militants directly as they had moved into the shrine itself, whereas in Chadoora the duty performed on the said two days was one of containment. Regarding the incident at Badipora, the same was also aimed against communal

forces who were trying to burn down the temple, but the same also involved containment and not a direct and active confrontation with militants. It was submitted that in the different circumstances, involving the S.H.O. of Charare Sharif and the Appellant, it could not be said that the Appellant had been discriminated against in the matter of out-of-turn promotion.

10. Having considered the submissions made on behalf of the parties and the materials on record, as also the judgments of the learned Single Judge and the Division Bench of the High Court, it does appear that the circumstances prevailing within the town of Charare Sharif and in Chadoora were different during the disturbance and the decision to grant out-of-turn promotion to Shaikh Hamidulla, who was the Station House Officer, Charare Sharif, during those fateful days was fully justified. In the absence of any glaring discrepancy or bias in the decision-making process, ordinarily the Court does not normally take upon itself the task of making a subjective assessment of an officer's performance in relation to matters of promotion and that too of the nature contemplated in the present case. However, at the same time, the Court is also entitled to consider the materials placed before it in order to arrive at a conclusion as to whether an injustice has been caused to the concerned officer. In the present case, both the Superintendent and Senior Superintendent of Police, Budgam District, had a chance to observe the Appellant's performance on the ground on 10th and 11th of May, 1995, when the incident was actually taking place and they have recommended that the Appellant should be given out-of-turn promotion. The Director General of Police has also recognized the exemplary performance of the appellant. All such recommendations seemed to suggest that the performance of the Appellant merited special consideration. Of course, the Appellant has already been promoted to the post of Inspector on 19th August, 2000, and the only question which now survives is whether such promotion should be given retrospective effect from the date on which Shaikh Hamidulla and Sub-Inspector Sonaullah were

given such promotion.

11. While considering the Appellant's claim for out-of-turn promotion or accelerated promotion in the Writ Petition filed by him, the learned Single Judge took special note of the condition, procedure and norms which provided that out-of-turn promotion would be considered only for consistently exceptional performance on the anti-militancy front. The learned Judge took note of the fact that except for two episodes, which, in any event, were performed in the usual course of duties, the same did not constitute any consistent exceptional performance on the part of the Appellant which would entitle him to out-of-turn promotion. The said view was endorsed by the Division Bench while dismissing the Letters Patent Appeal filed by the Appellant herein.

12. Neither the learned Single Judge nor the Division Bench of the High Court appears to have given proper attention to the Circular No.14-GR of 1990 dated 6th March, 1990, in relation to the recommendations which had been made by the Superintendent and the Senior Superintendent of Police, Budgam District. However, the final assessment for giving out-of-turn promotion lay with Director General of Police and in his judgment a cash reward of Rs.2,000/- was felt to be appropriate in recognition of the exemplary services rendered by the Appellant.

13. However, from the materials on record it is quite clear that the claim of the Appellant is covered by the policy decision of the Government contained in Circular No.14-GR of 1990 dated 6th March, 1990, which provided an incentive to all Government employees to give their best performance of duties in the service of the people and in meeting the challenge of the anti-national forces to disturb the law and order situation in the State. It is only subsequently that on 6th January, 2000, that a Government Order No.Home-3(P) of 2000 was published by the State in its Home Department regarding the procedure for out-of-turn promotion in the Police Department. It is in the said

circular that it has been indicated that out-of-turn promotion could be considered only for consistently exceptional performance on the anti-militancy front and that the recommendations of the Director General of Police, along with the dossier of the concerned employee, along with other formalities and the extent of deviation from the seniority rule, would have to be placed before the Home Department Select Committee for consideration and recommendation which would then be placed before the Chief Minister with the prior approval of the Minister of State, Home Department.

14. The aforesaid circular dated 6th January, 2000, directly links up out-of-turn promotion with the concept of consistently exceptional performance on the anti-militancy front, which did not figure in the earlier Circular No.14-GR of 1990 dated 6th March, 1990. Both the learned Single Judge and the Division Bench appear to have overlooked the difference in the two different circulars and the decision of the learned Single Judge is based on the later Circular dated 6th January, 2000, while the Appellant's claim is under the earlier Circular of 6th March, 1990, in relation to incidents which had taken place prior to the promulgation of the Government Order dated 6th January, 2000. In fact, in the Supplementary Affidavit filed on behalf of the State of Jammu and Kashmir on 3rd August, 2010, the said two circulars have been referred to and it has been submitted that the Circular of 6th January, 2000, had been issued in continuation and in addition to the Circular dated 6th March, 1990. It has also been stated that since the Circular dated 6th January, 2010, was issued subsequent to the circular issued in the year 1990, cases which have occurred after the issuance of the 2000 Circular would be subject to the same. It has been categorically stated that the case of the Appellant belongs to the period prior to the issuance of the 2000 Circular and, therefore, he would be governed by the 1990 Circular. Of course, it has also been submitted that the said Circular dated 6th March, 1990, does not confer any legal right on the Appellant nor does it cast any obligation on the State of Jammu

and Kashmir, since it was only an internal guideline which authorized the State Government to grant out-of-turn promotion in cases where the officials of the Jammu and Kashmir Police display exemplary bravery and courage in confronting terrorists, militants and insurgents. In the said affidavit it has been sought to be justified that the case of the Appellant did not merit out-of-turn promotion and he deserved a cash reward which had been duly awarded to him.

15. It is clear that the Respondent State of Jammu and Kashmir is also alive to the fact that the claim of the Appellant has to be considered in the light of the earlier Circular dated 6th March, 1990, and not by the subsequent Circular dated 6th January, 2000.

16. In these circumstances, we are of the view that the Appellant's claim for out-of-turn promotion, on the basis of the facts disclosed, require reconsideration in the light of the Circular dated 6th March, 1990, and not the Circular dated 6th January, 2000, as has been sought to be done in his case.

17. Accordingly, we set aside the orders passed by the learned Single Judge and the Division Bench of the High Court and direct that the case of the Appellant be reconsidered by the concerned Respondents in accordance with the Circular No.14-GR of 1990 dated 6th March, 1990, for the purpose of granting retrospective effect to the promotion already granted to him on 19th August, 2000, and if such retrospective effect is given, to consider such other benefits that he may, thereafter, become entitled to in accordance with law. The said exercise should be completed within three months from the date of communication of this order.

18. The appeals are allowed.

19. There will be no order as to costs.

B.B.B. Appeals allowed.

UNION OF INDIA AND ANR.

v.

B. KISHORE

(Civil Appeal No. 1045 of 2006)

APRIL 6, 2011

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

Service Law – Appointment – Compassionate appointment – Entitlement to – Respondent's wife died while she was in service – Respondent obtained death-cum-terminal benefits of his wife from her department – Subsequently he made application for compassionate appointment – Department rejected the application of respondent on the ground that he was not considered to be in 'indigent circumstances' – Decision upheld by Tribunal – Respondent filed writ petition – High Court allowed the writ petition holding that the scheme of compassionate appointment does not lay emphasis on indigency as a criterion for withholding or offering compassionate appointment and directed the appellants to include the name of respondent in the list of candidates waiting for appointment on compassionate basis – Justification of – Held: Not justified – Contrary to the High Court's observation, indigence of the dependents of the deceased employee is the first pre-condition to bring the case under the scheme of "compassionate appointment" – If the element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be a reservation in favour of the dependents of an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the Constitution – Respondent went abroad in search of employment and stayed there for four years before filing application for compassionate appointment – Though he

might have been struggling for financial upliftment, he certainly cannot be described as an indigent or destitute – Case of respondent therefore did not come under the scheme of compassionate appointments as envisaged under Office Memorandum dated October 9, 1998 – Even otherwise and without any reference to the said Office Memorandum, case of the respondent does not meet or satisfy the basic object and purpose of appointment on compassionate grounds – Further, respondent has already attained the age of superannuation and there is no question of his appointment on compassionate ground or on any other ground – Constitution of India, 1950 – Articles 14 and 16.

The wife of the respondent died while giving birth to their second child. At that time she was working as a Senior Accountant in the Office of the Directorate of Postal Accounts. The respondent made an application for payment of her death-cum-terminal dues and subsequently also made request for compassionate appointment. After payment of monetary dues to the respondent, the claim of respondent for appointment on compassionate basis was taken up. The respondent was informed that he was not found entitled to appointment on compassionate grounds because he was not considered to be "in indigent circumstances". Challenging the said decision, the respondent filed O.A. before the Tribunal. The Tribunal dismissed the O.A. Respondent filed writ petition.

The High Court, however, allowed the writ petition *inter alia* holding that the Scheme of compassionate appointment does not lay emphasis on indigency as a criterion for withholding or offering compassionate appointment and that compassionate appointment is to be made as a result of the death of the deceased official and when his/her family is in immediate need of assistance. The High Court held that in the instant case

there was a young son to be looked after and brought up and it cannot, therefore, be said that the family (of respondent) was not in need of income and thereafter directed the appellants to include the name of respondent in the list of candidates waiting for appointment on compassionate basis. Hence the present appeal.

Allowing the appeal, the Court

HELD:1.1. On going through the judgment passed by the High Court, it is evident that it is based on a complete misconception about the scheme of compassionate appointments. Contrary to the High Court's observation, indigence of the dependents of the deceased employee is the first pre-condition to bring the case under the scheme of "compassionate appointment". The very purpose and object of the scheme is to provide immediate succour to the family of an employee that, on his death, may suddenly find itself in a state of destitution. If the element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be a reservation in favour of the dependents of an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the Constitution. [Para 5] [725-E-H; 726-A]

1.2. The Central Government had issued revised and consolidated instructions in connection with the scheme of compassionate appointments *vide* Office Memorandum dated October 9, 1998, that had come into force when the case of respondent came up for consideration before the High Court. Clause 1 of the Office Memorandum describes the object of the Scheme as to grant appointment on compassionate grounds to a dependent family member of a Government servant

dying in harness or who is retired on medical grounds, thereby leaving his family in penury and without any means of livelihood to relieve the family of the Government servant concerned from financial destitution and to help it get over the emergency. Clause 5 of the said Office Memorandum lays down the eligibility criterion and requires that the family is indigent and deserves immediate assistance for relief from financial destitution. [Paras 7] [726-G-H; 727-A-B]

1.3. In the writ petition filed by the respondent before the High Court it was stated that he was unemployed. It was further stated that in August, 1988, one of his friends took him to Singapore in search of employment. But there too the respondent was unable to find a "lucrative job". He came back to India after staying there for about four years in 1992. From the writ petition it appears that though the respondent might have been struggling for financial upliftment, he certainly cannot be described as an indigent or destitute. [Para 8] [727-G-H; 728-A]

1.4. The case of the respondent clearly did not come under the Office Memorandum dated October 9, 1998. Even otherwise and without any reference to the Office Memorandum dated October 9, 1998, the case of the respondent does not meet or satisfy the basic object and purpose of appointment on compassionate grounds. [Para 9] [728-B-C]

State Bank of India v. Raj Kumar **(2010) 11 SCC 661 – relied on.**

2. An important and relevant fact was completely missed out in considering the respondent's claim for appointment on compassionate basis. From the records it appears that in the verification appended to his OA before the Tribunal he gave his age as 58 years in June,

1998. Unless his age is wrongly stated in the verification to the OA, he would be 54 years of age when he made the application for compassionate appointment and 61 years old when the High Court allowed his Writ Petition. In other words, he was already beyond the age of superannuation and there was no question of his appointment on compassionate ground or on any other grounds. [Para 11] [728-D-F]

Case Law Reference:

(2010) 11 SCC 661	**relied on**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1045 of 2006.

From the Judgment & Order dated 1.8.2001 of the HIgh Court of Madras in W.P. No. 1225 of 1998 an dated 24.11.2000 in W.P. No. 25135 in W.P. No. 12225 of 2003 in W.P. No. 12225 of 1998.

Shweta Verma, Mukesh Kumar (for V.K. Verma) for the Appellants.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal by special leave is directed against the judgment of the Division Bench of the Madras High Court. By the judgment and order coming under appeal, the High Court directed the appellants to include the name of the respondent in the list of candidates waiting for appointment under the scheme of "compassionate appointments".

2. The wife of the respondent K. Janaki died on September 1, 1993, while giving birth to their second child. At that time she was working as a Senior Accountant in the Office of the Directorate of Postal Accounts, Madras. On September

21, 1993, the respondent made an application for payment of her death-cum-terminal dues. A rival claim was raised by the mother of the deceased but the respondent was able to obtain the succession certificate and on that basis he got payment of a sum of Rs.71,000/- as death-cum-retirement gratuity of his deceased wife, in addition to a sum of Rs.2,998/- per month as family pension.

3. On January 11, 1994, the respondent made the request for compassionate appointment but he was informed by the concerned departmental authorities that his claim for compassionate appointment would be considered only after the settlement of the rival claims for payment of the death-cum-terminal dues of K. Janaki. After payment of the monetary dues to the respondent, his claim for appointment on compassionate basis was taken up and he was asked to submit proof of passing the S.S.L.C. examination. On July 9, 1996, the respondent made another representation for appointment on compassionate grounds. His case was finally considered by the Circle Selection Committee and he was informed by letter dated February 26, 1998, that he was not found entitled to appointment on compassionate grounds because he was not considered to be "in indigent circumstances".

4. The respondent challenged the decision of the Circle Selection Committee before the Central Administrative Tribunal, Madras Bench in O.A. No.610/1998. The Tribunal dismissed the O.A. by order dated July 16, 1998. Against the order passed by the Tribunal, the respondent went to the Madras High Court in Writ Petition No.12225/1998. A Division Bench of the High Court allowed the Writ Petition with the direction to the appellants to include his name in the list of candidates waiting for appointment on compassionate basis. The High Court in the judgment coming under appeal observed as follows:-

"In deserving cases even when there is an earning member in the family, compassionate appointment may be

offered, if the family is found to be in distress, with the prior approval of the Secretary of the Department concerned."

It went on to say:

"The Scheme, therefore, *does not lay emphasise on the indigency as a criterion* for withholding or offering compassionate appointment. Compassionate appointment is to be made as a result of the death of the deceased official and when his/her family is in immediate need of assistance."

(emphasis added)

It further said:

"Admittedly, there is a young son has to be looked after and brought up. It cannot, therefore, be said that the family is not in need of income. The fact that the family receives pension also no ground to decline appointment nowhere provides that in case where the family is paid pension."

5. On going through the judgment passed by the High Court, it is evident that it is based on a complete misconception about the scheme of compassionate appointments. Contrary to the High Court's observation, indigence of the dependents of the deceased employee is the first pre-condition to bring the case under the scheme of "compassionate appointment". The very purpose and object of the scheme is to provide immediate succour to the family of an employee that, on his death, may suddenly find itself in a state of destitution. If the element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be a reservation in favour of the dependents of an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the

Constitution.

6. In *State Bank of India* v. *Raj Kumar*, (2010) 11 SCC 661, elucidating the nature of the scheme of compassionate appointments this Court observed:

"It is now well settled that appointment on compassionate grounds is not a source of recruitment. On the other hand it is an exception to the general rule that recruitment to public services should be on the basis of merit, by an open invitation providing equal opportunity to all eligible persons to participate in the selection process. The dependants of employees, who die in harness, do not have any special claim or right to employment, except by way of the concession that may be extended by the employer under the rules or by a separate scheme, to enable the family of the deceased to get over the sudden financial crisis. The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant."

7. The Central Government issued revised and consolidated instructions in connection with the scheme of compassionate appointments under the Central Government *vide* Office Memorandum dated October 9, 1998. Clause 1 of the Office Memorandum describes the object of the Scheme as under:-

"The object of the Scheme is to grant appointment on compassionate grounds to a dependent family member of

a Government servant dying in harness or who is retired on medical grounds, thereby leaving his family in penury and without any means of livelihood to relieve the family of the Government servant concerned from financial destitution and to help it get over the emergency."

(emphasis added)

Clause 5 lays down the eligibility criterion and provides as follows:-

"(a) The family is indigent and deserves immediate assistance for relief from financial destitution; and

(b) Applicant for compassionate appointment shall be eligible and suitable for the post in all respects under the provisions of the relevant Recruitment Rules."

(emphasis added)

Clause 7 deals with availability of vacancies and sub-clause (b) provides as follows:-

"(b) Compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any Group 'C' or 'D' post. The appointing authority may hold back 5% of vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds."

8. In the writ petition filed by the respondent before the High Court it was stated that he was unemployed. It was further stated that in August, 1988, one of his friends took him to Singapore in search of employment. But there too the respondent was unable to find a "lucrative job". He came back to India after staying there for about four years in 1992. From the writ petition it appears that though the respondent might have been struggling for financial upliftment, he certainly cannot be

described as an indigent or destitute.

9. The case of the respondent clearly did not come under the revised and consolidated scheme formulated by Office Memorandum dated October 9, 1998, that had come into force when his case came up for consideration before the High Court. Even otherwise and without any reference to the Office Memorandum dated October 9, 1998, the case of the respondent does not meet or satisfy the basic object and purpose of appointment on compassionate grounds.

10. The High Court was, therefore, in error in passing the impugned order.

11. It further appears that an important and relevant fact was completely missed out in considering the respondent's claim for appointment on compassionate basis. From the records it appears that in the verification appended to his OA before the Tribunal he gave his age as 58 years in June, 1998. Unless his age is wrongly stated in the verification to the OA, he would be 54 years of age when he made the application for compassionate appointment and 61 years old when the High Court allowed his Writ Petition. In other words, he was already beyond the age of superannuation and there was no question of his appointment on compassionate ground or on any other grounds.

12. In light of the discussions made above, the order coming under appeal is wholly unsustainable. It is set aside. The appeal is allowed but with no order as to costs.

B.B.B. Appeal allowed.

NARMADA BAI
v.
STATE OF GUJARAT AND ORS.
(Writ Petition (Criminal) No. 115 of 2007)

APRIL 8, 2011

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

Investigation/inquiry: Allegation against high police officials and senior politician – Filing of charge-sheet by the State agency – Writ petition seeking investigation by specialized agency – Held: In an appropriate case, particularly, when the court feels that the investigation by the State police authorities is not in the proper direction as the high police officials are involved, in order to do complete justice, it is always open to the Court to hand over the investigation to an independent and specialized agency like the CBI even when charge sheet is submitted – In the instant case, the petitioner sought transfer of case to CBI to investigate fake encounter killing of her son (victim) – It was the definite case of the CBI that the abduction of 'S' and 'K', the associate of victim and their subsequent murders as well as the murder of the victim were one series of acts, so connected together as to form the same transaction u/s.220, Cr.P.C. and if two parts of the same transaction were investigated and prosecuted by different agencies, it might cause failure of justice not only in one case but in other trial as well – There was substantial material already on record which made it probable that the prime motive of elimination of victim was that he was a witness to abduction of 'S' and 'K' – Evidence raised strong suspicion that the encounter was fake and stage managed as predicted by victim prior to his death – Much before the incident of alleged fake encounter, complaints were lodged by victim in writing to the Collector and to the NHRC expressing the apprehension that he was

likely to be killed by Gujarat and Rajasthan police – It is the age old maxim that justice must not only be done but must be seen to be done – The fact that senior police officials and a senior politician were accused may shake the confidence of public in investigation conducted by the State Police – The analysis of the materials showed several lacuna on the part of the investigation by the State Government – In view of circumstances and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States, i.e. Andhra Pradesh and Rajasthan, it is not desirable to allow the Gujarat State Police to continue with the investigation – Accordingly, to meet the ends of justice and in the public interest, the CBI is directed to take over the investigation – Police Authorities of the Gujarat State are directed to handover all the records of the case to the CBI.

Criminal trial: Transfer of investigation to CBI ordered by the Supreme Court – Submission of report by CBI and subsequent monitoring – Held: Once a charge sheet is filed in the competent court after completion of the investigation, the process of monitoring by the Supreme Court for the purpose of making the CBI and other investigating agencies concerned perform their function of investigating into the offences concerned comes to an end – Thereafter it is only the court in which the charge sheet is filed which is to deal with all matters relating to the trial of the accused, including matters falling within the scope of s. 173(8) Cr.P.C.

In **Rubabbuddin Sheikh* case, the Supreme Court directed the CBI to investigate all aspects of the case relating to the killing of one 'S' and his wife 'K' in a fake encounter. In the said judgment, the court recorded that there was strong suspicion that the third person picked up with 'S' was 'T' and a possibility of "larger conspiracy" and that killing of 'T' was part of the same conspiracy. 'T' was stated to be a key witness to the murder of 'S' and 'K'.

The petitioner in the instant writ petition was the mother of 'T'. The grievance of the petitioner was that her son had been done away by respondent Nos. 6-19, the officials of Gujarat and Rajasthan police in a fake encounter with the ulterior intent to shield themselves in the investigation emanating under the directions of the Supreme Court in ****Rubabbuddin Sheikh* **case. The instant petition was filed by her under Article 32 of the Constitution praying for issuance of a writ of mandamus or in the nature thereof or any other writ, order of direction directing the CBI to register a First Information Report and investigate into the fake encounter killing of her son and submit its report to the Supreme Court. The petitioner also prayed for compensation for the killing of her son in a fake encounter thereby causing gross violation of Articles 21 and 22 of the Constitution.

The issues which arose for consideration in the instant writ petition were whether after filing of the charge-sheet by the State agency, the court is precluded from appointing any other independent specialized agency like the CBI to go into the same issues if the earlier investigation was not done as per the established procedure; and subject to the answer relating to the first issue whether the petitioner has made out a case for entrusting the investigation to the CBI.

Allowing the writ petition, the Court

HELD: 1.1. In an appropriate case, particularly, when the Court feels that the investigation by the State police authorities is not in the proper direction as the high police officials are involved, in order to do complete justice, it is always open to the Court to hand over the investigation to an independent and specialized agency like the CBI. It is clear from the judgment of ****Rubabbuddin Sheikh* **case that there was a strong suspicion that the

'third person' picked up with 'S' was 'T'. It was also observed that the call records of 'T' were not properly analysed and there was no justification for the then investigating officer to have walked out of the investigation pertaining to 'T'. The Court had also directed the CBI to unearth "larger conspiracy" regarding the murder of 'S'. In such circumstances, those observations and directions cannot lightly be taken note of and it is the duty of the CBI to go into all the details as directed by this Court. [paras 11, 19] [747-E; 756-E-F]

Rubabbuddin Sheikh vs. State of Gujarat & Ors.,* **2010 (1) SCR 991 = 2010 (2) SCC 200; *Vineet Narain vs. Union of India* **1996 (1) SCR 1053 = 1996 (2) SCC 199 – relied on.**

Union of India vs. Sushil Kumar Modi **(1998) 8 SCC 661;** *Rajiv Ranjan Singh 'Lalan' (VIII) vs. Union of India* **2006 (4) Suppl. SCR 742 = 2006 (6) SCC 613;** *Hari Singh vs. State of U.P.* **2006 (3) Suppl. SCR 59 = 2006 (5) SCC 733 ;** *Aleque Padamsee vs. Union of India* **2007 (8) SCR 390 = 2007 (6) SCC 171;** *M.C. Mehta vs. Union of India* **2007 (10) SCR 1060 = 2008 (1) SCC 407;** *R.S. Sodhi vs. State of U.P.* **1994 Supp (1) SCC 143;** *Ramesh Kumari vs. State (NCT of Delhi)* **2006 (2) SCR 403 = 2006 (2) SCC 677;** *Kashmeri Devi vs. Delhi Administration* **1988 Supp SCC 482;** *Gudalure M.J. Cherian vs. Union of India* **1991 (3) Suppl. SCR 251 = 1992 (1) SCC 397 ;** *Punjab & Haryana High Court Bar Asson. vs. State of Punjab* **1993 (3) Suppl. SCR 915 = 1994 (1) SCC 616 – referred to.**

1.2. In the instant case, it was the definite case of the CBI that the abduction of 'S' and 'K' and their subsequent murders as well as the murder of 'T' were one series of acts, so connected together as to form the same transaction under Section 220 of the Cr.P.C. As rightly pointed out by the CBI, if two parts of the same

transaction are investigated and prosecuted by different agencies, it may cause failure of justice not only in one case but in other trial as well. There was substantial material already on record which made it probable that the prime motive of elimination of 'T' was that he was a witness to abduction of 'S' and 'K'. Both oral and documentary evidence raised strong suspicion that the encounter was fake and stage managed as predicted by 'T' prior to his death. Much before the incident of alleged fake encounter of 'T', two complaints were lodged in writting, one to the Collector, Udaipur and another addressed to the Chairman, NHRC, New Delhi expressing the apprehension that he is likely and going to be killed by Gujarat and Rajasthan police. [Paras 23, 32] [759-B-E; 763-C-F]

1.3. It is the age-old maxim that justice must not only be done but must be seen to be done. The fact that in the case of murder of an associate of 'T', senior police officials and a senior politician were accused which may shake the confidence of public in investigation conducted by the State Police. If the majesty of rule of law is to be upheld and if it is to be ensured that the guilty are punished in accordance with law notwithstanding their status and authority which they might have enjoyed, it is desirable to entrust the investigation to the CBI. It was the specific claim of the State of Gujarat that they have conducted a fair and impartial investigation into the killing of 'T', however, analysis of the materials showed several lacuna on the part of the investigation by the State Government. Therefore, without entering into the allegations leveled by either of the parties, it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot

choose as to which investigation agency must investigate the alleged offence committed by them. Although, charge-sheet has been filed by the State of Gujarat after a gap of 3 ½ years after the incident, that too after pronouncement of judgment in Rubbabudin's case and considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, the investigation conducted and concluded in the instant case by the State police cannot be accepted. In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States, i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, the CBI is directed to take the investigation. [Paras 31, 32, 36, 37] [762-H; 763-A-C; 765-H]

Md. Anis vs. Union of India and Ors. **1993 (1) Suppl. SCR 263 = 1994 (1) Suppl. SCC 145 – relied on.**

M.C. Mehta (Taj Corridor Scam) vs. Union of India and Others **2006 (9) Suppl. SCR 683 = 2007 (1) SCC 110 – referred to.**

2. Once a charge sheet is filed in the competent court after completion of the investigation, the process of monitoring by the Supreme Court for the purpose of making the CBI and other investigating agencies concerned perform their function of investigation into the offences concerned comes to an end and thereafter it is only the court in which the charge sheet is filed which is to deal with all matters relating to the trial of the accused, including matters falling within the scope of Section 173(8) Cr.P.C. [Para 38] [766-F-H]

3. The Police Authorities of the Gujarat State are

directed to handover all the records of the instant case to the CBI within two weeks from this date and the CBI shall investigate all aspects of the case relating to the killing of 'T' and file a report to the concerned court/ special court having jurisdiction within a period of six months from the date of taking over of the investigation from the State Police Authorities. The Police Authorities of the State of Gujarat, Rajasthan and Andhra Pradesh are also directed to cooperate with the CBI Authorities in conducting the investigation. Though the petitioner has prayed for compensation for the killing of her son, inasmuch as the CBI is directed to investigate and submit a report before the court concerned/special court within six months, depending on the outcome of the investigation, petitioner is permitted to move the said court for necessary direction for compensation and it is for the said court to pass appropriate orders in accordance with law. [Paras 39-40] [767-H; 768-A-E]

Case Law Reference:

2010 (1) SCR 991	**relied on**	**Para 2, 13, 16, 17, 38, 36**
1996 (1) SCR 1053	**relied on**	**Para 11, 38**
(1998) 8 SCC 661	**referred to**	**Para 11, 38**
2006 (4) Suppl. SCR 742	**referred to**	**Para 11**
2006 (3) Suppl. SCR 59	**referred to**	**Para 11**
2007 (8) SCR 390	**referred to**	**Para 11**
2007 (10) SCR 1060	**referred to**	**Para 11**
1994 Supp (1) SCC 143	**relied on**	**Para 11, 34**
2006 (2) SCR 403	**referred to**	**Para 11**
1988 Supp SCC 482	**referred to**	**Para 11**

1991 (3) Suppl. SCR 251	**referred to**	**Para 11**
1993 (3) Suppl. SCR 915	**referred to**	**Para 11**
1993 (1) Suppl. SCR 263	**referred to**	**Para 33**
2006 (9) Suppl. SCR 683	**referred to**	**Para 37**

CRIMINAL APPELLATE JURIDICTION : Writ Petition (Crl.) No. 115 of 2007.

Under Article 32 of the Constitution of India.

H.P:. Rawal, ASG, Ranjeet Kumar, Ram Jethmalani, KTS Tulsi, Jaideep Gupta, Tushar Mehta, AAG, Huzefa, A. Ahmadi, Meenakshi Arora, Hemantika Wahi, Pranav Diesh, Karan Kalia, Anish K. Gupta, Subramonium Prasad, Rajat Khattry, Maheen Pradhan, A.K. Sharma, Deepak Prakash, Biju P. Raman, Rajesh B., Malini Poduval, Bhupender Yadav, S.S. Shamashery, Debaleena Kilikdar, B. R. Barik, R.C. Kohli, Gp. Capt. Karan Singh Bhati, Jyoti Upadhyay, Rashid Khan, Padmalakshmi Nigam, Harsh N. Parekh, Sonam Anand, S.N. Terdal for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Narmada Bai-the petitioner herein, mother of Tulsiram Prajapati-the deceased, who, according to her, was killed on 27/28.12.2006 in a fake encounter by respondent Nos. 6 to 19, who are the officials of Gujarat and Rajasthan Police, somewhere on the road going from Ambalimal to Sarhad Chhapri, has filed the above writ petition under Article 32 of the Constitution of India praying for issuance of a writ of mandamus or in the nature thereof or any other writ, order or direction directing the Central Bureau of Investigation (in short 'the CBI') to register a First Information Report (in short 'FIR') and investigate into the fake encounter killing of her son and submit its report to this Court. In the same petition, she also prayed for compensation for the killing of her son in a fake

encounter thereby causing gross violation of Articles 21 and 22 of the Constitution.

2. Case of the Writ Petitioner:-

(a) According to the petitioner, she is 55 years old illiterate widow. Her younger son had been done away by respondent Nos. 6-19 in a fake encounter with the ulterior intent to shield themselves in the investigation emanating under the directions of this Court in the case of *Rubabbuddin Sheikh vs. State of Gujarat & Ors.,* (2010) 2 SCC 200. She came to know through local persons about the fake encounter and killing of Sohrabuddin and his wife Kausarbi and the directions of this Court in that case. On being informed about the said incident, she approached this Court for directions to register an FIR into the fake encounter killing of her son Tulsiram Prajapati and investigation by an independent agency, like the CBI and for submission of its report to this Court for further action. According to the petitioner, the fake encounter killing of her son is directly connected to the case of Sohrabuddin and his wife Kausarbi as he would have been a material witness to the said killings.

(b) It is further stated that her son Tulsiram Prajapati while lodged in Central Jail, Udaipur, had addressed a letter dated 11.05.2006 to the Collector, Udaipur informing him about the life threatening attack carried out on him in Udaipur Central Jail on 25.03.2006, when he was beaten up with iron rods and lathis by co-prisoners. He expressly wrote that there was conspiracy to kill him along with two others and also named the persons who were behind the conspiracy and requested that incident be investigated and his life be protected. Thereafter, on 18.05.2006, the deceased also addressed a letter to the Chairman, National Human Rights Commission (in short 'NHRC') alleging that there was conspiracy among the police officials of Gujarat, Rajasthan, Maharashtra, etc. to do away with him in a fake encounter by cooking up a false story of running away from custody. In the said letter, the deceased

specifically requested that his security be ensured whenever he is taken on remand. In the same letter, he also mentioned that the Gujarat Crime Branch and Anti Terrorist Squad (in short 'ATS') were very notorious for staging fake encounters. The NHRC acknowledged the receipt of the said letter and forwarded a copy to the Superintendent of Police, Udaipur, Rajasthan vide letter dated 22.06.2006.

(c) Thus from March 2006, the deceased had been expressing serious apprehensions and threat to his life at the hands of the police. The deceased had reasons to believe that Mr. Dinesh Kumar, Superintendent of Police, respondent No.8, had taken a huge sum of money from the Marble traders and dealers in Rajasthan with the assurance that he would do away with him in a fake encounter. Before he being interrogated by Ms. Geeta Johri, an officer investigating the matter of fake encounter killing of Sohrabuddin and his wife Kausarbi, in the night intervening 27/28 December, 2006, Tulsiram Prajapati was done away in a fake encounter by respondent Nos. 6-19.

(d) Quoting from certain newspaper reports, more particularly, the Times of India dated 29.12.2006, the petitioner has alleged that her son was being escorted by Udaipur (Rajasthan) Police from Ahmedabad to Udaipur in a train. When the train was passing through Himatnagar-Shymlaji Stretch, the deceased sought permission to go to the toilet. The policemen escorted him to the toilet where two of his accomplices disguised as passengers attacked the policemen by throwing chilli powder in their eyes. When the policemen called for the other members of the escort party, the goons fired at them and jumped off the moving train. In response, the police opened fire but the accused fled in the cover of darkness after shooting back at the police.

(e) Pursuant to such alleged fleeing of Tulsiram Prajapati from police custody, Mr. Dinesh Kumar, SP, Udaipur called Mr. Vipul Agarwal, SP Banaskantha and informed him of the same. Thereafter, local police of Banaskantha headed by Mr. Vipul

Agarwal under direct supervision of Mr. D.G. Vanzara, Range DIG, swung into action and registered an FIR being Crime Register No. 115 of 2006 at Ambaji Police Station, Banaskantha, on 28.12.2006 at 8.00 hrs. claiming that Tulsiram Prajapati had been killed in an encounter.

(f) It is further alleged that when patrolling was carried out, three persons tried to stop one Matador van but the vehicle did not stop there. It has also been alleged that a police jeep of Mr. A.A. Pandya, SI was coming behind the Matador and the said three persons tried to stop it. On stopping the police jeep, Mr. Narayansinh Fatehsinh Chauhan, ASI recognized one of the three persons in the light of jeep as the absconding Tulsiram Prajapati. On seeing that, the deceased took out a weapon kept in the nylon belt on his waist and fired which hit the left side of the mudguard of the police jeep and ran away in the darkness. While running, they fired at the police party in which one bullet hit at the left shoulder of Shri A.A. Pandya, SI. It is alleged that in self-defence Shri A.A. Pandya fired two rounds from his service revolver and Mr. Narayansinh Fatehsinh Chauhan and Mr. Yuddharamsinh Nathusinh Rajput, Rajasthan police constables also fired from their weapons. On account of the firing by the police party, bullets hit Tulsiram Prajapati and he fell down on road side and the other two persons ran away and could not be traced. Thereafter, he was taken to Ambaji Cottage Hospital where he was declared dead by the doctor on duty.

(g) It is the further case of the petitioner that the deceased being a key eye witness to the murder of Sohrabuddin and his wife Kausarbi, the team of Mr. D.G. Vanzara and others planned to do away with him to avoid his interrogation by Ms. Geeta Johri, Inspector General of Police. The aforesaid facts create a strong suspicion on the conduct of respondent Nos. 6 to 19 and the petitioner has every reason to believe that her son-Tulsiram Prajapati has been killed by them in a fake encounter. She also alleged that the respondents/accused officers enjoy

powerful position in their respective State Police and are trying to obstruct further inquiry into the fake encounter killing of her son, who was a material witness in the case of fake encounter of Sohrabuddin and his wife Kausarbi. Hence, the petitioner has preferred this petition before this Court praying for direction to CBI to register an FIR and investigate the case.

3. **Stand of the State of Gujarat – respondent No.1**

(a) Shri I.M. Desai, Deputy Inspector General of Police, CID (Crime), Gujarat State filed an affidavit wherein it was stated that the present petition under Article 32 of the Constitution is not maintainable as the case registered in respect of death of the petitioner's son in police firing on 28.12.2006 was under investigation. The Writ Petition (Crl.) No. 6 of 2007 being a Habeas Corpus was entertained by this Court as an exceptional case and, therefore, the same cannot be cited as a precedent. It was further stated in the said affidavit that Tulsiram Prajapati was a dreaded inter-state criminal and was also known as Tulsiram Prajapati @ Prafull @ Samir son of Ganga Ram Prajapati involved in 21 criminal cases and he was killed on 28.12.2006 in police firing after escaping from police custody. In respect of the same, an FIR was registered in Ahmedabad Railway Police Station of Gujarat vide CR No. 294/06 under Sections 307, 224, 225, 34 of Indian Penal Code (in short "IPC") and Section 25(1)(AB) of the Arms Act, 1959 and Section 135 of Bombay Police Act, 1951.

(b) According to the State, after escaping from the Police Custody, Tulsiram Prajapati was again confronted by Gujarat Police and Rajasthan Police and was killed in police firing for which an FIR was registered in Ambaji Police Station vide CR No. 115 of 2006 dated 28.12.2006 under Sections 307, 427, 34 of IPC and Section 25(1)(C) of the Arms Act, 1959 and Section 135 of the Bombay Police Act, 1951. Since the cases in respect of the above two incidents had already been registered in the Police Stations, there is no need to register a fresh case as claimed by the petitioner. It was further stated

that Tulsiram Prajapati was not a material witness in the case of Sohrabuddin. He also denied that any such incident had taken place within the premises of Udaipur Central Jail as claimed by the petitioner on 25.03.2006 but there was a quarrel among the prisoners on 24.03.2006 in the Court lock-up for which a criminal case was registered at Bhopalpura Police Station in C.R.No. 131 of 2006 under Sections 341, 323, 506 and 34 IPC.

(c) As regards the complaint made to the NHRC, investigation carried out so far revealed that no such conspiracy amongst the police officers of Maharashtra, Gujarat, Madhya Pradesh and Rajasthan has come on record. The deceased also never showed any apprehension to the petitioner about danger to his life from marble dealers or police officers of Udaipur. The petitioner's claim about Tulsiram Prajapati's apprehension to his life is at the most hearsay and based on extraneous considerations.

(d) The claim that the deceased-Tulsiram Prajapati was highly inconvenient witness for respondent Nos. 6-19 is without substance as respondent No. 10 – Mr. V.L. Solanki, an inquiry officer, has stated in respect of alleged killing of Sohrabuddin that during preliminary enquiry there was no link between Tulsiram Prajapati and the death of Sohrabuddin and his wife Kausarbi in an encounter. The same view has been expressed by Ms. Geeta Johri, IGP under whose direct supervision the case relating to Sohrabuddin was investigated. The 'third person' allegedly present at the time of abduction of Sohrabuddin and Kausarbi was Kalimuddin and not Tulsiram Prajapati.

(e) In the subsequent affidavit dated 19.08.2010, Dashrathbhai R. Patel, Under Secretary, Government of Gujarat, Home Department has stated that the State CID (Crime) has filed a charge-sheet which is the subject-matter of present writ petition. It is the consistent stand of the State that the encounter killing of Tulsiram Prajapati (subject-matter of Writ

Petition (Crl.) No. 115 of 2007) has nothing to do with the killing of Sohrabuddin and Kausarbi (which was the subject-matter decided by this Court in Writ Petition (Crl.) No. 6 of 2007).

4. **Stand of Mr. Amit Shah – respondent No.2:**

(a) The present writ petition is an abuse of the process of law by/at the behest of political party controlling the CBI.

(b) The investigation in a criminal case normally takes place in accordance with the procedure prescribed under the Code of Criminal Procedure (in short 'the Cr.P.C.') and by the normal investigating agency prescribed. The Constitutional Court can direct deviation from such statutorily prescribed method of investigation and direct an outside agency like the CBI to step in and investigate an offence only in extraordinary circumstances and in rarest of rare cases. The petitioner has not led factual foundation of facts to hold that the present case is one of the rarest of rare cases which requires deviation from the statutorily prescribed mode of investigation.

(c) On perusal of both the investigations and charge-sheet which are filed in both the offences, it is seen that there is no credible evidence to support the view that Tulsiram Prajapati was that 'third person' and the evidence which the CBI is relying on is clearly fabricated being based on the unreliable statements of witnesses. On the other hand all available evidence points to the fact that the 'third person' could only be Kalimuddin @ Naimuddin who is under the protection of the Andhra Pradesh Police. The CBI is seeking to take over Tulsiram Prajapati's encounter case only to fabricate the evidence and to destroy the charge-sheet filed by the Gujrat Police in Tulsiram Prajapati's case. The status report filed by the CBI in Sohrabuddin's case that Tulsiram Prajapati was the 'third person' which is a blatant lie. Though there is no link between the two and yet the CBI is attempting to fabricate a link that does not exist. Inasmuch as the CBI which has lost all its credibility as an independent agency and is being used by

political party in power in the Central Government, in the absence of any extraordinary circumstances having been shown by the petitioner in the petition no direction need be issued for handing over the investigation to the CBI and prayed for dismissal of the writ petition.

(5) **Stand of the CBI – respondent No.21:**

(a) The investigation conducted in R.C. No. 4(S)/2010, Special Crime Branch, Mumbai, as per the directions of this Court in its order dated 12.01.2010, vide Writ Petition (Crl.) No. 6 of 2007 revealed that the alleged fake encounter of Tulsiram Prajapati on 28.12.2006 was done in order to eliminate him as he was the key witness in the criminal conspiracy of the abduction and killing of Sohrabuddin and Kausarbi by the powerful and the influential accused persons. The investigation further revealed that the deceased knew that his death was imminent at the hands of Gujarat Police in connivance with the Rajasthan Police as he was the prime witness to the said case.

(b) The investigation also revealed that Tulsiram Prajapati was brought to Ahmedabad on 28.11.2006 and 12.12.2006 in connection with the case No. 1124 of 2004 in JM Court No. 13, Ahmedabad, along with co-accused Md. Azam and around 50 police commandos were accompanied for the escort party, whereas on 25.11.2006, Tulsiram Prajapati was brought alone on police escort by Rajasthan Police from Udaipur Jail when less than five police men accompanied him. After the orders of this Court for the investigation by this agency, it emerged that police officials of ATS, Ahmedabad were involved in the abduction and killing of Sohrabuddin and his wife Kausarbi.

(c) The murder of Tulsiram Prajapati took place on 28.12.2006, case was registered on 28.12.2006 and Gujarat CID commenced investigation on 22.03.2007. However, even after a lapse of 3 years, no action was taken against any of the accused. As directed by this Court, only on the investigation of Tulsiram Prajapati's case, the "larger conspiracy" would be

established and the mandate and tasks assigned by this Court to the CBI would be accomplished both in letter and spirit towards the goal of a fair trial, upholding the rule of law. If Tulsiram Prajapati's fake encounter case is not transferred to the CBI for investigation, it may lead to issue-estoppel or res judicata against prosecution.

Stand of the other respondents

6. As far as the officials of the Gujarat State Police are concerned, they reiterated the stand taken by the State. Mr. Dinesh Kumar, S.P. Udaipur, Rajasthan-respondent No.8 has filed a separate counter affidavit denying all the allegations made by the petitioner and taking the same stand as that of the State of Gujarat and ultimately prayed for dismissal of the writ petition.

7. In the light of the above pleadings, we heard Mr. Huzefa A. Ahmadi, learned counsel for the writ petitioner, Mr. Ranjit Kumar, learned senior counsel for the State of Gujarat (respondent No.1), Mr. Ram Jethmalani, learned senior counsel for Amit Shah (respondent No.2), Mr. K.T.S. Tulsi, learned senior counsel for the CBI, Mr. Deepak Prakash, learned counsel for respondent No.8, Mr. Jaideep Gupta, learned senior counsel for respondent No.6, Gp. Capt. Karan Singh Bhati, learned counsel for respondent Nos. 12, 13 and 14 and Mr. H.P. Rawal, learned ASG for the Union of India.

8. The main grievance of the petitioner is that her deceased son – Tulsiram Prajapati being a key witness to the murder of Sohrabuddin and his wife Kausarbi, the team of Mr. D.G. Vanzara, DIG and other officers of the State Police planned to do away him to avoid the interrogation by Ms. Geeta Johri, IGP. The petitioner had also strong suspicion on the conduct of respondent Nos. 6-19 and has every reason to believe that her son had been killed by them in a fake encounter. It is also the apprehension of the petitioner that since the respondents/accused police officers enjoy powerful position

in their respective States and they are trying to obstruct further inquiry in the matter, prayed for entrusting the investigation to a specialized independent agency like the CBI.

9. Mr. Ranjit Kumar, learned senior counsel for the State of Gujarat and Mr. Ram Jethmalani, learned senior counsel for Mr. Amit Shah, respondent No.2, who, at the relevant time was the Home Minister of the State, vehemently objected the claim of the petitioner and by placing several materials submitted that inasmuch as after proper investigation the State Police has filed the charge-sheet, there is no need for further investigation by the CBI at this stage. They further submitted that any such direction at this stage would delay the entire prosecution.

Key Issues:

10. Keeping the above submissions in mind, we have to first find out (a) whether after filing of the charge-sheet by the State agency, the Court is precluded from appointing any other independent specialized agency like the CBI to go into the same issues if the earlier investigation was not done as per the established procedure; and (b) subject to the answer relating to the issue raised in (a) whether the petitioner has made out a case for entrusting the investigation to the CBI.

Analysis as to issue (a):

11. The first issue i.e. (a) as in the case on hand also arose in the case of *Rubabbuddin Sheikh* (supra). The factual details therein will be discussed in the later paragraphs. With regard to the similar objection as to further investigation by the CBI, this Court considered the following cases:

(i) *Vineet Narain vs. Union of India,* (1996) 2 SCC 199

(ii) *Union of India vs. Sushil Kumar Modi,* (1998) 8 SCC 661

(iii) *Rajiv Ranjan Singh 'Lalan' (VIII) vs. Union of India,* (2006) 6 SCC 613

(iv) *Hari Singh vs. State of U.P.,* (2006) 5 SCC 733

(v) *Aleque Padamsee vs. Union of India,* (2007) 6 SCC 171

(vi) *M.C. Mehta vs. Union of India,* (2008) 1 SCC 407

(vii) *R.S. Sodhi vs. State of U.P.*, 1994 Supp(1) SCC 143

(viii) *Ramesh Kumari vs. State (NCT of Delhi),* (2006) 2 SCC 677

(ix) *Kashmeri Devi vs. Delhi Administration,* 1988 Supp SCC 482

(x) *Gudalure M.J. Cherian vs. Union of India,* (1992) 1 SCC 397; and

(xi) *Punjab & Haryana High Court Bar Asson. Vs. State of Punjab,* (1994) 1 SCC 616

and concluded in paragraphs 60 and 61 as under:

"60. Therefore, in view of our discussions made hereinabove, it is difficult to accept the contentions of Mr Rohatgi, learned Senior Counsel appearing for the State of Gujarat that after the charge-sheet is submitted in the court in the criminal proceeding it was not open for this Court or even for the High Court to direct investigation of the case to be handed over to CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the

independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

61. Keeping this discussion in mind, that is to say, in an appropriate case, the court is empowered to hand over the investigation to an independent agency like CBI even when the charge-sheet has been submitted, we now deal with the facts of this case whether such investigation should be transferred to the CBI Authorities or any other independent agency in spite of the fact that the charge-sheet has been submitted in court. On this ground, we have carefully examined the eight action taken reports submitted by the State police authorities before us and also the various materials produced and the submissions of the learned counsel for both the parties."

(Emphasis supplied)

It is clear that in an appropriate case, particularly, when the Court feels that the investigation by the State police authorities is not in the proper direction as the high police officials are involved, in order to do complete justice, it is always open to the Court to hand over the investigation to an independent and specialized agency like the CBI.

12. In the light of the above principles, now let us consider the second issue (b) viz., whether the investigation relating to the encounter killing of Tulsiram Prajapati should be transferred to the CBI in spite of the fact that the charge-sheet has been submitted in the Court by the State Police.

13. It is the specific stand of the writ petitioner that while considering the grievance of Rubabbuddin Sheikh about the death of his brother Sohrabuddin in a fake encounter, the present petitioner, mother of Tulsiram Prajapati also filed Writ Petition (Crl.) No. 115 of 2007 and, the same was tagged along

with Writ Petition (Crl.) No. 6 of 2007 which was filed by brother of Sohrabuddin. The cause title of the case vide *Rubabbuddin Sheikh vs. State of Gujarat & Ors.* (2010) 2 SCC 200 shows that Writ Petition (Crl.) No. 115 of 2007 was heard along with Writ Petition (Crl.) No. 6 of 2007. Though at the end of the judgment, this Court directed that Writ Petition (Crl.) No. 115 of 2007 be listed after eight weeks before an appropriate Bench. As pointed out by the learned counsel for the petitioner and the CBI, the said judgment records that there is strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati. It was also observed that call records of Tulsiram Prajapati were not properly analyzed and there was no justification for the then investigation officer, Ms. Geeta Johri to have walked out of the investigation pertaining to Tulsiram Prajapati. In para 65, the following observations are relevant:

"65. It also appears from the charge-sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted. The possibility of the third person being Tulsiram Prajapati cannot be ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram. *In our view, the facts surrounding his death evokes strong suspicion that a deliberate attempt was made to destroy a human witness."*

(Emphasis supplied)

Apart from the above conclusion, after analyzing several Action Taken Reports filed by the State and various circumstances and in view of the involvement of the high police officials of the State in the crime therein, this Court directed the CBI to investigate all the aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the possibility of a "larger conspiracy'"

14. Pursuant to the said direction, the CBI investigated the

cause of death of Sohrabuddin and his wife Kausarbi. The CBI, in their counter affidavit, has specifically stated that as per their investigation Tulsiram Prajapati was a key witness in the murder of Sohrabuddin and he was the 'third person' who accompanied Sohrabuddin from Hyderabad and killing of Tulsiram Prajapati was a part of the same conspiracy. It was further stated that all the records qua Tulsiram Prajapati's case were crucial to unearth the "larger conspiracy" regarding the Sohrabuddin's case which despite being sought were not given by the State of Gujarat.

15. As against the assertion of the writ petitioner and the stand of the CBI, Mr. Ranjit Kumar and Mr. Ram Jethmalani, learned senior counsel appearing for respondent Nos. 1 and 2 respectively cited several instances and relied on certain materials to show that inquiry by the CBI is not warranted. They are:

(i) Tulsiram Prajapati, as mentioned in the petition and in the prayer was the sharp shooter of Sohrabuddin. He was co-accused of Sohrabuddin in Hamid Lala's case and was taken into custody only on 29.11.2005. Obviously, he had been absconding till then. In other words, he had been absconding for nearly a year before he was arrested. After his arrest, he was lodged in Central Jail, Udaipur. While in custody, he and two of his jail-mates addressed a letter dated 11.05.2006 to the Collector, Udaipur informing him about the attack carried out on them in the jail premises and they were badly injured. He did not even express a suspicion about any one who planned the attack on him. He named seven persons who had actually participated in the attack. In the said letter, he did not allege or even suspect that this dangerous assault in jail had anything to do with the Sohrabuddin-Kausarbi fake encounter case or that he was being eliminated because he was a witness of the murder of either Sohrabuddin or his wife.

(ii) On 18.05.2006, Tulsiram Prajapati addressed another letter to the Chairman, NHRC, New Delhi. In this letter again,

he did not allege that he was an eye witness and that is why he was afraid of being eliminated. He, however, did admit that he is an accused in serious cases in the State of Maharashtra, Gujarat, Madhya Pradesh and Rajasthan. What he alleged was that there was a conspiracy among the police officers of these States to knock him out. Even the NHRC did not draw any inference. Ultimately, Tulsiram Prajapati was killed at about 8.00 a.m. on 28.12.2006. The scene of offence was within the jurisdiction of Ambaji Police Station in District Banaskantha of Gujarat. An FIR of this incident was registered on the same day within 15 minutes.

(iii) Till his death, no evidence had emerged that he had accompanied Sohrabuddin about 13 months back i.e. on 25.11.2005 to Gujarat where the encounter took place on the outskirts of Ahmedabad.

(iv) The order of this Court in Rubabbuddin Sheikh (supra) has been made under unfortunate circumstances without hearing anybody except the State of Gujarat. It is the Union of India and Amicus who is a law officer of the Union of India that wanted the investigation into the Sohrabuddin's case be transferred to the CBI which had been fully investigated by the State police and resulted in a charge-sheet as far back as on 16.07.2007. The main ground on which faults were found was that the investigation was the alleged failure to identify the Andhra Pradesh Police officers and others who participated in the abduction of the couple from Hyderabad to Gujarat leading eventually to their being killed.

(v) Apart from the 13 accused who had originally been charge-sheeted by the Gujarat Police as a result of their investigation, the CBI, on 23.07.2010, added the then Home Minister of Gujarat as accused No.16 and involved him in the Sohrabuddin's murder case.

(vi) The CBI submitted two reports- Status Report No.1 on 30.07.2010 and a week thereafter, they filed the charge-sheet.

In pursuance of the charge-sheet, accused No.16-Amit Shah was arrested on 25.07.2010 and released on bail by the High Court of Gujarat on 29.10.2010. The order releasing him on bail is subject matter of challenge in SLP (Crl.) No. 9003 of 2010. The Status Report No.1, filed by the CBI before the Bench on 30.07.2010 informed the Court that Tulsiram Prajapati was abducted along with Sohrabuddin and Kausarbi and he was handed over to the Rajasthan Police. There is no explanation as to why he was not killed along with Kausarbi or Sohrabuddin. After all, both were arch criminals jointly involved in several murderous activities all over the country. When he was spared for 13 months and then disposed of during this time he had every opportunity to disclose that he was an eye witness of the Sohrabuddin's murder case.

16. By placing all the above details and further materials both the senior counsel submitted:

(i) By filing the charge-sheet by the Gujarat Police the State has granted the prayer which Narmada Bai has made in her writ petition.

(ii) The persons whom she has implicated have all been charge-sheeted by the Gujarat Police.

(iii) The conduct of the CBI does not inspire any confidence in this case. It has become a party to a political conspiracy.

(iv) In the Status Report Nos. 1 and 2 filed by the CBI and submitted before the other Bench, they have already reported to the Court that the Sohrabuddin couple on their fateful journey from Hyderabad to Gujarat were accompanied by a 'third person' and that 'third person' was Tulsiram Prajapati. This is a dishonest finding based upon some fabricated circumstances which are capable of being easily demolished.

(v) The order dated 12.01.2010 in *Rubabbuddin Sheikh* (supra) is contrary to binding authorities and no credence or

value can in law be assigned to the two Status reports. The very anxiety on the other side that this should be handed over to the CBI creates a serious apprehension about the impartiality and independence of this agency.

Analysis as to issue (b):

17. Inasmuch as the present writ petition is having a bearing on the decision of the writ petition filed by Rubabbuddin Sheikh and also the claim of the petitioner, the observations made therein, particularly, strong suspicion about the 'third person' accompanied Sohrabuddin, it is but proper to advert factual details, discussion and ultimate conclusion of this Court in Rubabbudin Sheikh's case. Acting on a letter written by Rubabbuddin Sheikh to the Chief Justice of India about the killing of his brother Sohrabuddin Sheikh in a fake encounter and disappearance of his sister-in-law Kausarbi at the hands of the Anti-Terrorist Squad (ATS), Gujarat Police and Rajasthan Special Task Force (RSTF), the Registry of this Court, on 21.01.2007, forwarded the letter to the Director General of Police, Gujarat for necessary action. It is further seen that after six months, the Director General of Police, Gujarat directed Ms. Geeta Johri, Inspector General of Police (Crime), to inquire about the facts stated in the letter. A case was registered as Enquiry No. 66 of 2006 and from 11.09.2006 to 22.01.2007, four interim reports were submitted by Mr. V.L. Solanki, Police Inspector, working under Ms. Geeta Johri. In Writ Petition No. 6 of 2007, Rubabbuddin Sheikh prayed for direction for investigation by the CBI into the alleged abduction and fake encounter of his brother Sohrabuddin by the Gujarat Police Authorities and also prayed for registration of an offence and investigation by the CBI into the alleged encounter of one Tulsiram Prajapati, a close associate of Sohrabuddin, who was allegedly used to locate and abduct Sohrabuddin and his wife Kasurbi, and was thus a material witness against the police personnel. He also prayed for production of Kausarbi, his sister-in-law. After going through various reports, arguments of the

counsel for the writ petitioner and the State of Gujarat as well as Solicitor General for India, who appeared as Amicus Curiae, this Court disposed of the writ petition by entrusting the investigation to the CBI. Even before the said Bench, such move was strongly resisted by the State through their senior counsel Mr. Mukul Rohtagi.

18. Mr. Ram Jethmalani, learned senior counsel appearing for the respondent No. 2 in the present writ petition vehemently submitted that the entire discussion and the ultimate conclusion in Rubabbuddin Sheikh's case is unacceptable and no reliance needs to be placed on it. He also submitted that respondent No. 2 and other police officials were not heard by the said Bench before ordering fresh investigation by the CBI. It is true that in the said writ petition, on behalf of the respondents, the Bench heard only the counsel for the State of Gujarat, however, it is not the case of any one that the State was not given adequate opportunity before the said Bench. As said earlier, in fact, the State was represented by Mr. Mukul Rohtagi, reputed senior counsel and he put forth all relevant materials highlighting the stand of the State. Inasmuch as all the police officials of the State of Gujarat including the respondent No. 2 in the present writ petition were part of the State in Rubabuddin Sheikh's case, we are of the view that it cannot be said that the same is not applicable to the case on hand. The following conclusion in Rubabbuddin Sheikh's case are relevant:

> **"53.** It is an admitted position in the present case that the accusations are directed against the local police personnel in which the high police officials of the State of Gujarat have been made the accused. Therefore, it would be proper for the writ petitioner or even the public to come forward to say that if the investigation carried out by the police personnel of the State of Gujarat is done, the writ petitioner and their family members would be highly prejudiced and the investigation would also not come to an end with proper finding and if investigation is allowed

> to be carried out by the local police authorities, we feel that all concerned including the relatives of the deceased may feel that investigation was not proper and in that circumstances it would be fit and proper that the writ petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility however faithfully the local police may carry out the investigation, particularly when the gross allegations have been made against the high police officials of the State of Gujarat and for which some high police officials have already been taken into custody.
>
> **54.** It is also well known that when police officials of the State were involved in the crime and in fact they are investigating the case, it would be proper and interest of justice would be better served if the investigation is directed to be carried out by the CBI Authorities, in that case CBI Authorities would be an appropriate authority to investigate the case.
>
> **60.** Therefore, in view of our discussions made hereinabove, it is difficult to accept the contentions of Mr Rohatgi, learned Senior Counsel appearing for the State of Gujarat that after the charge-sheet is submitted in the court in the criminal proceeding it was not open for this Court or even for the High Court to direct investigation of the case to be handed over to CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

61. Keeping this discussion in mind, that is to say, in an appropriate case, the court is empowered to hand over the investigation to an independent agency like CBI even when the charge-sheet has been submitted, we now deal with the facts of this case whether such investigation should be transferred to the CBI Authorities or any other independent agency in spite of the fact that the charge-sheet has been submitted in court……..

62. From a careful examination of the materials on record including the eight action taken reports submitted by the State police authorities and considering the respective submissions of the learned Senior Counsel for the parties, we are of the view that there are large and various discrepancies in such reports and the investigation conducted by the Police Authorities of the State of Gujarat and also the charge-sheet filed by the State investigating agency cannot be said to have run in a proper direction. It appears from the charge-sheet itself that it does not reveal the identity of police personnel of Andhra Pradesh even when it states that Sohrabuddin and two others were picked up by Gujarat Police personnel, accompanied by seven personnel of Hyderabad Police. It also appears from the charge-sheet that Kausarbi was taken into one of the two Tata Sumo Jeeps in which these police personnel accompanied the accused. They were not even among the people who were listed as accused. Mr Gopal Subramanium, Additional Solicitor General for India (as he then was) was justified in making the comment that an honest investigating agency cannot plead their inability to identify seven personnel of the police force of the State.

65. It also appears from the charge-sheet that it identifies the third person who was taken to Disha farm as Kalimuddin. But it does not contain the details of what happened to him once he was abducted. The possibility of the third person being Tulsiram Prajapati cannot be

ruled out, although the police authorities or the State had made all possible efforts to show that it was not Tulsiram. In our view, the facts surrounding his death evokes strong suspicion that a deliberate attempt was made to destroy a human witness.

68. From the above factual discrepancies appearing in the eight action taken reports and from the charge-sheet, we, therefore, feel that the Police Authorities of the State of Gujarat had failed to carry out a fair and impartial investigation as we initially wanted them to do. It cannot be questioned that the offences the high police officials have committed were of grave nature which needs to be strictly dealt with."

After arriving at such conclusion, the Bench directed the CBI to investigate all aspects of the case relating to the killing of Sohrabuddin and his wife Kausarbi including the alleged possibility of a "larger conspiracy".

19. It is clear that the above judgment records that there was a strong suspicion that the 'third person' picked up with Sohrabuddin was Tulsiram Prajapati. It was also observed that the call records of Tulsiram were not properly analyzed and there was no justification for the then Investigation Officer – Ms. Geeta Johri to have walked out of the investigation pertaining to Tulsiram Prajapati. The Court had also directed the CBI to unearth "larger conspiracy" regarding the Sohrabuddin's murder. In such circumstances, we are of the view that those observations and directions cannot lightly be taken note of and it is the duty of the CBI to go into all the details as directed by this Court.

20. Countering the stand of the petitioner, CBI and Union of India, the State and other respondents projected the case relating to Navrangpura which took place on 08.12.2004. The scene of offence was the office premises of a firm called Popular Builders owned by two Patel brothers – Raman Patel

and Dashrath Patel. Some unknown persons entered into the premises and they did not kill anyone but they fired shots which damaged the computer installed in the office. An employee of the firm, who was sitting on the ground floor, where the incident took place, lodged an FIR with the Navrangpura Police Station on 08.12.2004 in the city of Ahmedabad. The FIR did not name any one of the assailant, however, it was then discovered that the FIR was substantially a false one and the suspects were known and yet had not been named. As a result of fresh discovery made during the course of investigation, it was Patel Brothers who were ultimately charge-sheeted for filing a false case. The second case is Hamid Lala murder case in which one Hamid Lala, a protector of marble dealers of Rajasthan against criminal extortion by Sohrabuddin gang was shot dead at a place within the jurisdiction of Ambaji Police Station, Udaipur in the State of Rajasthan. This incident took place on 31.12.2004. It is a fact that Sohrabuddin after committing Hamid Lala's murder absconded and was not available to the Rajasthan Police. Later, it came to the knowledge of the investigating authorities that he had been hiding in a village of Madhya Pradesh. In the Hamid Lala murder case, Sohrabuddin's co-accused were Tulsiram Prajapati, Sylvester and one Azamkhan. It was further pointed out that one Kalimuddin @ Naimuddin another notorious criminal wanted in many serious cases was residing in the State of Andhra Pradesh along with his sister Saleema Begum. They were acting as informers of the Andhra Pradesh Police and they were under their protection. Saleema Begum was residing in Government Railway Quarters. It was Kalimuddin, who seems to have approached by somebody who invited Sohrabuddin and his wife Kausarbi from their hide out in Madhya Pradesh to Hyderabad. This happened in the middle of November, 2005. It was further highlighted that on or about 22.11.2005, Sohrabuddin and his wife Kausarbi left by a luxury bus for Sangli in Maharashtra. Two tickets for the bus journey were purchased by one Sri Hari. The bus was pursued by police vehicle, two of them were in Tata Sumo vehicles belonging to the Andhra

Pradesh Police. They were driven by two drivers in the employment of police being ordinary policemen. The Andhra Pradesh police officers who sat in these two vehicles have not been identified despite investigation both by the Gujarat Police as well as later by the CBI. Sohrabuddin was done to death in an encounter with the police in the early morning of 26.11.2005. In the eventual charge-sheet filed by the Gujarat Police on 16.07.2007 against 13 persons it was reported that the encounter was a fake one. It is the definite case of the respondent No. 2 that the preliminary enquiry was first registered on 27.06.2006. In the charge-sheet filed on 16.07.2007, the Gujarat Police found no evidence of any kind to implicate the respondent No. 2-Amit Shah.

21. Mr. Ranjit Kumar and Mr. Ram Jethmalani, learned senior counsel pointed out that the Gujarat Police while investigating Sohrabuddin's murder case had conducted a good part of investigation in the State of Andhra Pradesh. The Andhra Pradesh Police, however, was determined to yield no clue whatsoever about the role of the State police in the murder. Ms. Geeta Johri, the head of the Gujarat Investigating Chief had interrogated the potential witnesses but she drew a blank. She was not provided with more materials such as Vehicle Entry Register for further investigation. The Gujarat police headed by Ms. Johri had come to the conclusion that it was possible that the couple was accompanied by a 'third person' and in all probability that person was Kalimuddin, who had succeeded in getting the couple from Madhya Pradesh to Hyderabad and he handed over the couple to the murdering team which certainly included the Andhra Pradesh officers.

22. According to the learned senior counsel, from all the details particularly, the charge-sheet filed by the Gujarat Police which included even senior police officers as accused, there is no need for further investigation by the CBI. Even otherwise, according to them, the conduct of the CBI does not inspire any confidence in this case. It has become party to a political

conspiracy and acting as subordinate police force of the Central Government in sensitive cases having political implications.

23. If we analyze the allegations of the State and other respondents with reference to the materials placed with the stand taken by the CBI, it would be difficult to accept it in its entirety. It is the definite case of the CBI that the abduction of Sohrabuddin and Kausarbi and their subsequent murders as well as the murder of Tulsiram Prajapati are one series of acts, so connected together as to form the same transaction under Section 220 of the Cr.P.C. As rightly pointed out by the CBI, if two parts of the same transaction are investigated and prosecuted by different agencies, it may cause failure of justice not only in one case but in other trial as well. It is further seen that there is substantial material already on record which makes it probable that the prime motive of elimination of Tulsiram Prajapati was that he was a witness to abduction of Sohrabuddin and Kausarbi. Both oral and documentary evidence raise strong suspicion that the encounter was fake and stage managed as predicted by Tulsiram Prajapati prior to his death in a number of communications. We have already adverted to his complaint to the District Collector, Udaipur, Rajasthan and representation to the NHRC, New Delhi. In both the representations Tulsiram Prajapati highlighted about the danger to his life. In fact, the NHRC forwarded his representation to the Director General of Police, Gujarat for necessary action.

24. It is relevant to point out the letter of Shri V.L. Solanki dated 18.12.2006 seeking permission to interrogate Tulsiram Prajapati and Sylvester lodged in Udaipur Jail. With regard to the letter, Ms. Geeta Johri, Head of SIT, is alleged to have recorded that even she may be given permission to accompany the I.O. for interrogation. It was pointed out by the CBI that the letter of Shri V.L. Solanki containing the signature of Ms. Geeta Johri was not found in the official file. In its place, it was pointed

out that a fabricated note dated 05.01.2007 along with a noting of Shri G.C.Raigar dated 06.01/08.01.2007 was found in the file in which it was recorded as under:

> "To go to Udaipur to interrogate accused Sylvester and Tulsiram Prajapati (both being allegedly primary witnesses in the case) of whom Tulsi was recently encountered at BK by border range."

If we compare the note and the above record of statement, it shows that each one is self contradictory, more particularly, the note seeks to interrogate the dead man. It also cannot be ruled out that the stand taken by the CBI that as soon as the State police learnt about the direction of investigation by Ms. Geeta Johri, immediate pre-emptive steps have been taken to eliminate Tulsiram Prajapati. The CBI has pointed out that the critical document is the note dated 22.05.2007 in the handwriting of Ms. Geeta Johri which records as under:

> "There is a systematic effort on the part of the State Government supporting the police to tamper with witnesses and evidences….."

It was pointed out that the words "State Government supporting" are sought to be struck off and are substituted by "certain agencies including" in place of "State Government supporting". This was pointed out as a direct evidence of systematic effort of the State Government attempting to tamper with the witnesses and evidences. The CBI has also pointed out that Ms.Geeta Johri in her note dated 22.05.2007 recorded that

> "…the Government may please therefore be moved to handover the case to the CBI for the purpose of meting out justice to the petitioners and maintaining the image of Gujarat Police…"

It is relevant to point out that the FIR recorded by the Gujarat Police in Sohrabuddin's case claimed it to be an encounter death and it was only on the intervention and issuance of rule

nisi by this Court and filing of eight Action Taken Reports, the SIT informed this Court that it was a fake encounter and identified the police officials.

25. Apart from the above vital information, it is useful to refer that even after the transfer of Sohrabuddin's case to the CBI on 12.01.2010, the Gujarat Police did not move till May, 2010. The first arrest in the Tulsiram Prajapti was made in May, 2010. Further, when the CBI laid charge-sheet on 23.07.2010 in Sohrabuddin's case, the State promptly concluded its investigation and filed charge-sheet in Tulsiram Prajapati's case on 30.07.2010. It was also pointed out that this was done only because after repeated requests the Gujarat Police handed over the copies of notes, diaries in Tulsiram Prajapati's case to the CBI in the month of May, 2010.

26. Another important aspect is that on earlier occasions, Tulsiram Prajapti was produced before the Court in Ahmedabad through video conferencing and he was removed from jail on 27.12.2006 and produced before a Court, when ultimately, on 28.12.2006 i.e. the next day, he was killed.

27. According to the CBI, the investigation has revealed that Tulsiram Prajapati was the 'third person' accompanying Sohrabuddin and Kausarbi on the fateful night of their abduction and subsequent murders in the year 2005. The investigation further revealed that after the abduction of Sohrabuddin and Kausarbi, police personnel of Rajasthan had taken away Tulsiram Prajapati from Valsad on 23.11.2005. However, it was pointed out by the CBI that he was shown to have been arrested on 29.11.2005 at Bhilwara by the Rajasthan Police.

28. Nayamuddin Shaikh, in his statement dated 19.02.2010, before the CBI has mentioned that they had gone to see off his brother Sohrabuddin, Kausarbi and Tulsiram Prajapati from Indore bus stand for Hyderabad and that Sohrabuddin had told him that they would be staying with Kalimuddin in Hyderabad. The above statement of Nayamuddin

Shaikh is corroborated by the statement of Rubabuddin Shaikh dated 18.02.2010 wherein he had stated that Nayamuddin told him that from Indore, Tulsiram Prajapati, friend of Sohrabuddin had also joined them for going to Hyderabad. Rubabuddin had further stated that when Tulsiram Prajapati was brought from Udaipur to Ujjain for court hearing, Tulsiram Prajapati had told him that he along with Sohrabuddin and Kausarbi had gone to Hyderabad and had stayed with Kalimuddin in Hyderabad.

29. The statement of Azam Khan dated 26.03.2010 indicates the manner in which the abduction of Sohrabuddin and Kausarbi was planned and executed. Azam Khan, in his statement had stated that he and Tulsiram Prajapati were lodged in Udaipur prison at which time Tulsiram Prajapati told him that on information given by Tulsiram Prajapati, Sohrabuddin, Kausarbi and Tulsiram were abducted from Hyderabad. Among the entire statement of Azam Khan, the relevant part is that Tulsiram Prajapati helped in tracking down Sohrabuddin.

30. Learned senior counsel for the CBI, Mr. K.T.S. Tulsi has pointed out that since the CBI had primarily conducted the investigation in the case of encounter of Sohrabuddin and the murder of Kausarbi, it has so far not launched a full fledged investigation into the circumstances in which Tulsiram Prajapati was killed. According to him, certain facts have come to the notice of the CBI only as part of "larger conspiracy" with regard to which investigation was ordered by this Court and it was pointed out that full-fledged investigation by the CBI alone reveal further facts and lead to more direct evidence. Mr. K.T.S. Tulsi is right in claiming that the investigation in every criminal case is conducted on the basis of suspicion and reason to believe and to apply the standard of proof beyond doubt at a stage when a full fledged investigation is yet to be launched.

31. It is not in dispute that it is the age-old maxim that justice must not only be done but must be seen to be done. The fact that in the case of murder of an associate of Tulsiram

Prajapati, Senior police officials and a senior politician were accused which may shake the confidence of public in investigation conducted by the State Police. If the majesty of rule of law is to be upheld and if it is to be ensured that the guilty are punished in accordance with law notwithstanding their status and authority which they might have enjoyed, it is desirable to entrust the investigation to the CBI.

32. As stated earlier, it is the specific claim of the State of Gujarat that they have conducted a fair and impartial investigation into the killing of Tulsiram Prajapati, however, analysis of the materials which we have already discussed show several lacuna on the part of the investigation by the State Government. It is relevant to point out that much before the incident dated 28.12.2006 which happened in village Chappri in Banaskantha District of the State of Gujarat in which Tulsiram Prajapati was allegedly shot in an encounter while he had opened fire on the police party, who was on the look out for him to apprehend him, after he had allegedly escaped from a running train while being taken back to Rajasthan from Gujarat where he was stated to be produced in a court proceeding, Tulsiram Prajapati lodged two complaints in written, one to the Collector, Udaipur and another addressed to the Chairman, NHRC, New Delhi expressing the apprehension that he is likely and going to be killed by Gujarat and Rajasthan police. In fact, on 28.12.2006, Tulsiram Prajapati has been killed in the fake encounter which has now being admitted to be a fake counter after a gap of 3 ½ years.

33. In *Md. Anis vs. Union of India and Ors.* 1994 Supp (1) SCC 145, it has been observed by this Court that:

> "5……Fair and impartial investigation by an independent agency, not involved in the controversy is the demand of public interest. If the investigation is by an agency, which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to the public interest as well as the interest of justice……."

> "2…..Doubts were expressed regarding fairness of investigation as it was feard that as the local police was alleged to be involved in the encounter, the investigation by an officer of the UP Cadre may not be impartial…."

34. In another decision of this Court in *R.S. Sodhi vs. State of U.P. & Ors.* 1994 Supp (1) SCC 143, the following conclusion is relevant:

> "2……We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice to entrust the investigation to the Central Bureau of Investigation forthwith and we do hope that it would complete the investigation at an early date so that those involved in the occurrences, one way or the other, may be brought to book. We direct accordingly……"

35. In both these decisions, this Court refrained from expressing any opinion on the allegations made by either side but thought it wise to have the incident investigated by an independent agency like the CBI so that it may bear credibility. This Court felt that no matter how faithfully and honestly the local police may carry out the investigation, the same will lack credibility as allegations were directed against them. This Court, therefore, thought it both desirable and advisable and

in the interest of justice to entrust the investigation to the CBI so that it may complete the investigation at an early date. It was clearly stated that in so ordering no reflection either on the local police of the State Government was intended. This Court merely acted in public interest.

36. The above decisions and the principles stated therein have been referred to and followed by this Court in Rubbabuddin Sheikh (supra) wherealso it was held that considering the fact that the allegations have been leveled against higher level police officers, despite the investigation made by the police authorities of the State of Gujarat, ordered investigation by the CBI. Without entering into the allegations leveled by either of the parties, we are of the view that it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them.

37. In view of our discussions and submission of learned counsel on either side and keeping in mind the earlier directions given by this Court, although, charge-sheet has been filed by the State of Gujarat after a gap of 3 ½ years after the incident, that too after pronouncement of judgment in Rubbabudin's case and considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, we are satisfied that the investigation conducted and concluded in the present case by the State police cannot be accepted. In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States, i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, we feel that the CBI should be directed to take the investigation.

Submission of Report by the CBI to this Court and subsequent monitoring.

38. The other question relates to submission of a report by the CBI to this Court and further monitoring in the case. Though in *Rubabbudin Sheikh's* case (supra), this Court directed the CBI that after investigation submits a report to this Court and thereafter, further necessary orders will be passed in accordance with the said report, in view of the principles laid down in series of decisions by this Court, we are not persuaded to accept the course relating to submission of report to this court and monitoring thereafter.

(a) In *Vineet Narain* (supra), this Court held as under:

> "In case of persons against whom a prima facie case is made out and a charge-sheet is filed in the competent court, it is that court which will then deal with that case on merits, in accordance with law."

(b) In *Sushil Kumar Modi* (supra), this Court observed that the monitoring process in the High Court in respect of the particular matter had come to an end with the filing of the charge-sheet in the Special Court and the matter relating to execution of the warrant issued by the Special Court against Shri Laloo Prasad Yadav was a matter only within the competence of the Special Court so that there was no occasion for the High Court to be involved in any manner with the execution of the warrant. By relying on decision in Vineet Narain's case (supra), this Court reiterated that once a charge-sheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making the CBI and other investigating agencies concerned perform their function of investigating into the offences concerned comes to an end; and thereafter it is only the court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused, including matters falling within the scope of Section 173(8) of the Code.

(c) In *M.C. Mehta (Taj Corridor Scam) vs. Union of India and Others,* (2007) 1 SCC 110, this Court again reiterated the same principle. The following conclusion is relevant:

> "30. At the outset, we may state that this Court has repeatedly emphasized in the above judgments that in Supreme Court monitored cases this Court is concerned with ensuring proper and honest performance of its duty by CBI and that this Court is not concerned with the merits of the accusations in investigation, which are to be determined at the trial on the filing of the charge-sheet in the competent court, according to the ordinary procedure prescribed by law… ….."
>
> After saying so, this Court concluded:
>
> "34. We, accordingly, direct CBI to place the evidence/ material collected by the investigating team along with the report of the SP as required under Section 173(2) CrPC before the court/Special Judge concerned who will decide the matter in accordance with law."

The above decisions make it clear that though this Court is competent to entrust the investigation to any independent agency, once the investigating agency complete their function of investigating into the offences, it is the Court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused including matters falling within the scope of Section 173(8) of the Code. Thus, generally, this Court may not require further monitoring of the case/investigation. However, we make it clear that if any of the parties including the CBI require any further direction, they are free to approach this Court by way of an application.

Conclusion:

39. In view of the above discussion, the Police Authorities of the Gujarat State are directed to handover all the records of

the present case to the CBI within two weeks from this date and the CBI shall investigate all aspects of the case relating to the killing of Tulsiram Prajapati and file a report to the concerned court/special court having jurisdiction within a period of six months from the date of taking over of the investigation from the State Police Authorities. We also direct the Police Authorities of the State of Gujarat, Rajasthan and Andhra Pradesh to cooperate with the CBI Authorities in conducting the investigation.

40. It is made clear that any observation made in this order is only for the limited purpose of deciding the issue whether investigation is to be handed over to the CBI or not and shall not be construed as expression of opinion on the merits of the case. Though the petitioner has prayed for compensation for the killing of her son, inasmuch as we direct the CBI to investigate and submit a report before the court concerned/ special court within six months, depending on the outcome of the investigation, petitioner is permitted to move the said court for necessary direction for compensation and it is for the said court to pass appropriate orders in accordance with law. The writ petition is allowed on the above terms.

D.G. Writ petition allowed.

BHANU VALVE

v.

STATE

(Special Leave Petition (Criminal) No. 3192 of 2011)

APRIL 18, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – s. 376 – Accused raped his own daughter regularly for five years after his wife left him, and fathered a child from his daughter – Conviction by courts below – On appeal, held: There is no reason to disbelieve the evidence of the daughter as also the courts below – The act of the accused was most barbaric and heinous, and cannot be condoned by any means – Thus, order passed by the courts below upheld.

CRIMINAL APPELLATE JURISDICTION : SLP (Criminal) No. 3192 of 2011.

From the Judgment and Order dated 27.07.2010 of the High Court of Bombay at Goa in Criminal Appeal No. 48 of 2009.

Garvesh Kabra for the Petitioner.

The following order of the Court was delivered

O R D E R

Heard learned counsel for the petitioner.

Delay condoned.

This petition has been filed against the impugned judgment of the Bomaby High Court dated 27.07.2010 by which the High Court has upheld the conviction of the petitioner by the trial court.

The facts in detail have been set out in the impugned judgment, and hence we are not repeating the same here. The High Court and the trial court have discussed the evidence in great detail, and we entirely agree with the view they have taken.

This is one of the most barbaric and heinous cases we have come across in our judicial career. The petitioner has been found guilty of raping his own daughter regularly for five years after his wife left him, and has produced a child from her. This kind of unheard behaviour cannot be condoned by any means. The daughter-PW-1 (prosecutrix) has given her evidence in this case, and we see no reason to disbelieve her.

The special leave petition is dismissed accordingly.

N.J. Special Leave Petition dismissed.

AFJAL IMAM
v.
STATE OF BIHAR AND ORS.
(Civil Appeal No. 2843 of 2011)

APRIL 19, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

Bihar Municipal Act, 2007:

ss.23, 27 – Election of new Mayor when the vacancy arises in the office of Mayor – Power of newly elected Mayor to nominate members of Empowered Standing Committee of the Municipal Corporation – Held: If a vote of no confidence is passed against the Mayor and a new Mayor is elected in his place, the members of the Empowered Standing Committee nominated by erstwhile Mayor shall have to vacate their seats and the new Mayor will have the authority to nominate his nominees on the Committee – If the new Mayor is not allowed to nominate his nominees on the Committee, it is likely to result into a situation of conflict – In such situation, the new Mayor would be treated dissimilarly with the earlier Mayor for no justifiable distinction – s.23(3) does not say that the newly elected Mayor will not have the powers of nominating the other members on the Committee which is available to the Chief Councillor or Mayor u/s.21(3) – Thus, in fact, by stating that the nomination of the members on the Committee is a one time act, the respondents are adding words in s.21(3) – Thus, in a way, they are supplying the words 'only by the first Chief Councillor and not by his successors in office' in place of 'the Chief Councillor' after the words 'shall be nominated' in s.21(3) of the Act – Such a reading and resultant situation will be contrary to the basic principle of parliamentary democracy, viz. that those in office ought to be representative of and responsible to the House – If, however, s.27 is read as it is, without being read in line with

and subject to ss.25(4), 23(3) and 21(3) of the Act, the councillors nominated by the earlier Mayor will continue on the Committee – This straight reading of s.27 would lead to an anomalous situation – Such interpretation would make s.27 ultra-vires Article 14 of the Constitution and contrary to the powers of Mayor u/s.21(3) – Therefore, s.27 should be read down harmoniously with ss.25(4), 23 (3) and 21(3) of the Act thereby, holding that the nominated members shall also automatically vacate their office when the Mayor nominating them is no longer in the office – This would clearly show that after the 74th Amendment to the Constitution, the Municipalities are given wide ranging powers – The Municipal Laws in other states demonstrate that wherever Mayor-in-Council system is adopted, the tenure of the members in the Council is made co-terminus with that of the Mayor – Municipalities – Interpretation of statutes – Reading down a section to save it from being ultra vires – Constitution of India, 1950 – Articles 14, 243W.

s.22 – Concept of 'Executive Power' and Article 14 – Held: The term 'Executive Power' has been specifically used in s.22 and s.57 specifically uses the term 'Municipal Governance' – The executive function comprises both the determination of the policy as well as carrying it into execution – Administrative law – Constitution of India, 1950 – Article 14.

s.28(1) – Delegation of Powers – s.28(1) of the Act provides for delegation of the powers and functions of the Municipal Corporation to the Empowered Standing Committee, and u/s.28(2), the Committee may delegate its powers and function to the Chief Councillor or to the Chief Municipal Officer.

ss.57 to 59 – Principle of Collective responsibility – Held: Empowered Standing Committee is expected to function on the principle of collective responsibility – This element of collective functioning is introduced in Municipal Governance

u/ss.57 and 59 of the Act – s.57(1) clearly uses the phrase 'Municipal Governance' – Besides, questions about the Municipal Administration can be asked to the Empowered Standing Committee and any member of the Committee can answer such questions – Apart from these provisions in the Act, separate rules have been framed under s. 419 of the Act read with ss.22 and 63 thereof, to regulate the exercise of this executive power under s.22 of the Act – These rules are known as Bihar Municipal Empowered Standing Committee Conduct of Business Rules, 2010 – These rules make it clear that the executive power vests in the Committee – Though the Mayor nominates the members of the Committee, the decisions of the Committee are to be taken by majority, and the Committee members have to function on the basis of collective responsibility – Bihar Municipal Empowered Standing Committee Conduct of Business Rules, 2010 – rr.6, 7, 10.

Empowered Standing Committee – Powers and duties – Discussed.

Interpretation of statutes:

Anomalous situation – Removal of anomaly – Held: When on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is our duty to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies.

Harmonious construction – Held: It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction – Bihar Municipal Act, 2007.

The Bihar Municipal Act, 2007, like other Municipal Acts, provided for the election of the Municipal Councillors, the Mayor or Chief Councillor and the

Deputy Mayor/Deputy Chief Councillor. It also provided for an Empowered Standing Committee to exercise the executive power of the Municipality. This Committee consists of the Mayor, the Deputy Mayor and seven other Councillors nominated by the Mayor/Chief Councillor under section 21(3) of this Act. Section 27 of the Act provides that the term of office of the Mayor/Chief Councillor and the members of the Empowered Standing Committee shall be co-terminous with the duration of members of the Municipality. The Act provides for the removal of the Mayor/Chief Councillor and the Deputy Mayor/Deputy Chief Councillor under section 25(4) of the Act by a vote of no confidence, which can be moved only after two years from taking over of the charge of the post. Section 23(3) of the Act provides for the election of a new Mayor/Chief Councillor when a vacancy arises in the office of Mayor/Chief Councillor on account of death, resignation, removal or otherwise. There is, however, no specific provision for the removal of the members of the Empowered Standing Committee appointed by the earlier Mayor or for nomination of new members on the Committee in their place by the newly elected Mayor/ Chief Councillor, thereby leading to an anomalous situation, namely that the Municipal Council will have a new Mayor/Chief Councillor having the confidence of the house, but the members on the Committee nominated by the previous Mayor/Chief Councillor who has lost the confidence of the house will continue to remain on the Committee.

The question which arose for consideration in the instant appeal was whether the members of the Empowered Standing Committee nominated by a Mayor/ Chief Councillor continue in their office or vacate it by implication, when a vacancy arises in the post of a Mayor/Chief Councillor either on account of death,

resignation, removal or otherwise, and when a new Mayor/Chief Councillor is elected in that vacancy. The consequential question was whether section 27 of the Bihar Municipal Act, 2007 should be read as it is and without reference to other connected sections, meaning thereby whether the members of the Empowered Standing Committee would continue to hold office (for the entire period of the municipal body) even if the nominator Mayor/Chief Councillor is no longer in the office or, whether such a reading of section 27 would treat a newly elected Mayor dissimilarly, and, therefore, whether section 27 of the Act is *ultra vires* the Constitution of India and in that event, can it be saved by reading it down harmoniously by implication in line with and subject to sections 25(4), 23(3) and 21(3) of the Act, thereby holding that the term of nominated members shall be co-terminous with the nominating Mayor, and they would automatically vacate their office when the Mayor nominating them is no longer in the office, and that the newly elected Mayor/Chief Councillor would have the authority to nominate seven members of his choice on the Empowered Standing Committee.

Partly allowing the appeal, the Court

HELD: 1. By virtue of Section 22 of the Bihar Municipal Act, 2007, the Executive power of the Municipality is to be exercised by the Empowered Standing Committee, and in the case of a Municipal Corporation, their committee consists of the Mayor, the Deputy Mayor and seven other Councillors under section 21(2)(a) of the Act. These seven members are to be nominated under section 21(3) of the Act by the Mayor or the Chief Councillor from amongst the Councillors. [Para 13] [794-D-E]

2. Delegation of Powers: Section 28 (1) of the Act

provides for delegation of the powers and functions of the Municipal Corporation to the Empowered Standing Committee, and under section 28(2), the Empowered Standing Committee may delegate its powers and function to the Chief Councillor or to the Chief Municipal Officer. [Para 15] [795-B-C]

3. Collective responsibility: The Empowered Standing Committee is expected to function on the principle of collective responsibility. This element of collective functioning is introduced in Municipal Governance under sections 57 and 59 of the Act. Under section 57(1), a Councillor may, subject to the provisions of sub-section (2), ask the Empowered Standing Committee, questions on any matter relating to the administration of the Municipality or municipal governance. Sub-section (2) of this section lays down the conditions subject to which this right to ask the question is to be exercised. Section 57(1) clearly uses the phrase 'Municipal Governance.' Besides, questions about the Municipal Administration can be asked to the Empowered Standing Committee and any member of the Empowered Standing Committee can answer such questions. Apart from these provisions in the Act, separate rules have been framed under Section 419 of the Act read with Sections 22 and 63 thereof, to regulate the exercise of this executive power under Section 22 of the Act. These rules are known as Bihar Municipal Empowered Standing Committee Conduct of Business Rules, 2010. Rule 6 of these rules provides for the quorum of the meeting of the committee, Rule 7 provides for the notice for the meeting, and the items to be taken up for consideration, and it specifically lays down that except with the assent of the majority of members present, no business other than those included in the list shall be transacted in the meeting. Rule 10 speaks about the executive power of the

Empowered Standing Committee. These rules make it clear that the executive power vests in the Empowered Standing Committee. Though the Mayor nominates the members of the Empowered Standing Committee, the decisions of the Empowered Standing Committee are to be taken by majority, and the committee members have to function on the basis of collective responsibility. [Paras 16, 17] [797-C-H; 798-A-H; 800-D-E]

Jagdish Singh v. State of Bihar **2009 (2) PLJR 394;** *Jitendra Kumar Verma v. State of Bihar* **2010 (3) PLJR 285 – overruled.**

Sagufta Parween v. State of Bihar **2010 (2) PLJR 1072;** *State of Jharkhand and Anr. v. Govind Singh* **2005 (10) SCC 437=2004 (6) Suppl. SCR 651;** *Union of India and Another v. Shardindu* **2007 (6) SCC 276=2007 (6) SCR 1039 ;** *Satheedevi v. Prasanna and Anr.* **2010 (5) SCC 622 = 2010 (6) SCR 657 – referred to.**

4. The Municipalities are expected to render wide-ranging functions. They are now enumerated in the Constitution. Article 243W lays down the powers of the Municipalities to perform the functions that are listed in Twelfth Schedule. [Para 25] [806-E-F]

5. The scheme of the Bihar Municipal Act, 2007: The Act is a detailed Act running into 488 sections which are divided into VIII parts and 44 chapters and they govern all the aspects of Municipal Governance and Administration. Part I contains the preliminary provisions. Part II deals with the Constitution of the Government of the Municipal Bodies. Part III deals with the Financial Management of Municipalities. Part IV is on the Municipal Revenue. Part V is on the Urban Environmental Infrastructure and Services. Part VI deals with Urban Environmental Management, Community Health and Public Safety. Part VII deals with the Regulatory

Jurisdiction, and contains chapters on Development Plans, Improvement, Public Streets, Buildings, Municipal Licences, Vital Statistics, Disaster Management and Industrial Townships. Lastly Part VIII deals with the Powers, Procedures, Offences and Penalties. Thus, the Bihar Municipal Act is quite a comprehensive Act, and the executive powers of the Municipality are vested in the Empowered Standing Committee under section 22 of the Act. The members of this Empowered Standing Committee are nominated by the Mayor. After a Mayor is removed, and another Mayor is elected in his place, if the new Mayor is not allowed to nominate his nominees on the Empowered Standing Committee, it is likely to result into a situation of conflict. This is apart from the fact that the new Mayor will be treated dissimilarly with the earlier Mayor, although both of them are elected by the same full House and there is no justifiable reason for making any distinction. The fact that a councillor is elected as the Mayor immediately after the general election to the Municipality, and he nominates seven councillors on the Empowered Standing Committee, cannot make this act of nomination as a one time act, nor does the enactment say so. After a Mayor is removed under section 25(4) of the Act, a new Mayor is to be elected under section 23(3) of the Act. This section does not say that the newly elected Mayor will not have the powers of nominating the other members on the Empowered Standing Committee which is available to the Chief Councillor or Mayor under section 21(3) of the Act. Thus, in fact, by stating that the nomination of the members on the Empowered Standing Committee is a one time act, the respondents are adding words in section 21(3) of the Act. Thus, in a way, they are supplying in section 21(3) the words 'only by the first Chief Councillor and not by his successors in office' in place of 'the Chief Councillor' after the words 'shall be nominated' in section 21(3) of the Act. Such a reading and

resultant situation will be contrary to the basic principle of parliamentary democracy, viz. that those in office ought to be representative of and responsible to the House. Therefore, if the house has lost confidence in the earlier Mayor, it is all the more necessary that the members of the Empowered Standing Committee should be made to step down alongwith him and a newly elected Mayor be permitted to have his nominees on the Empowered Standing Committee. [Paras 26, 27] [808-F-H; 809-A-H; 810-A-H; 811-B-C]

6. The concept of Executive Power and Article 14: The term executive power has been specifically used in section 22 of the Act and section 57 specifically uses the term Municipal Governance. The *executive function comprises both the determination of the policy as well as carrying it into execution.* The executive power of the Empowered Standing Committee, the newly elected Mayor will not be able to exercise the same effectively and the entire municipal governance will come in jeopardy, if the other members on the Committee are not his nominees. Apart from the said resultant administrative difficulty, if a literal interpretation of section 27 is followed alongwith adding words in section 21(3) as pointed out, the newly elected Mayor will be treated dissimilarly for no justifiable distinction. In that case, as against the earlier elected Mayor he will not permitted to have his nominees on the Empowered Standing Committee. A literal interpretation of section 27 of the Act will clearly bring it in conflict with section 21(3) of the Act, and will also be violative of Article 14 of the Constitution of India. [Paras 28, 29] [811-D-H; 812-A-D]

Rai Sahib Ram Jawaya Kapur & Ors. v. The State of Punjab **AIR 1955 SC 549 = 1955 SCR 225;** *State of West Bengal v. Anwar Ali Sarkar* **AIR 1952 SC 75 = 1952 SCR 284 – referred to.**

7.1. Removal of anomaly. When on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is duty of court to adopt the latter and not the former, seeking consolation in the thought that the law bristles with anomalies. [Para 31] [815-B; G-H; 816-A]

N.T. Veluswami Thevar v. G. Raja Nainar **AIR 1959 SC 422 = 1959 Suppl. SCR 623 – relied on.**

7.2. Making cross-reference to sections to read them harmoniously. **One of the methods adopted in such situations is to make cross-reference to the relevant sections to read them harmoniously. [Para 33] [816-E-G]**

Ramkissendas Dhanuka v. Satyacharan Lal **AIR 1950 PC 81– relied on.**

7.3. Reading down a section to save it from being *ultra vires*. The intention of the legislature as seen from the provisions of the Act and the Rules is to have a 'Mayor-in-Council' who enjoys the confidence of the Municipal House. The Empowered Standing Committee along with him is vested with the executive power and is expected to run the municipal governance. There is no reason to treat the subsequently elected Mayor differently, and deny him the right to nominate his nominees on the Empowered Standing Committee which right is available to the duly elected Mayor under section 21(3) of the Act. Except for the fact that the person who is elected as the Mayor after the no confidence motion is passed against the first Mayor, is elected subsequent to the first Mayor, there is no ground to classify the subsequent Mayor differently from the first Mayor. The view canvassed by the respondents would lead to a conflict between the newly elected Mayor and the other members of the Empowered Standing Committee if they are not nominated by him. That was surely not the

intention of the legislature. Considering the powers which are available to the Empowered Standing Committee, if the newly elected Mayor is not read as having the power to nominate his nominees on the Empowered Standing Committee, he will be treated dissimilarly and such an interpretation will make section 27 violative of Article 14 of the Constitution and contrary to the powers of the Mayor under section 21(3) of the Act. The only way, therefore, to save section 27 is to read it down by implication, and to make it subject to sections 25(4), 23 (3) and 21(3) of the Act, thereby, holding that the nominated members shall also automatically vacate their office when the Mayor nominating them is no longer in the office. Thus, the newly elected Mayor will also have the authority to nominate seven members of his choice on the Empowered Standing Committee. This would clearly show that after the 74th Amendment to the Constitution, the Municipalities are strengthened and they are given wide ranging powers. The Municipal Laws in other States demonstrate that wherever Mayor-in-Council system is adopted, the tenure of the members in the Council is made co-terminus with that of the Mayor. The idea is that the Mayor should have the confidence of the Executive Council or the Empowered Standing Committee, as the case may be, apart from that of the House. The members of the Empowered Standing Committee are authorized to answer the questions on behalf of the Empowered Standing Committee under the Bihar Municipal Act. Thus, there is an element of collective responsibility. The Empowered Standing Committee is supposed to function on the basis of the principle of Democratic Governance in the sense that the decisions are to be taken by the majority. If the new Mayor is not permitted to have his nominees on the Empowered Standing Committee, the collective functioning will be under jeopardy. Thus, there is a clear omission in the

Bihar Municipal Act, 2007 in this behalf. The interpretation sought to be placed on section 27 by the respondents requires addition of words in section 21(3) of the Act. Even after adding the necessary words, the result will be incongruous to a democratic functioning in as much as the nomination on the Empowered Standing Committee will be a one time act and the newly elected Mayor will be at the mercy of the other members of the Empowered Standing Committee. Such a reading will be also be contrary to section 21 of the Act and the newly elected Mayor will be treated dissimilarly as against the earlier elected Mayor for no justifiable reason. Thereby section 27 will be *ultra vires* to Article 14 of the Constitution. The legislature cannot be attributed such an intent. On the other hand, reading section 27 by making a cross-reference and making the same subject to sections 25 (4), 23 (3), 21 (3) and 21 (4) will lead to a harmonious functioning of the Municipal Corporation and will also save the section from being *ultra vires* Article 14. The judgment of the Division Bench of the Patna High Court in *Jagdish Singh V. State of Bihar* and that of the full bench of that Court in *Jitendra Kumar V. State of Bihar* do not lay down the correct legal position and are overruled. Impugned judgment and order passed by the Division Bench of the High Court is set aside. The said writ petition filed by the appellant herein stands allowed in part. Section 27 of the Bihar Municipal Act 2007, shall be read down harmoniously with and subject to sections 25(4), 23(3), 21(3) and 21(4) of the Act. The respondent no.3, the District Magistrate, Patna, Bihar is consequently directed to administer the oath of secrecy under Section 24 of the Act to the seven Municipal Councillors nominated by the appellant to the Empowered Standing Committee. The appellant as well as the members of the Empowered Standing Committee shall be entitled to exercise all the powers as the Mayor and the members of the Empowered Standing Committee as provided in

the Bihar Municipal Act, 2007, in accordance with law. [Paras 35, 37-39] [819-C-H; 820-A-C; 821-E-H; 822-A-H; 823-A-B]

Durgesh Sharma v. Jayshree **2008 (9) SCC 648 = 2008 (13) SCR 1056 ;** ***20th*** *Century Finance Corpn. Ltd. v. State of Maharashtra* **2000 (6) SCC 12 = 2000 (1) Suppl. SCR 120 – relied on.**

Reserve Bank of India v. Peerless Corp. **1987 (1) SCC 424=1987 (2) SCR 1 ;** *Union of India v. Filip Tiago De Gama,* **1990 (1) SCC 277= 1989 (2) Suppl. SCR 336;** *Anwar Hasan Khan v. Mohd. Shafi and others* **2001 (8) SCC 540;** *S.V. Kondeakar v. V.M. Deshpande* **AIR 1972 SC 878 = 1972 (2) SCR 965, referred to.**

Case Law Reference:

2009 (2) PLJR 394	**overruled**	**Paras 7, 38**
2010 (2) PLJR 1072	**referred to**	**Para 8**
2010 (3) PLJR 285	**overruled**	**Paras 9, 38**
2004 (6) Suppl. SCR 651	**referred to**	**Para 22**
2007 (6) SCR 1039	**referred to**	**Para 23**
2010 (6) SCR 657	**referred to**	**Para 24**
1955 SCR 225	**referred to**	**Para 28**
1952 SCR 284	**referred to**	**Para 29**
1987 (2) SCR 1	**referred to**	**Para 30**
1989 (2) Suppl. SCR 336	**referred to**	**Para 30**
2001 (8) SCC 540	**referred to**	**Para 30**
1959 Suppl. SCR 623	**relied on**	**Para 31**
1972 (2) SCR 965	**referred to**	**Para 32**

AIR 1950 PC 81	**relied on**	**Para 33**
2008 (13) SCR 1056	**relied on**	**Para 34**
2000 (1) Suppl. SCR 120	**relied on**	**Para 36**

CIVIL APPEAL JURISDICTION : Civil Appeal No. 2843 of 2011.

From the Judgment and Order dated 08.07.2010 of the High Court of Judicature at Patna in CWJC No. 9981 of 2010.

S.B.K. Mangalam, Rajesh Anand, Ashutosh Pande, Madhumita Singh and Abhay Kumar for the Appellant.

Santosh Mishra, Gopal Singh, Manish Kumar, Chandan Kumar, Santosh Kumar Tripathi and Neeraj Shekhar for the Respondents.

The Judgment of the Court was delivered by

GOKHALE J. 1. Leave granted.

By the order passed by us on April 1, 2011, we had allowed this appeal. We had, further, observed that we will indicate our reasons by a separate judgment. We do so herein.

2. The Bihar Municipal Act, 2007, like other Municipal Acts, provides for the election of the Municipal Councillors, the Mayor or Chief Councillor and the Deputy Mayor/Deputy Chief Councillor. It also provides for an Empowered Standing Committee to exercise the executive power of the Municipality. This committee is supposed to consist of the Mayor, the Deputy Mayor and seven other Councillors nominated by the Mayor/ Chief Councillor under section 21 (3) of this Act. Section 27 of this Act provides that the term of office of the Mayor/Chief Councillor and the members of the Empowered Standing Committee shall be co-terminous with the duration of members of the Municipality. The Act provides for the removal of the

Mayor/Chief Councillor and the Deputy Mayor/Deputy Chief Councillor under section 25 (4) of the Act by a vote of no confidence, which can be moved only after two years from taking over of the charge of the post. Section 23 (3) of the Act provides for the election of a new Mayor/Chief Councillor when a vacancy arises in the office of Mayor/Chief Councillor on account of death, resignation, removal or otherwise. There is, however, no specific provision for the removal of the members of the Empowered Standing Committee appointed by the earlier Mayor or for nomination of new members on the Committee in their place by the newly elected Mayor/Chief Councillor, thereby leading to an anomalous situation, namely that the Municipal Council will have a new Mayor/Chief Councillor having the confidence of the house, but the members on the Committee nominated by the previous Mayor/Chief Councillor who has lost the confidence of the house will continue to remain on the committee.

3. **Questions of Law arising in this appeal**

A question, therefore, arises as to whether the members of the Empowered Standing Committee nominated by a Mayor/Chief Councillor continue in their office or vacate it by implication, when a vacancy arises in the post of a Mayor/Chief Councillor either on account of death, resignation, removal or otherwise, and when a new Mayor/Chief Councillor is elected in that vacancy. This appeal raises the consequential question as to whether section 27 of the Act should be read as it is and without reference to other connected sections, meaning thereby whether the members of the Empowered Standing Committee will continue to hold office (for the entire period of the municipal body) even if the nominator Mayor/Chief Councillor is no longer in the office? Or, whether such a reading of section 27 treats a newly elected Mayor dissimilarly, and therefore, whether section 27 of the Act is ultra vires the Constitution of India? In that event, can it be saved by reading it down harmoniously by implication in line with and subject to sections 25 (4), 23 (3) and 21 (3) of

the Act, thereby holding that the term of nominated members shall be co-terminous with the nominating Mayor, and they will automatically vacate their office when the Mayor nominating them is no longer in the office, and that the newly elected Mayor/Chief Councillor will have the authority to nominate seven members of his choice on the Empowered Standing Committee?

4**. Facts leading to this appeal**:-

The Election to the Patna Municipal Corporation was held sometime in May/June, 2007. The Municipal Corporation has 72 members. After the election of the Municipal Corporation, the councillors elected one Shri Sanjay Kumar as the Mayor and one Shri Santosh Mehta as the Deputy Mayor. Two years later, no confidence motions were moved against both of them on 13.6.2009, and were passed on 14.7.2009. As far as the motion against the Mayor is concerned, we are informed that 42 members voted in favour thereof and 28 opposed it. One member is reported to have remained absent being in jail, and one had died.

5. The above referred Sanjay Kumar challenged the decision on the no confidence motion by filing a Writ Petition bearing No. 8603 of 2009. A Learned Single Judge of the Patna High Court who heard the petition, initially granted a stay on the fresh election being held to fill the vacancy in the post of Mayor arising out of the no confidence motion. Ultimately the petition was allowed. That decision was challenged in an appeal to the Division Bench of the Patna High Court, and the Division Bench set aside that order by its judgment dated 14.5.2010. Shri Sanjay Kumar challenged the decision of the Division Bench by filing Special Leave Petition No. 16578/2010. A prayer was made to this Court that the election to fill the vacancy should not be permitted. This Court did not grant that prayer, but vide its order dated 31.5.2010 directed that the subsequent election will be subject to the decision on this SLP. (It is relevant to place it on record at this stage that this Writ

Petition came to be dismissed by this bench by its separate order passed on 3.2.2011).

6. In view of the order passed by this Court on 31.5.2010, a notice was given on 3.6.2010, and a meeting was accordingly convened on 14.7.2010 wherein the appellant was elected as the Mayor of the Municipal Corporation. We are informed that the he obtained 44 votes and Shri Sanjay Kumar 18 votes, a third candidate 9 votes and 1 vote was rejected. The appellant was given the oath of his office on the same day. On his election, he nominated 7 councillors to be the members of the Empowered Standing Committee of the Municipal Corporation as per the provision of section 21 (3) of the Bihar Municipal Act. He requested the District Magistrate (D.M.) of Patna to give them oath of secrecy as per section 21 (4) read with section 24 of the Act, but the D.M. declined to do so, in view of the decision of a Full Bench of the Patna High Court dated 11.5.2010 in LPA No.618 of 2010 holding that such nomination by the Mayor is only a one time Act. In that decision, the Full Bench had upleld the Govt. Memo No.6020 dated 12.12.2009 to the effect that notwithstanding change of Mayor/Chief Councillor, the Empowered Standing Committee as nominated earlier shall continue.

7. **The facts leading to the decision of the Full Bench:-**

A similar problem had arisen in another Municipal Corporation of Bihar, viz. Ara Municipal Corporation. One Jagdish Singh who was elected as a councillor of Ara Municipal Corporation, filed a Writ Petition bearing CWJC NO. 9380 of 2008 to challenge the constitutional validity of the above referred section 27, on the ground that although there was a provision for the removal of the Chief Councillor (or Mayor) in section 25 of the Act, there was no similar provision for removal of the members of the Empowered Standing Committee. Once the councillors were nominated to the Empowered Standing Committee, they continued to be members of that committee

so long as they remained councillors. There was a lack of any provision for removal of members of the Empowered Standing Committee, and the members of such committee had been given unguided and unbridled power. The Division Bench negated that contention by holding that a member of the Municipal Council, if he is nominated as a member of the Empowered Standing Committee, can either be recalled under section 17 of the Act, or if he incurs disqualification for holding the post as a member, and an order of removal for such disqualification is passed under section 18 (2), his membership of the Empowered Standing Committee ipso facto comes to an end. The bench, therefore observed:-

> "In this view of the matter, even if there was no specific provision for removal of the members of the Empowered Standing Committee, there is enough mechanism under the Act, 2007 that cessation of membership to the municipality automatically brings to an end the membership of the Empowered Standing Committee".

The High Court therefore repelled the challenge to the constitutionality of Section 27 of the Act. This Division Bench rendered its decision on 14.11.2008 which is reported in 2009 (2) PLJR at page 394 in the case of *Jagdish Singh v. State of Bihar*.

8. It so transpired that in another Municipal Corporation, namely Gaya Municipal Corporation, the Mayor of the Municipal Corporation expired, and one Sagufta Parween was elected as a new Mayor in that vacancy. She wanted to nominate her nominees on the Empowered Standing Committee, but was not allowed to do so in view of the above referred Government Direction in Memo No. 6020 dated 18.12.2009, to the effect that notwithstanding the change of Mayor or Chief Councillor, the Empowered Standing Committee of the Municipal Corporation, as nominated earlier, would continue. Meaning thereby, that the Mayor/Chief Councillor newly elected would not have the power to nominate members of the Empowered

Standing Committee of the Corporation in terms of section 21 (3) of the Municipal Act. Smt. Sagufta Parween challenged that Government Direction by filing CWJC No. 1067 of 2010 which was heard by a Single Judge, who held that the aforesaid Government Direction was contrary to the statutory provisions and the statutory scheme. The Learned Single Judge therefore, allowed the Writ Petition and directed that the necessary consequences will accordingly follow. This Judgment of the Learned Single Judge dated 23.2.2010 is reported in 2010 (2) PLJR at page 1072.

9. Being aggrieved by this judgment of the Single Judge, one Jitendra Kumar Verma and others filed LPA No. 618 of 2010. When this LPA came up before a Division Bench, it took note of the above referred Division Bench decision rendered in *Jagdish Singh vs. The State of Bihar & Ors.* (Supra), and thought it appropriate that the matter should be heard by a larger Bench. That LPA, therefore, came to be decided by a Full Bench. The Full Bench in its decision dated 11.5.2010 followed the decision of the Division Bench in the case of *Jagdish Singh* (Supra), and held in paragraph 19 of its judgment reported in 2010 (3) PLJR 285 that the appointment of the members of the Empowered Standing Committee was a one time act. The full bench therefore allowed the appeal and set aside the order passed by the learned Single Judge.

10. On this background, after the appellant in the present appeal was elected as the Mayor of Patna, he nominated his nominees on the Empowered Standing Committee. However, the D.M., Patna declined to administer the oath of office to them. The appellant therefore filed Writ Petition bearing No. 9981 of 2010 for a declaration that section 27 of the Act is ultra vires to the provisions of the Constitution of India and to section 21 of the Act, and alternatively to read down section 27 of the act. The appellant also prayed for a Writ of Mandamus commanding the respondent D.M., Patna to administer oath of office to those nominees. The Division Bench which decided

the petition, noted in its order that the petition had sought to challenge the constitutional validity of section 27 of the Bihar Municipal Act, 2007 for being contrary to section 21 of that Act. It, however, noted that the matters at issue were squarely covered by the decision of the Full Bench in *Jitendra Kumar Vs. State of Bihar* (Supra). The bench, therefore, passed an order dated 8.7.2010 that for the reasons recorded by the Full Bench, this petition was dismissed in limine. This order is being challenged in this Appeal by Special Leave wherein the issues which are mentioned at the outset of this judgment have been raised for our consideration.

11. We have heard the learned counsel for the appellant as well as the counsel for the State of Bihar, Patna Municipal Corporation and the counsel for the intervening members of the Empowered Standing Committee who would be unseated if this appeal was to be allowed. We have also gone through the written submissions presented by them.

12. **The relevant Sections of the Bihar Municipal Act, 2007**

In this appeal we are concerned with the interrelation amongst sections 21, 23, 25 and 27 of the Act. The sections of the Bihar Municipal Act relevant for our purposes are as follows:-

"2. Definition:-

(36) "**Empowered Standing Committee**" means the Empowered Standing Committee referred to in Section 21.

Section 21. Constitution of Empowered Standing Committee of Municipality. (1) In every Municipality there shall be an Empowered Standing Committee.

(2) The Empowered Standing Committee shall consist of-

(a) in the case of a Municipal Corporation, the

Mayor, the Deputy Mayor, and seven other Councillors;

(b) in the case of a Class 'A' or Class 'B' Municipal Council, the Municipal Chairperson, the Municipal Vice Chairperson, and five other Councillors;

(c) in the case of a Class 'C' Municipal Council, the Municipal Chairperson, the Municipal Vice-Chairperson, and three other Councillors; and

(d) in the case of a Nagar Panchayat, the Municipal President, the Municipal Vice-President, and three other Councillors.

(3) The other members of the Empowered Standing Committee shall be nominated by the Chief Councillor from among the Councillors elected under sub section (1) of section 12 within a period of seven days of his entering office.

(4) The other members of the Empowered Standing Committee shall assume charge after taking the oath of secrecy under section 24.

(5) The Chief Councillor shall be the presiding officer of the Empowered Standing Committee.

(6) The manner of transaction of business of the Empowered Standing Committee shall be such as may be prescribed.

(7) The Empowered Standing Committee shall be collectively responsible to the Municipal Corporation or the Municipal Council or the Nagar Panchayat, as the case may be.

Section 22. Executive power of Municipality to be exercised by Empowered Standing Committee. –

Subject to the provisions of this Act and the rules and the regulations made there under, the executive power of a Municipality shall be exercised by the Empowered Standing Committee.

Section 23. Election of Chief Councillor and Deputy Chief Councillor. – (1) The Councillors shall, in the first meeting under section 35, elect in accordance with such procedure as may be prescribed from amongst the Councillors to be the Chief Councillor and Deputy Chief Councillor who shall assume office forthwith after taking the oath of secrecy under section 24.

(2) If the Councillors fail to elect a Chief Councillor under sub-section (1), the State Government shall appoint by name one of the Councillors to be the Chief Councillor.

(3) In the case of any casual vacancy in the office of the Chief Councillor caused by death, resignation, removal or otherwise, the Councillors shall, in accordance with such procedure as may be prescribed, elect one of the Councillors to fill up the vacancy.

Section 25. Removal of Chief Councillor/Deputy Chief Councillor. – (1) The Chief Councillor/Deputy Chief Councillor shall cease to hold office as such if he ceases to be a Councillor.

(2) The Chief Councillor may resign his office by writing under his hand addressed to the Divisional Commissioner and Deputy Chief Councillor may resign his office by writing under his hand addressed to the Chief Councillor.

(3) Every resignation under sub-section (2) shall take effect on the expiry of seven days from the date of such resignation, unless within the said period of seven days he withdraws such resignation by writing under his hand addressed to the Divisional Commissioner or the Chief Councillor, as the case may be.

(4) The Chief Councillor/Deputy Chief Councillor may be removed from office by a resolution carried by a majority of the whole number of Councillors holding office for the time being at a special meeting to be called for this purpose in the manner prescribed, upon a requisition made in writing by not less than one-third of the total number of Councillors, and the procedure for the conduct of business in the special meeting shall be such as may be prescribed:

"Provided that a no confidence motion shall not be brought against the Chief Councillor/Deputy Chief Councillor within a period of two years of taking over the charge of the post:

Provided further that a no confidence motion shall not be brought again within one year of the first no confidence motion:

Provided further also that no confidence motion shall not be brought within the residual period of six months of the municipality.

(5) "Without prejudice to the provisions under this Act, if, in opinion of the Divisional Commissioner having territorial jurisdiction over the Municipality the Chief Councillor/ Deputy Chief Councillor absents himself without sufficient cause for more than three consecutive meetings or sittings or willfully omits or refuses to perform his duties and functions under this Act, or is found to be guilty of misconduct in the discharge of his duties or becomes physically or mentally incapacitated for performing his duties or is absconding being an accused in a criminal case for more than six months, the Divisional Commissioner may, after giving the Chief Councillor/ Deputy Chief Councillor a reasonable opportunity for explanation, by order, remove such Chief Councillor from office.

(6) The Chief Councillor/Deputy Chief Councillor so removed shall not be eligible for re-election as Chief Councillor/Deputy Chief Councillor or Councillor during the remaining term of office of such Municipality.

Appeal shall lie before the State Government against the order of the Divisional Commissioner."

Section 27. The term office of the Chief Councillor and the members of Empowered Standing Committee.- The term of office of the Chief Councillor and the members of Empowered Standing Committee shall be coterminous with the duration of members of the Municipality."

13. As seen from section 22 above, the Executive power of the Municipality is to be exercised by the 'Empowered' Standing Committee, and in the case of a Municipal Corporation, their committee consists of the Mayor, the Deputy Mayor and seven other Councillors under section 21 (2) (a) of the Act. These seven members are to be nominated under section 21 (3) of the Act by the Mayor or the Chief Councillor from amongst the Councillors.

14. **Changes brought in by the Present Act**

It would be relevant to refer to the other connected provisions to enable us to decide the question of law which is raised in this appeal. As far as Patna Municipal Corporation is concerned, it was earlier governed under the Patna Municipal Corporation Act, 1951 (which has been repealed by section 488 of the Bihar Municipal Act, 2007). It is material to note that under section 36 of the repealed Act, the principal committee of the Municipal Corporation was known merely as the 'Standing Committee', and the members of the Standing Committee were directly elected under section 37 of the Act by the full house of the Municipal Corporation, and their tenure was for two years. They were not nominated by the Mayor.

Under the present Act, they are nominated by the Mayor. Now, the principal committee of the Municipal Corporation is known as the 'Empowered Standing Committee' under section 22 of the Act.

15. **Delegation of Powers**

Section 28 (1) of the present Act provides for delegation of the powers and functions of the Municipal Corporation to the Empowered Standing Committee, and under section 28 (2), the Empowered Standing Committee may delegate its powers and function to the Chief Councillor or to the Chief Municipal Officer. This section 28 reads as follows:-

"28. **Delegation of Powers and Functions.-**(1) The Municipality may, by resolution, delegate, subject to such conditions as may be specified in the resolution, any of its powers or functions to the Empowered Standing Committee.

(2) The Empowered Standing Committee may, by order in writing, delegate, subject to such conditions as may be specified in the order, any of its powers or functions to the Chief Councillor or to the Chief Municipal Officer.

(3) Subject to such standing orders as may be made by the Empowered Standing Committee in this behalf –

(a) the Chief Councillor may, by order, delegate, subject to such conditions as may be specified in the order, any of his powers or functions to the Deputy Chief Councillor or the Chief Municipal Officer;

(b) the Chief Municipal Officer may, by order, delegate, subject to such conditions as may be specified in the order, any of his powers or functions, excluding the powers or functions under sub-section (2) of section 354 or section 365, to any

officer or other employee of the Municipality; and

(c) any officer of the Municipality, other than the Chief Municipal Officer, may, by order, delegate, subject to such conditions as may be specified in the order, any of his powers or functions to any other officer subordinate to him.

(4) Notwithstanding anything contained in this section, the Empowered Standing Committee, the Chief Councillor, the Chief Municipal Officer, or the other officer referred to in clause (C) of sub-section (3), shall not delegate –

(a) any of its or his powers or functions delegated to it or him under this section, or

(b) such of its or his powers or functions as may be specified by regulations."

16. **Collective responsibility**

The Empowered Standing Committee is expected to function on the principle of collective responsibility. This element of collective functioning is introduced in Municipal Governance under sections 57 and 59 of the Act. Under section 57 (1), A Councillor may, subject to the provisions of sub-section (2), ask the Empowered Standing Committee, questions on any matter relating to the administration of the Municipality or municipal governance. Sub-section (2) of this section lays down the conditions subject to which this right to ask the question is to be exercised. This section is divided into six sub-sections, though for our purpose it is section 57 (1) which is relevant which reads as follows:-

"**57. Right of Councillors to ask questions**. - *(1) A Councillor may, subject to the provisions of sub-section (2), ask the Empowered Standing Committee questions on* ***any matter relating to the administration of the Municipality or municipal governance****, and* ***all such***

questions** shall be addressed to the Empowered Standing Committee and **shall be answered either by the Chief Councillor or by any other member of the Empowered Standing Committee."

(emphasis supplied)

In continuation of this Section 57, Section 59 provides for asking for a statement from the Empowered Standing Committee on any urgent matter relating to administration of the Municipality. This section reads as follows:

"**59. Asking for statement from Empowered Standing Committee. -** (1) Any Councillor may ask for a statement from the Empowered Standing Committee on an urgent matter relating to the administration of the Municipality by giving notice to the Municipal Secretary at least one hour before the commencement of the meeting of the Municipality on any day.

(2) **The Chief Councillor or a member of the Empowered Standing Committee may either make a brief statement on the same day or fix a date for making such statement.**

(3) Not more than two such matters shall be raised at the same meeting and, in the event of more than two matters being raised priority shall be given to the matters which are, in the opinion of the Chief Councillor, more urgent and important.

(4) There shall be no debate on such statement at the time it is made."

As has been seen, section 57 (1) clearly uses the phrase '**Municipal Governance.**' Besides, as seen from these provisions, questions about the Municipal Administration can be asked to the Empowered Standing Committee and any

member of the Empowered Standing Committee can answer such questions.

17. **Relevant provisions of the Bihar Municipal Empowered Standing Committee Conduct of Business Rules, 2010**

(i) Apart from these provisions in the Act, separate rules have been framed under Section 419 of the Act read with Sections 22 and 63 thereof, to regulate the exercise of this executive power under Section 22 of the Act,. These rules are known as **Bihar Municipal Empowered Standing Committee Conduct of Business Rules, 2010**. Rule 6 of these rules provides for the quorum of the meeting of the committee, Rule 7 provides for the notice for the meeting, and the items to be taken up for consideration, and it specifically lays down that except with the assent of the majority of members present, no business other than those included in the list shall be transacted in the meeting. **Rule 7** reads as follows:-

"**7**. The notice for the meeting shall be issued by the Chief Municipal Officer with the approval of the Chairman, at least four days before the date of the meeting, but in case of an emergency meeting the notice may be issued at least 48 hours before the meeting, The Chief Municipal officer shall send to each member of the committee at least 24 hours previous to the meeting; a list of business as approved by the Chairman. Except with the assent of the majority of members present, no business other than those included in the list shall be transacted in the meeting."

(ii) **Rule 10** of these rules speaks about the executive power of the Empowered Standing Committee. This rule reads as follows:-

"**10.** The Executive Powers of the Municipality shall vest in the Empowered Standing Committee. **Executive Powers shall be used collectively.**

Provided that administrative control on the Staffs of Municipality shall vest in Chief Executive Officer/Executive Office. Resolution shall be passed in the light of orders/ directions issued time to time by State Government.

Officially brought agenda shall contain the following-

(a) items relating to the establishment as per provision of the Act, which includes appointments promotions, benefits, transfers, disciplinary actions etc. of the employees of the Municipality.

items relating to the collection of taxes and fees.

(b) items relating to the financial position of the Municipality.

(c) development activities undertaken and to be undertaken by the Municipal body.

(d) items necessary for effective implementation of the provision of the Act.

Provided that all items are to be placed before the committee by the Chief Municipal officer and shall be in the form of memorandum which will include the subjects, the status and the proposal to be approved by the committee. A separate sheet is to be attached under the signature of the Chief Municipal officer specifying the period by which the proposal approved by the committee shall be implemented.

(4) The Empowered Standing Committee shall not discuss and pass a resolution in

(a) any matter/issue which is against the rules, laws and directives of the State Government.

(b) any issue which is sub-judice in any court of law and

which may affect the interest of Municipality adversely.

(5) All issues passed by the committee shall be placed before the Municipality in its next meeting."

(iii) **Rule 14** lays down that the business of the committee will be decided by majority and this rule reads as follows:-

"**14.** All business which may come before the Committee at any meeting shall be decided by the majority of the members present by voting at the meeting and in case of equality of votes, the Chairman shall have a second or casting vote."

These rules make it clear that the executive power vests in the Empowered Standing Committee. Though the Mayor nominates the members of the Empowered Standing Committee, the decisions of the Empowered Standing Committee are to be taken by majority, and the committee members have to function on the basis of collective responsibility.

18. **Submissions on behalf of the appellant**

The counsel for the appellant therefore submits that consequently if a vote of no confidence is passed against the Mayor and a new Mayor is elected in his place, it should be read by implication that the members of the Empowered Standing Committee nominated by him shall vacate their seats and the new Mayor will have the authority to nominate his nominees on the committee. Otherwise, the new Mayor will not be able to function in unison with the other members on the committee. On the other hand, if section 27 is read as it is, without being read in line with and subject to sections 25 (4), 23 (3) and 21 (3) of the Act, the councillors nominated by the earlier Mayor will continue on the Empowered Standing Committee. Thus, although the Mayor will be one who will have the confidence of the House, the other members of the

Empowered Standing Committee will be those who have been nominated by the earlier Mayor who has lost confidence of the House. The functioning on the basis of collective responsibility will be difficult. There is a clear possibility of a conflict between the new Mayor and the other members of the Empowered Standing Committee, and the new Mayor who is elected by the House will not be able to carry the municipal governance as per the desire of the House, since his proposals could be opposed by the members of the Empowered Standing Committee who are nominated by the erstwhile Mayor. This straight reading of section 27 thus leads to an anomalous position. The counsel for the appellant submits that although there is no difference in the position of the newly elected Mayor and the earlier Mayor, if literal interpretation is accepted, the newly elected Mayor will be treated dis-similarly as against the earlier elected Mayor, and the entire municipal governance will come under strain. He therefore submits that section 27 is ultra-vires section 21 of the Act and Article 14 of the Constitution of India. Section 27 should therefore be either struck down, or if it is to be saved, it should be read down harmoniously with sections 25 (4), 23 (3) and 21 (3) of the Act.

19. **Submissions on behalf of the Respondents**:

The counsel for the respondents, on the other hand, submit that as held by different benches of the Patna High Court, the appointment of the members of the Empowered Standing Committee is a one time Act. A statutory provision should be read as it is, and the court should not add anything to the statute. They submit that the municipal administration is supposed to be run on a non-political basis, and it is immaterial that another Mayor is elected in place of the previous one, since all of the Councillors are supposed to work harmoniously with each other for the benefit of all the citizens.

20. **Reference to the provisions in Municipal Laws of other States**

The respondents submit that the Local Government is a subject in the **State List** under the Constitution of the India **(being entry No.5 in list II of the Seventh Schedule thereof)** and it is for the State Government concerned to make necessary statutory provisions. The provisions as enacted should be given due respect.

(i) Thus the respondents point out that different States have made different provisions in this behalf. In the neighbouring State of West Bengal under the system of 'Mayor-in-council' under the **Howrah Muncipal Corporation Act, 1980 and Calcutta Municipal Corporation Act, 1980**, the Mayor is elected by the corporators but the Deputy Mayor and the council members are nominated by the Mayor under section 6 (2) of the Howrah Act and section 8 (2) of the Calcutta Act. Under section 7 (d) of the Howrah Act and section 9 (d) and (e) of the Calcutta Act, members of the Mayor-in-council have to vacate their seats when a newly elected Mayor enters into the office in place of the earlier Mayor. The Mayor has the power to remove the Council member/Deputy Mayor under section 7 (c) of the Howrah Act and section 9(c) of the Calcutta Act. The West Bengal Municipal Corporation Act, 2006 applies to corporations other than Howrah and Calcutta in the State of West Bengal. It also creates a 'Mayor-in-Council' system and under section 41 of the Act, the executive power of the corporation vests in the Mayor-in-Council. The Deputy Mayor and members of the council are nominated by the Mayor under section 19 (2) of the Act and their tenure is co-terminous with that of the Mayor under section 20 (d) of the Act.

(ii) Similar is the provision in Madhya Pradesh under section 37 of the **Madhya Pradesh Municipal Corporation Act, 1956** (the section in the present form is since 1998 Amendment). The Mayor, who is elected by the Councillors from amongst themselves, nominates his Mayor-in-Council members. Section 37 (3) provides that the members shall hold office during the pleasure of the Mayor. Section 37 (8) provides

that the new Mayor (i.e., elected after the office of the Mayor is declared vacant) has the choice to continue the old Council members or appoint new members in their place.

(iii) The same is the effect and import of section 70 (in place since the 1998 Amendment) of the **M.P. and Chattisgarh Municipalities Act, 1961**. Section 70 deals with President-in-Council of the Municipal Council and is in pari materia with section 37 of the Madhya Pradesh Municipal Corporation Act, 1956.

(iv) In the **Mizoram Municipalities Act**, **2007**, there is a provision for an Executive Council similar to the Empowered Standing Committee. The tenure of the members of the Executive Council is co-terminous with that of the Chairman under section 21 (d) of Mizoram Municipalities Act, 2007.

(v) Somewhat similar are the provisions under sections 52, 64 and 66 of the **Goa Municipalities Act 1968.** Under section 66 (1) of the Act, the term of office of the members of the Standing Committee is co-terminous with the term of the Chairperson during whose period they are elected. The Chairperson of the Municipal Council and the members of the Standing Committee under that Act are, however, elected by the councillors, and not nominated by the Chairperson.

(vi) It is therefore, submitted by the respondents that it is for a State Legislature to lay down the law as to what should be the provision in this behalf, and in its wisdom the Bihar Legislature had not made the term of the councillors co-terminous with that of the Mayor, and it should be read as it is.

21. In this connection, it is material to note that by the 74th Amendment to the Constitution of India, the Municipalities have been given a status under the Constitution. **Part IX A** has been introduced concerning the Municipalities and their powers and functions are laid down under the **Twelfth Schedule** of the Constitution. Article **243R** provides for the composition of the

Municipalities, and the same is to be done by the Legislature of a State by law. Article **243R** (2) (b) provides for the manner of election of the Chairperson of a Municipality. Article **243S** provides for the constitution and composition of the Wards Committees, and sub-article (5) thereof provides for constitution of Committees in addition to the Wards Committees. Article **243U** assures the Municipalities a term of five years. Thus, it is true that it is for the State Legislature to make necessary provisions concerning the municipal administration. However, the enactments of different States relied upon by the respondents, in fact, point out that whenever the Mayor-in-Council or on analogous pattern is adopted, the term of the members on the Council or the Standing Committee is co-terminous with that of the Mayor or the Chairperson.

22. The respondents submitted that the approach of the appellant amounted to legislation and should not be permitted. They relied upon various judgments to submit that the court is expected to interpret the law and not legislate. Firstly, they relied upon the judgment of this Court in *State of Jharkhand and Anr. Vs. Govind Singh,* reported in 2005 (10) SCC 437, which was a case under Forest Act, 1927. The High Court had read into sections 52 (3) of the Act, the power to direct release of seized vehicles on payment of fine in lieu of confiscation, when there was no such specific provision in the statute. This Court held that casus omissus cannot be readily inferred by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. The decision was rendered in view of the facts of the case and the relevant provisions of the Forest Act 1927, and while so doing, the court did make it clear that if literal construction of a particular clause leads to manifestly absurd or anomalous results, a literal interpration may not be preferred. The proposition of law laid down in this case, is thus quite clear and does not help the respondents. In para 21 of the judgment this Court (per *Arijit Pasayat, J***)** observed as follows:-

"Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole — appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. "An intention to produce an unreasonable result", said Danckwerts, L.J. in Artemiou v. Procopiou[18] (All ER p. 544 I), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result", we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in Luke v. IRC where at AC p. 577 (All ER p. 664 I) he also observed: "This is not a new problem, though our standard of drafting is such that it rarely emerges.]"

23. The respondents relied upon the judgment in *Union of India and Another Vs. Shardindu,* reported in 2007 (6) SCC 276, wherein this Court set aside the premature repatriation of the respondent to his parent cadre. The appointment of the respondent in that case was a tenure appointment under a statute, and it was contented on behalf of the appellant that same is governed under the 'Doctrine of Pleasure' available under the Constitution. In that context, this Court laid down that when it was an appointment under a statute as against a

constitutional appointment, the court could not bring in such concept, and could not supply the omission under the statute. The judgment will have to be read in that context.

24. The respondents then relied upon the judgment of this Court in *Satheedevi Vs. Prasanna and Anr.* reported in 2010 (5) SCC 622 to submit that the intention of the legislature must be read in the words used by the legislature itself. It was submitted that if words that are used are capable of one construction it was not open to courts to adopt any other hypothetical construction on the grounds that it is more consistent with the alleged object and policy of the Act. It is however, material to note that in paragraph 12 thereof this judgment also accepts that when the words used in the statute are capable of two constructions, the question of giving effect to the policy or object of the act can legitimately arise.

25. **Consideration**

Constitutional Provisions concerning the Municipalities

Before we deal with the rival submissions, we may note that the Municipalities are expected to render wide-ranging functions. They have now been enumerated in the Constitution. Article **243W** lays down the powers of the Municipalities to perform the functions that are listed in **Twelfth Schedule** It reads as follows:-

"**243W. Powers, authority and responsibilities of**

Municipalities, etc. – Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow –

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and

responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice;

(ii) the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;

(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule."

Twelfth Schedule reads as follows:-

TWELFTH SCHEDULE

[Article 243W]

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and, commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.

8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds and electric crematoriums.
15. Cattle ponds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.

26. **The scheme of the Bihar Municipal Act, 2007**

The provisions of the Bihar Municipal Act, 2007 will have to be looked into on this background. The Act is a detailed Act running into 488 sections which are divided into VIII parts and 44 chapters and they govern all the aspects of Municipal Governance and Administration. **Part I** contains the preliminary provisions. **Part II** deals with the Constitution of the Government of the Municipal Bodies some of which provisions we have already referred to namely those contained in Sections 21 to

59. **Part III** deals with the Financial Management of Municipalities. **Part IV** is on the Municipal Revenue. **Part V** is on the Urban Environmental Infrastructure and Services which contains the following chapters.

Chapter 21 on Private Sector Participation Agreement and Assignment of Other Agencies,

Chapter 22 on Water-supply,

Chapter 23 on Drainage and Sewerage,

Chapter 24 on other provisions relating to Water-supply, Drainage and Sewerage,

Chapter 25 on Solid Wastes,

Chapter 26 on Communication Systems which deals with the public streets and street lighting,

Chapter 27 on Markets, Commercial Infrastructure and Slaughter Houses.

Part VI deals with Urban Environmental Management, Community Health and Public Safety.

Chapter 28 is on local agenda for Urban Environmental Management,

Chapter 29 on Environmental Sanitation and Community Health,

Chapter 30 on restraint of infection,

Chapter 31 on disposal of the dead,

Chapter 32 on Urban Forestry, Parks, Gardens, Trees and Playgrounds.

Part VII deals with the Regulatory Jurisdiction, and contains chapters on Development Plans, Improvement, Public

Streets, Buildings, Municipal Licences, Vital Statistics, Disaster Management and Industrial Townships.

Lastly **Part VIII** deals with the Powers, Procedures, Offences and Penalties.

27. Thus, it will be seen that the Bihar Municipal Act is quite a comprehensive Act, and as noted earlier the executive powers of the Municipality are vested in the Empowered Standing Committee under section 22 of the Act. The members of this Empowered Standing Committee are nominated by the Mayor. After a Mayor is removed, and another Mayor is elected in his place, if the new Mayor is not allowed to nominate his nominees on the Empowered Standing Committee, it is likely to result into a situation of conflict. This is apart from the fact that the new Mayor will be treated dissimilarly with the earlier Mayor, although both of them are elected by the same full House and there is no justifiable reason for making any distinction. The fact that a councillor is elected as the Mayor immediately after the general election to the Municipality, and he nominates seven councillors on the Empowered Standing Committee, cannot make this act of nomination as a one time act, nor does the enactment say so. After a Mayor is removed under section 25 (4) of the Act, a new Mayor is to be elected under section 23 (3) of the Act. This section does not say that the newly elected Mayor will not have the powers of nominating the other members on the Empowered Standing Committee which is available to the Chief Councillor or Mayor under section 21 (3) of the Act. Thus, in fact, by stating that the nomination of the members on the Empowered Standing Committee is a one time act, the respondents are adding words in section 21 (3) of the Act. Thus, in a way, they are supplying in section 21 (3) the words **'only by the first Chief Councillor and not by his successors in office**' in place of **'the Chief Councillor'** after the words **'shall be nominated'** in section 21 (3) of the Act. Thus, they want section 21 (3) to read as follows:-

"*(3) The other members of the Empowered Standing*

*Committee shall be nominated '**only by the first Chief Councillor and not by his successors in office'*** from among the Councillors elected under sub section (1) of section 12 within a period of seven days of his entering office."

Such a reading and resultant situation will be contrary to the basic principle of parliamentary democracy, viz. that those in office ought to be representative of and responsible to the House. Therefore, if the house has lost confidence in the earlier Mayor, it is all the more necessary that the members of the Empowered Standing Committee should be made to step down alongwith him and a newly elected Mayor be permitted to have his nominees on the Empowered Standing Committee.

28. **The concept of Executive Power and Article 14**

As seen above, the term executive power has been specifically used in section 22 of the Act and section 57 specifically uses the term Municipal Governance. The concept of executive power has been read widely by Constitution Bench of this Court way back in **Rai Sahib Ram Jawaya Kapur & Ors. Vs. The State of Punjab,** reported in **[AIR 1955 SC 549],** wherein this court has observed:-

"12. It may not be possible to frame an exhaustive definition of what executive functions means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.....

13. .....The executive function comprises both the determination of the policy as well as carrying it into execution....."

This being the breadth of the executive power of the Empowered Standing Committee, the newly elected Mayor will not be able to exercise the same effectively and the entire

municipal governance will come in jeopardy, if the other members on the Committee are not his nominees.

29. Apart from the aforesaid resultant administrative difficulty, if a literal interpretation of section 27 is followed alongwith adding words in section 21 (3) as pointed out above, the newly elected Mayor will be treated dissimilarly for no justifiable distinction. In that case, as against the earlier elected Mayor he will not permitted to have his nominees on the Empowered Standing Committee. A literal interpretation of section 27 of the Act will clearly bring it in conflict with section 21 (3) of the Act, and will also be violative of Article 14 of the Constitution of India as held by the Constitution Bench of this Court way back in *State of West Bengal Vs. Anwar Ali Sarkar,* reported in [AIR 1952 SC 75]. In that matter, in his leading judgment, *B.K. Mukherjea, J.* (as he then was) observed in para 46 as follows–

..... *"If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as "hostile" in the sense that it affects injuriously the interests of that person or class. Of course, if one's interests are not at all affected by a particular piece of legislation, he may have no right to complain. But if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position. I do not think that it is incumbent upon him, before he can claim relief on the basis of his fundamental rights, to assert and prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class."*

30. *The correct approach towards interpretation*

What should be then the approach towards interpreting the

provisions in such a situation? Guidance can be had from three passages quoted herein below:-

(a) In *Reserve Bank of India Vs. Peerless Corp.* reported in [AIR 1987 SC 1023] = 1987 (1) SCC 424, O. Chinnappa Reddy, J. has observed as follows (in para 33):-

> *"33. Interpretation must depend on the text and the context.* They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in Srinivasa and we find no reason to depart from the Court's construction." (emphasis supplied)

(b) *In Union of India Vs. Filip Tiago De Gama,* reported in 1990 (1) SCC 277, K. Jagannatha Shetty, J. observed as follows (in para 16) :-

> **16.** The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose. A statute is neither a literary text nor a divine revelation. "Words are certainly not crystals, transparent and unchanged" as Mr Justice Holmes has wisely and properly warned. (Towne v. Eisner1) Learned Hand, J., was equally emphatic when he said: *"Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."* (Lenigh Valley Coal Co. v. Yensavage 2)."
>
> (1 245 US 428,425 (1918)
>
> 2 218 FR 547, 553)
>
> *(emphasis supplied)*

(c) In *Anwar Hasan Khan Vs. Mohd. Shafi and others* reported in 2001 (8) SCC 540, R.P. Sethi, J. quoted the above paragraph in Filip Tiago De Gama with approval prior whereto he observed as follows (in para 8):-

> **"8.** It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statute. *It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction.* The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. *The well-known principle of*

harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" is not harmonious construction."

(emphasis supplied)

31. *Removal of anomaly*

This rule of harmonious construction has been adopted by this Court from time to time. In *N.T. Veluswami Thevar Vs. G. Raja Nainar* reported in [AIR 1959 SC 422], a bench of three Judges of this Court, (consisting of T.L. Venkatarama Aiyer, P.B. Gajendragadkar and A.K. Sarkar JJ.) was dealing with a matter concerning the election to the Legislative Assembly of the then State of Madras held in the year 1957. In this case arising under the Representation of the People Act, 1951, the Supreme Court held that if the Returning Officer had rejected a nomination paper of a candidate on one disqualification, it was open for the Election Tribunal to find the rejection proper on some other ground of disqualification which may not have been raised before the Returning Officer. It was pointed out that if this construction is not placed on section 100 (1) (c) of the Act, the result will be anomalous in that if the decision under section 36(6) of the Returning Officer on the objection on which he rejected the nomination paper is held to be bad, the Tribunal will have no option but to set aside the election under section 100(1) (c) even though the candidate was disqualified and his nomination paper was rightly rejected. In holding so, *Venkatarama Aiyer, J.* observed as follows in para 13:

……"It is no doubt true that if on its true construction, a statute leads to anomalous results, the Courts have no option but to give effect to it and leave it to the Legislature to amend and alter the law. *But when on a construction of a statute, two views are possible, one which results in an anomaly and the other not, it is our duty to adopt the*

latter and not the former, seeking consolation in the thought that the law bristles with anomalies."…..

(emphasis supplied)

32. In *S.V. Kondeakar Vs. V.M. Deshpande,* reported in [AIR 1972 SC 878], a Constitution Bench of this Court was concerned with the construction of section 446 (1) of the Companies Act, 1956 which provides that when a winding up order has been made or the official liquidator has been appointed, no suit or legal proceedings shall be commenced or continued against the company except with the leave of the court, the Supreme Court held that assessment proceedings under the Income-tax Act do not fall within the section. This conclusion was reached on the ground that only such proceedings fall under section 446 (1) which could appropriately be dealt with by the winding up court under section 446 (2). The Court held in para 7 of the judgment for the bench *I.D. Dua, J.* observed as follows:-

"It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceeding to itself and assess the company to income-tax."

33. *Making cross-reference to sections to read them harmoniously*

One of the methods adopted in such situations is to make cross-reference to the relevant sections to read them harmoniously. Thus, way back in *Ramkissendas Dhanuka Vs. Satyacharan Lal,* reported in [AIR 1950 PC 81], the Privy Council was faced with such a situation in a case arising under the Companies Act, 1913. One of the Articles of Association i.e. 109 of the Company concerned prescribed a maximum of four and a minimum of three directors without any qualifying words. Another Article i.e. 126 authorised the company in a general meeting from time to time to increase or reduce the number of directors subject to the provisions of section 83A(1)

and to alter their qualification and change the order of rotation of the increased or reduced number. The question was whether the power of the company by ordinary resolution to "increase or reduce" the number of directors conferred by Article 126 was only exercisable within the limits set by the maximum and the minimum prescribed by Article 109, and whether a special resolution altering Art. 109 was required to increase the number of directors beyond the prescribed maximum. After considering the relevant Articles, the Privy Council held that Articles 126 and 109 were two textually inconsistent provisions. The proposition that emerges from the judgment is that it is permissible to read words such as "subject to" etc. in order to reconcile two apparently inconsistent provisions. To reconcile Article 109 with Article 126 and to give effective content to them, it was necessary to imply words such as "subject to". The Court therefore, observed in paragraph 5 as follows:-

> "The omission to make such cross-references as may be required to reconcile two textually inconsistent provisions is a common defect of draftsmanship. There is thus no insuperable difficulty in reconciling Article 109 with Article 126 either by implying in the former some such opening words as "subject to Article 126" or implying in the latter some such opening words as "notwithstanding anything containing in Article 109."

34. *Reading a section subject to another to realise the real intent of the two provisions*

Recently this Court was concerned with the anomaly between section 23 (3) of the Code of Civil Procedure and section 25 thereof as substituted by the Act No. 104 of 1976 in *Durgesh Sharma Vs. Jayshree* reported in 2008 (9) SCC 648. The amending Act did not delete or omit section 23 (3) of the Code which provided that where several Courts having the jurisdiction are subordinate to different High Courts, the application for transfer shall be made to the High Court within the local limits of whose jurisdiction the court in which the suit

is brought is situate. Section 25 as substituted empowered the Supreme Court to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one Civil Court in a State to any other Civil Court in another State through the Country. The scope of amended section 25 is very wide and plenary and extensive powers have been conferred on this Court as it stands now. In the case of Durgesh Sharma versus Jayshree (supra), this Court held that section 23 must be read subject to section 25 and even if the High Court had the power to transfer a case from one State to another, that must be taken to have been withdrawn from 1.1.1997 when the Amending Act of 1976 came into force. The Amending Act had failed to delete section 23 (3) and therefore this Court had to make it clear that section 23 (3) will be subject to section 25 of the Act. In para 55 of the judgment, *C.K. Thakker, J.* held as follows:-

> "It is no doubt true that even when section 25 in the present form was substituted by the Amendment Act of 1976, sub-section (3) of Section 23 of the Code has neither been deleted nor amended. That, however, is not relevant. Since in our considered view, Section 23 is merely a procedural provision, no order of transfer can be made under the said provision. If the case is covered by section 25 of the Code, it is only that section which will apply for both the purposes, namely, for the purpose of making application and also for the purpose of effecting transfer. On the contrary, reading of sub-section (3) of section 23 of the Code in the manner suggested by the learned counsel for the respondent wife would result in allowing inroad and encroachment on the power of this Court not intended by Parliament. Section 23, therefore, in our considered view, must be read subject to Section 25 of the Code."……..
>
> (emphasis supplied)

Thereafter in para 57 of that judgment the Court gave a declaration as follows:-

> "....We hold that a High Court has no power, authority or jurisdiction to transfer a case, appeal or other proceedings pending in a court subordinate to it to any court subordinate to another High Court in purported exercise of power under sub-section (3) of Section 23 of the Code and it is only this Court which can exercise the said authority under section 25 of the Code....."

35. *Reading down a section to save it from being ultra vires*

We have noted that the view canvassed by the respondents that the nomination of the members on the Empowered Standing Committee is a one time act, is possible only if the words are added in section 21 (3) of the Act as pointed out above. The intention of the legislature as seen from the provisions of the Act and the Rules is to have a 'Mayor-in-Council' who enjoys the confidence of the Municipal House. The Empowered Standing Committee along with him is vested with the executive power and is expected to run the municipal governance. There is no reason to treat the subsequently elected Mayor differently, and deny him the right to nominate his nominees on the Empowered Standing Committee which right is available to the duly elected Mayor under section 21 (3) of the Act. Except for the fact that the person who is elected as the Mayor after the no confidence motion is passed against the first Mayor, is elected subsequent to the first Mayor, there is no ground to classify the subsequent Mayor differently from the first Mayor. The view canvassed by the respondents would lead to a conflict between the newly elected Mayor and the other members of the Empowered Standing Committee if they are not nominated by him. That was surely not the intention of the legislature. Considering the powers which are available to the Empowered Standing Committee, if the newly elected Mayor is not read as having the power to nominate his nominees on

the Empowered Standing Committee, he will be treated dissimilarly and such an interpretation will make section 27 violative of Article 14 of the Constitution and contrary to the powers of the Mayor under section 21(3) of the Act. The only way, therefore, to save section 27 is to read it down by implication, and to make it subject to sections 25 (4), 23 (3) and 21 (3) of the Act, thereby, holding that the nominated members shall also automatically vacate their office when the Mayor nominating them is no longer in the office. Thus, the newly elected Mayor will also have the authority to nominate seven members of his choice on the Empowered Standing Committee.

36. This has been the approach adopted by this Court in similar cases for instance by the Constitution Bench in *20th Century Finance Corpn. Ltd. Vs State of Maharashtra,* reported in 2000 (6) SCC 12. Amongst others, in that matter the Constitution Bench was concerned with the Maharashtra Sales Tax on the Transfer of the Right to use any Goods for any Purpose Act, 1985. Explanation to section 2(10) of that Act deemed the transfer of right to use any goods to have occurred in the State of Maharashtra if the goods were located within the State at the time of their use, irrespective of the place where agreement of such transfer of the right is made and therefore included deemed sales (i) which are in the course of inter-State trade and commerce; (ii) sales outside the State of Maharashtra; and (iii) sales which occasioned import of goods into India. Section 3 laid down that subject to the provisions contained in the Act and Rules, tax shall be leviable on the turnover of sales and therefore turnover necessarily has to include outside sale and sale in the course of inter-State trade and commerce and sales which occasioned import of goods. Although Section 8-A of the Act provided that nothing in this Act would be deemed to impose or authorize imposition of any tax on a sale outside the State or in the course of the import or export or inter-state trade or commerce but the explanation has not been amended accordingly. There is a provision for

exemption of turnover related to goods in respect of which tax has already been paid under the Bombay Sales Tax Act, 1952, but there is no provision that such exemption would be available in case of goods which have suffered sales tax under the other Sales Tax Laws. In the circumstances, this Court held as follows in para 38 (per **V.N. Khare, J** (as he then was) speaking for the majority on the bench):-

> "We are, therefore, of the view that since the explanation has not been amended in conformity with Section 8-A of the Act, the explanation to Section 2(10) of the Maharashtra Act transgresses the limits of legislative power conferred on the State Legislature under Entry 54 of List II and we, thus, instead of striking it down, direct that the explanation to Section 2(10) of the Act shall be read down to this effect that it would not be applicable to the transactions of transfer of right to use any goods if such deemed sale is (i) an outside sale; (ii) sale in course of the import of the goods into or export of the goods out of the territory of India; and (iii) an inter-State sale."

37. *Conclusions*

The above overview clearly shows that after the 74th Amendment to the Constitution, the Municipalities are strengthened and they are given wide ranging powers. The Municipal Laws in other states which we have seen clearly demonstrate that wherever Mayor-in-Council system is adopted, the tenure of the members in the Council is made co-terminus with that of the Mayor. The idea is that the Mayor should have the confidence of the Executive Council or the Empowered Standing Committee, as the case may be, apart from that of the House. The members of the Empowered Standing Committee are authorized to answer the questions on behalf of the Empowered Standing Committee under the Bihar Municipal Act. Thus, there is an element of collective responsibility. The Empowered Standing Committee is supposed to function on the basis of the principle of Democratic

Governance in the sense that the decisions are to be taken by the majority. If the new Mayor is not permitted to have his nominees on the Empowered Standing Committee, the collective functioning will be under jeopardy. Thus, there is a clear omission in the Bihar Municipal Act, 2007 in this behalf.

38. As noted above, the interpretation sought to be placed on section 27 by the respondents requires addition of words in section 21 (3) of the Act. Even after adding the necessary words, the result will be incongruous to a democratic functioning in as much as the nomination on the Empowered Standing Committee will be a one time act and the newly elected Mayor will be at the mercy of the other members of the Empowered Standing Committee. Such a reading will be also be contrary to section 21 of the Act and the newly elected Mayor will be treated dissimilarly as against the earlier elected Mayor for no justifiable reason. Thereby section 27 will be ultra vires to Article 14 of the Constitution. The legislature cannot be attributed such an intent. On the other hand, reading section 27 by making a cross-reference and making the same subject to sections 25 (4), 23 (3), 21 (3) and 21 (4) will lead to a harmonious functioning of the Municipal Corporation and will also save the section from being ultra vires Article 14. The judgment of the Division Bench of the Patna High Court in *Jagdish Singh Vs. State of Bihar* (supra) and that of the full bench of that Court in *Jitendra Kumar Vs. State of Bihar* (supra) do not lay down the correct legal position and are overruled.

39. In the circumstances, we allow this appeal. Impugned judgment and order passed by the Division Bench of the Patna High Court in Writ Petition bearing No. CWJC 9981/2010, dated 8th July, 2010, is set aside. The said writ petition filed by the appellant herein stands allowed in part. Section 27 of the Bihar Municipal Act 2007, shall be read down harmoniously with and subject to sections 25 (4), 23 (3), 21 (3) and 21 (4) of the said Act. The respondent no.3, the District Magistrate, Patna, Bihar is consequently directed to administer the oath of

secrecy under Section 24 of the Act to the seven Municipal Councillors nominated by the appellant to the Empowered Standing Committee. The appellant as well as the members of the Empowered Standing Committee shall be entitled to exercise all the powers as the Mayor and the members of the Empowered Standing Committee as provided in the Bihar Municipal Act, 2007, in accordance with law.

40. Parties will bear their own costs of the proceedings.

D.G. Appeal Partly allowed.

CBI, HYDERABAD
v.
SUBRAMANI GOPALAKRISHNAN & ANR.
(Criminal Appeal Nos. 985-86 of 2011)

APRIL 21, 2011

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

Bail – Grant of – Challenge to – Corporate scam – Fudging of the Company accounts and manipulation of records by Chairman, M.D. and other Directors of a Company which were certified by the auditors – Huge financial loss to shareholders – Complaint against Chairman, Directors and Auditors of the Company – Entrustment of investigation to CBI – Grant of bail to two co-accused-A4 and A 10, external and internal auditors of the Company by the High Court – Justification of – Held: Not justified – A4 and A10 being external and internal auditors of the company respectively, played a paramount role in inflating processing assets and bank balances of the Company – High Court erred in granting bail to A4 and A10, by placing reliance on the bail order granted in favour of A5 since the roles ascribed to A4 and A5 were not identical – Also, the bail granted in favour of all the main accused had been cancelled by Supreme Court and directions were issued, on basis of which the trial has to be concluded within the schedule time – In the facts and circumstances of the case and in view of the magnitude of the scam, the High Court erred in granting bail to A4 and A10 – Order of the High Court granting bail in favour of A4 and A10 set aside.

Several frauds and cooking books of accounts took place in M/s SCSL Company. Many investors suffered loss. One of the investor filed a complaint against the then Chairman, Directors and Auditors of M/s SCSL and others under Section 120-B read with Sections 409, 420, 467, 468,

471 and 477A IPC. The investigation was entrusted to CBI. The High Court enlarged the respondents be A4 and A10 external and internal auditors of the Company on bail by imposing certain conditions. Therefore, the appellant-CBI filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 As per the complaint and investigation, A4 and A10 along with the other accused were involved in one of the greatest corporate scams of the commercial world. It has caused a financial storm not only throughout the country but also worldwide and by their action and conduct, lakhs of shareholders and others have been duped and the corporate credibility of the nation has received a serious setback. Nobody can underestimate the sufferings of the shareholders and others due to the scam. [Para 11] [834-G-H; 835-A]

1.2 The High Court, while ordering bail for A4 and A10, heavily relied on the order of this Court dated 04.02.2010 made in the appeal which relates to A5, who is a Chartered Accountant and working as a partner with M/s Price Waterhouse which is the statutory authorized auditors of M/s SCSL. The allegation against A5 is that while submitting the audit report for the year 2007-08, some inflated figures were incorporated in the said report and thereby he committed serious breach of faith as a Member of the professional body of auditors/ accountants. Considering certain factual details for releasing A5 on bail that it could be easily assumed that the trial of this case would take a long time even to start without expressing any opinion on the merits of the case regarding the nature of offence or gravity thereof allegedly committed by A5 and having regard to the fact that he had been in custody for more than a year released him on bail on 04.02.2010 by imposing certain conditions. [Para 13] [835-D-F; 836-B]

1.3 In view of the appeal filed by A5 against the dismissal of his bail application by the High Court, this Court considering certain facts released A5 on bail subject to certain conditions. There is no similarity in respect of the role assigned to A4 and A5. After going through the materials, prima facie, the assumption that the role assigned to A-4 and A-5 is identical is incorrect. Though both A4 and A5 were Auditors of M/s SCSL at the relevant time, admittedly, A5 had worked only for a period of one year whereas A4 was in-charge of auditing the accounts of M/s SCSL for a period of seven years, i.e., from 2000 to 2007. Three charge-sheets and the imputations made against both these accused persons have been verified. In these factual details available, prima facie, A4 and A5 cannot be put on the same footing in respect of erroneous auditing resulting in inflated cash and bank balances of M/s SCSL. [Para 15] [836-C-G]

1.4 This Court by order dated 26.10.2010 in a Criminal Appeal cancelled the bail granted by the High Court in respect of A1, A2, A3, A7, A8 and A9. After passing such order, this Court after recording the fact that the charges have been framed on 25.10.2010 and trial is scheduled to commence w.e.f. 02.11.2010 issued several directions. [Para 16] [836-H; 837-A]

1.5 In view of the specific directions of this Court in the order dated 26.10.2010, the trial is proceeding on day-to-day basis and is likely to be concluded by 31.07.2011. Out of 697 witnesses, the prosecution has dropped 470 witnesses and only 227 witnesses are to be examined. Out of this, 193 witnesses have already been examined and some of them are to be cross-examined. According to ASG only 30 more witnesses have to be produced and examined. Thus, the reasons stated while granting bail for A5 by this Court on 04.02.2010 are not applicable to

the respondents. The reliance on the basis of the bail order granted in favour of A5 cannot be applied to these respondents. [Paras 17 and 18] [837-F-H; 838-B]

1.6 The High Court granted bail to A4 and A10 on 25.06.2010 and the CBI challenging the said order filed two special leave petitions before this Court on 06.10.2010. Though the appellant-CBI was not so diligent to bring the special leave petitions for orders immediately after filing of the same due to various reasons and compliance of the office report had taken some time, however, on this ground their challenge with regard to the order of the High Court granting bail cannot be rejected without going into the merits. [Para 19] [838-D-G]

1.7 Though the counsel for A-10, submitted that he being the internal auditor, employee of M/s SCSL, there is no statutory function and his name does not find in the first charge-sheet and he was named only in the second charge-sheet, considering the materials available, it is not desirable to go into the correctness or otherwise at this juncture and at the same time in view of the magnitude of the scam and without the assistance and connivance of persons in-charge of auditing, the stand of the counsel cannot be accepted and the High Court was not justified in granting bail to A-10. [Para 20] [838-H; 839-A-B]

1.8 There is difference between yardsticks for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner. The satisfaction of the court on the basis of the

materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. Thus, the bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. In the facts and circumstances of the magnitude of the scam, the bail granted in favour of all the main accused have been cancelled and respondent Nos. A4 and A10 being external and internal auditors respectively, their role being paramount in inflating processing assets and bank balances of M/s SCSL, the High Court was not justified in granting bail. [Para 21] [839-C-H]

1.9 In view of the specific allegation by the prosecution that A4 and A10 were party to the criminal conspiracy showing inflated (non-existent) cash and bank balances reflected in the books, inflated proceeds over a period of last several years, frauds and cooking books of accounts, the High Court ought not to have granted bail to these respondents. Considering the subsequent order of this Court cancelling the bail in respect of other accused and issuing directions based on which the trial has to be concluded within the schedule time, the High Court committed an error in granting bail to A4 and A10. [Para 22] [840-A-C]

1.10 The impugned order of the High Court granting bail in favour of the respondents- A4 and A10 is set aside. They are directed to surrender on or before 30.04.2011 otherwise the appellant would take appropriate steps in accordance with law. All the observations and directions, as stated in the earlier order dated 26.10.2010, are also applicable to the respondents A4 and A10. [Para 23] [840-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 985-986 of 2011.

From the Judgment & Order 25.06.2010 of the High Court of Andhra Pradesh at Hyderabad in Criminal Petition No. 4972 and 4913 of 2011.

P.P. Malhotra, Vivek Tankha, ASG, Mukul Rohatgi, Siddharth Luthra, Shweta Verma, Pratul Sandilya, Rishabh Sancheti, Sumeer Sodhi, Vabhav Shrivastava, D. Kumnan, Madhurima Mridul, Arvind Kumar Sharma, R.N. Karanjawala, Majil Karanjawala, Ruby Singh Ahuja, Abeer Kumar, Pragya Ohri, Karanjawala & Co., D. Rama Krishna Reddy, D. Bharathi Reddy for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted. These appeals, at the instance of the Central Bureau of Investigation (in short "the CBI"), Hyderabad are directed against the order dated 25.06.2010 passed by the High Court of Andhra Pradesh at Hyderabad in Criminal Petition Nos. 4972 and 4913 of 2010, in and by which, the High Court enlarged the respondents herein, namely, S. Gopalakrishnan (A4) and V.S. Prabhakara Gupta (A10) on bail by imposing certain conditions.

2. Since the CBI has challenged the order of the High Court granting bail in respect of the two accused, namely, A4 and A10, we are constrained to refer only the facts which are necessary for the disposal of these appeals.

3. Brief Facts:

(a) On 07.01.2009, B. Ramalinga Raju (A1), the then Chairman of M/s Satyam Computer Services Limited (in short "M/s SCSL") addressed a confessional letter to the Board of Directors revealing certain financial irregularities in M/s SCSL. As per this letter, the balance-sheet as on 30.09.2008 showed

inflated (non-existent) cash and bank balances of Rs. 5,040/- crores, an accrued interest of Rs. 376/- crores which is non-existent and an understated liability of Rs.1,230/- crores on account of funds arranged by him and an overstated debtors position of Rs. 490/- crores (as against Rs. 2,651/- crores reflected in the books). He also revealed several other factual details which resulted an increase in artificial cash and bank balances.

(b) He also revealed several frauds and cooking books of accounts ever happened in India's corporate history. Due to the fraud on the part of the persons in Management including the Financial Advisors, Auditors, etc., many investors suffered loss and on the complaint of one of such investors, a First Information Report (in short "FIR") was registered on 09.01.2009 by the Andhra Pradesh State Crime Investigation Department against the then Chairman, Directors and Auditors of M/s SCSL and others under Section 120-B read with Sections 409, 420, 467, 468, 471 and 477A of the Indian Penal Code (in short 'IPC'). Considering the magnitude of the offence, investigation was entrusted to the CBI and a regular case being RC.No.4(S)/2009 was registered by the CBI, Anti-Corruption Branch, Hyderabad, on 20.02.2009.

(c) Due to fudging of the company accounts and manipulation of records by showing incorrect and inflated figures in the balance-sheets by the Chairman, M.D. and other Directors of the Company which were certified by the Auditors, the value of the shares of the Company suddenly dropped causing huge financial loss to the shareholders. The drop in the value of the shares was due to dishonest and fraudulent acts committed by the aforesaid functionaries, who were managing the affairs of the Company and were associated with its functioning and day-to-day affairs.

4. With the above brief facts, let us consider the allegations leveled against the Respondents herein (A4 and A10) and the role played by them.

The role of S. Gopalakrishnan (A4), Partner and In-charge of M/s Price Waterhouse in CC 1/2010:

(a) He affixed his signature on the financial statements as partner of M/s Price Waterhouse, the Statutory Auditors for M/s SCSL from the financial year 2001 till 2007.

(b) He was a partner in the firm 'M/s Price Waterhouse, Bangalore and not in 'M/s Price Waterhouse'.

(c) In the agreement entered into between M/s SCSL and M/s Price Waterhouse, instead of affixing his signature, he signed as 'M/s Price Waterhouse' which is contrary to the established practice and procedure.

(d) By virtue of his status as a Statutory Auditor, it is incumbent on his part to verify the bank balances and FDRs claimed to be held by M/s SCSL besides other investments, liabilities and sales of the Company before certifying the statutory Audit Report which forms the basis of Annual Financial Statement of the Company

(e) The presentations made by him to the Audit Committee about the health of the Company were misleading.

(f) As a consideration for his acts in accommodating the accused persons, he received an exorbitant audit fee from M/s SCSL over and above the market rate which reflects a quid pro quo arrangement.

(g) Letters generated on the letter-heads of M/s Price Waterhouse were recovered from the computer systems of M/s SCSL. These letters were supposed to be written by the Auditors addressed to the banks seeking confirmations about the balances.

(h) Though deficiencies were found in Information Technology General Check, no substantial and elaborate examination of the financial accounts was conducted by him.

(i) Control deficiencies identified in the integrated audit were not brought to the notice of the Audit committee.

(j) The above overt acts of A4 reveal the offences punishable under Section 120-B read with Sections 420, 419, 467, 471 and 477A of IPC.

5. The role of Sri S. Gopalakrishnan (A4), in CC 3/2010:

(a) He failed to comply with the Audit & Assurance Standards while conducting Statutory Audit in case of M/s SCSL.

(b) He failed to point out the existence of forged and fabricated invoices in the Invoice Samples.

(c) As a quid pro quo for his role he received very high remuneration.

(d) The above overt acts of A4 reveal the offences punishable under Section 120-B r/w 420, 471 & 477A IPC.

The role of Sri V.S. Prabhakara Gupta (A10), Head Internal Audit, M/s SCSL in the Supplementary Charge-sheet:

(a) He was the Associate In-charge – Internal Audit and was the Global Head of Internal Audit of M/s SCSL during the relevant period of time.

(b) He had intentionally not included auditing of Oracle Financials (OF) in the Internal Audit Plan of M/s SCSL till 2007 even though the system was operational since 2002.

(c) He intentionally submitted a prioritization plan to the Audit Committee for postponing the audit of many items including Oracle Financials citing several irrelevant reasons.

(d) With regard to anomalies pertaining to the invoices no correctional measures or follow up action was taken.

(e) He did not properly follow up for the restoration of the access to the offshore books of accounts for the Internal Audit team.

(f) He intentionally flouted the laid down procedures mentioned in the Internal Audit Manual.

(g) The above overt acts of A10 reveal the offences punishable under Section 120-B r/w Section 420 IPC.

6. Apart from the above details, Mr. P.P. Malhotra, learned ASG has also brought to our notice that prior to the grant of bail by the High Court A4 had filed seven bail applications and the High Court passed the impugned order only in the eighth bail application. He also pointed out that in the same way, A10 had filed six bail applications and the High Court passed the impugned order enlarging him on bail only in the sixth bail application.

7. By pointing out all these details, learned ASG submitted that at this stage, release of the accused-respondents from judicial custody will jeopardize the trial, particularly, when these two respondents, A4 and A10 who were the external and internal auditors of the Company, will influence the witnesses and it would be difficult for the employees to come and depose against them. He also submitted that considering the seriousness of the offence, impact on the society as a whole and magnitude of the offence, the respondents are not entitled for bail and the High Court has committed an error in granting the bail to them. He also submitted that the reliance on the orders of this Court insofar as Talluri Srinivas (A5) is not comparable because after the order of this Court granting him bail on 04.02.2010 in Criminal Appeal No. 257 of 2010, the entire scenario in the trial has changed, hence the said order cannot be cited as a precedent. He also submitted that though A4 and A5 were Auditors of M/s SCSL, A5 was there only for a limited period of one year whereas A4 worked for a period of seven years i.e. from 2000-07. He also relied on the order

of this Court in Criminal Appeal No. 2068-2072 of 2010 dated 26.10.2010 wherein this Court cancelled the bail granted by the High Court insofar as A1, A2, A3, A7, A8 and A9 are concerned.

8. On the other hand, Mr. Mukul Rohatgi, learned senior counsel appearing for A4 highlighted the alleged role between those accused, i.e. A1, A2, A3, A7, A8 and A9 whose bail has been cancelled by this Court and that of A4. According to him, the order of this Court dated 26.10.2010 in Criminal Appeal No. 2068-2072 of 2010 is not applicable. A4 had been in custody for one year and five months before he was enlarged on bail. He also demonstrated that even according to the prosecution the role assigned to A4 and A5 is identical and when A5 was ordered to be released by this Court even as early as on 04.02.2010, the High Court rightly applied parity between them and granted bail. He also contended that A4 was not an employee of M/s SCSL but was partner in M/s Price Waterhouse and has nothing to do with the alleged claim in M/s SCSL.

9. Shri D. Rama Krishna Reddy, learned counsel appearing for A10 submitted that though he was an internal auditor of M/s SCSL, no statutory function was assigned to him. He also pointed out that only in the second charge-sheet, his name was included as an accused. He further pointed out that before granting bail by the High Court, he was put in jail for 222 days.

10. We have perused the impugned order of the High Court, various details furnished by both the sides and considered the rival contentions.

11. As per the complaint and investigation, A4 and A10 along with the other accused are involved in one of the greatest corporate scams of the commercial world. It has caused a financial storm not only throughout the country but also worldwide and by their action and conduct, lakhs of

shareholders and others have been duped and the corporate credibility of the nation has received a serious setback. It is not in dispute that nobody can underestimate the sufferings of the shareholders and others due to the scam in question.

12. Though it was argued that the Management of M/s SCSL has been shifted to other corporate entity, it is demonstrated before us that the employees who were working in the erstwhile M/s SCSL are now working under the present management. In view of the same, at least persons working in the accounts section/financial management will not come forward to depose against the Respondents herein (A4 and A10) who were the external and internal auditors of the Company and who had influence in the Company.

13. The High Court, while ordering bail for A4 and A10, heavily relied on the order of this Court dated 04.02.2010 made in Criminal Appeal No. 257 of 2010. The said appeal relates to one - Talluri Srinivas (A5), who is a Chartered Accountant, registered with the Institute of Chartered Accountants of India (ICAI). He was working as a partner with M/s Price Waterhouse, Bangalore registered with the ICAI. M/s Price Waterhouse is the statutory authorized auditors of M/s SCSL and allegation against A5 is that while submitting the audit report for the year 2007-08, some inflated figures were incorporated in the said report and thereby he committed serious breach of faith as a Member of the professional body of auditors/accountants. After noting several details and hearing the learned counsel on either side, this Court noted the following circumstances for releasing A5 on bail:

"i) the charge-sheet is running into several thousand pages;

ii) The CBI proposes to examine 470 witnesses;

iii) a very large volume of records have been produced in this case;

iv) therefore, it can be easily assumed that the trial of this case will take a long time even to start."

Considering these factual details without expressing any opinion on the merits of the case regarding the nature of offence or gravity thereof allegedly committed by A5 and having regard to the fact that he had been in custody for more than a year released him on bail on 04.02.2010 by imposing certain conditions.

14. Now the question is whether the same reasonings are applicable to the respondents herein, i.e. A4 and A10?

15. We have already pointed out that in view of the appeal filed by Talluri Srinivas (A5) against the dismissal of his bail application by the High Court, this Court considering the facts stated in the earlier paragraph passed an order on 04.02.2010 releasing A5 on bail subject to certain conditions. First of all, there is no similarity in respect of the role assigned to A4 and A5. Mr. Mukul Rohtagi, learned senior counsel, after taking us through several materials, submitted that even as per the prosecution, the role assigned to A4 and A5 is identical. After going through the same, prima facie, we are satisfied that the said assumption is incorrect. It is pointed out that though both A4 and A5 were Auditors of M/s SCSL at the relevant time, admittedly, A5 had worked only for a period of one year whereas A4 was in-charge of auditing the accounts of M/s SCSL for a period of seven years, i.e., from 2000 to 2007. In addition to the same, we have also verified three charge-sheets and the imputations made against both these accused persons. In these factual details available, prima facie, we are satisfied that A4 and A5 cannot be put on the same footing in respect of erroneous auditing resulting in inflated cash and bank balances of M/s SCSL.

16. It is relevant to point out the recent order of this Court dated 26.10.2010 in Criminal Appeal No. 2068-2072 of 2010 wherein this Court cancelled the bail granted by the High Court

in respect of A1, A2, A3, A7, A8 and A9. After passing such order, this Court after recording the fact that the charges have been framed on 25.10.2010 and trial is scheduled to commence w.e.f. 02.11.2010 issued several directions, namely,

(i) the trial Court to take up the case on day-to-day basis and conclude the trial as expeditiously as possible in any event on or before 31.07.2011;

(ii) the trial Court would avoid granting undue adjournments, unless it becomes absolutely imperative;

(iii) the parties are directed to examine only material and most essential witnesses and fully cooperate with the trial Court;

(iv) the accused shall be produced before the trial Court on time, on every date of hearing, unless exempted by orders of the Court;

(v) the trial Court is free to decide the case without being influenced by any of the observations made by the High Court or by this Court;

(vi) for any reason, trial is not concluded before 31.07.2011, the accused would be at liberty to approach the trial Court for grant of bail.

17. The recent order dated 26.10.2010 of this Court referred to above makes it clear that this Court cancelled the bail in respect of prime accused, namely, A1, A2, A3, A7, A8 and A9. It is also brought to our notice that in view of the specific directions of this Court in the said order, the trial has started and according to the learned ASG, it is likely to be concluded by the cut off date, i.e. 31.07.2011. It is also brought to our notice that out of 697 witnesses, the prosecution has dropped 470 witnesses and only 227 witnesses are to be examined. Out of this, 193 witnesses have already been examined and some

of them are to be cross-examined. According to the him, only 30 more witnesses have to be produced and examined.

18. In view of the directions of this Court in the subsequent order dated 26.10.2010, the trial is proceeding on day-to-day basis and likely to be concluded by 31.07.2011. We are satisfied that the reasons stated while granting bail for Talluri Srinivas (A5) by this Court on 04.02.2010 are not applicable to the respondents herein. Accordingly reliance on the basis of the bail order granted in favour of A5 cannot be applied to these respondents.

19. Mr. Mukul Rohatgi, learned senior counsel, appearing for A4 and Mr. D. Rama Krishna Reddy, learned counsel appearing for A10 strongly commented the conduct of the CBI in not challenging the order of the High Court granting bail to these persons and failure on their part to place these matters before the Court at the appropriate time. It is not in dispute that the High Court granted bail to these respondents on 25.06.2010 and the CBI challenging the said order filed two special leave petitions before this Court on 06.10.2010. No doubt, the matter was listed before the Court only on 01.04.2011 on which date, this Court issued notice to the respondents and on the same day the notice was accepted by the respective counsel for the respondents and they were permitted to file their reply. After filing reply, when the matter again came up for hearing on 04.04.2011 at the request of both sides, the matter was posted for final hearing on 15.04.2011 and was argued at length on the same day. Though the appellant-CBI was not so diligent to bring the special leave petitions for orders immediately after filing of the same due to various reasons and compliance of the office report had taken some time, however, on this ground their challenge with regard to the order of the High Court granting bail cannot be rejected without going into the merits.

20. Though Mr. D. Rama Krishna Reddy, learned counsel for A-10, submitted that he being the internal auditor, employee

of M/s SCSL, there is no statutory function and his name does not find place in the first charge-sheet and he was named only in the second charge-sheet, considering the materials available, it is not desirable to go into the correctness or otherwise at this juncture and at the same time in view of the magnitude of the scam and without the assistance and connivance of persons in-charge of auditing, we are unable to accept the stand of the learned counsel and hold that the High Court is not justified in granting bail for him.

21. It is also relevant to note that there is difference between yardsticks for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the Court on the basis of the materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. We have already pointed out that the issue before us is not for cancellation of bail granted earlier, the question is whether in the facts and circumstances of the magnitude of the scam, the bail granted in favour of all the main accused have been cancelled and the Respondent Nos. A4 and A10 being external and internal auditors respectively, their role being paramount in inflating processing assets and bank balances of M/s SCSL, we are of the view that the High Court is not justified in granting bail.

22. In view of the specific allegation by the prosecution that A4 and A10 were party to the criminal conspiracy showing inflated (non-existent) cash and bank balances reflected in the books, inflated proceeds over a period of last several years , frauds and cooking books of accounts, we are satisfied that the High Court ought not to have granted bail to these respondents. Considering the subsequent order of this Court dated 26.10.2010 cancelling the bail in respect of other accused and issuing directions based on which the trial has to be concluded within the schedule time, viz. 31.07.2011, we hold that the High Court committed an error in granting bail to these respondents A4 and A10.

23. In the light of the above discussion, the impugned order of the High Court dated 25.06.2010 in Crl. Petition Nos. 4913 and 4972 of 2010 granting bail in favour of the respondents i.e., A4 and A10 is set aside. They are directed to surrender on or before 30.04.2011 otherwise the appellant shall take appropriate steps in accordance with law. All the observations and directions, as stated in the earlier order dated 26.10.2010, are also applicable to the respondents (A4 and A10). We also make it clear that the above said conclusion is for considering the grant of bail by the High Court and the trial Court is free to decide the case without being influenced by any of the observations made by the High court and by this Court in this order.

24. The appeals are allowed.

N.J. Appeals allowed.

DR. SHEHLA BURNEY AND OTHERS
v.
SYED ALI MOSSA RAZA (DEAD) BY LRS. AND ORS.
(Civil Appeal No. 6409 of 2002)

APRIL 21, 2011

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

CODE OF CIVIL PROCEDURE, 1908:

O. 7, rr. 5 and 7 – Relief against defendants – Suit for possession initially filed against a single defendant – Subsequently defendant-2 also added, but no relief claimed against him – HELD: In a case where prayer is not made against a particular defendant, no relief possibly can be granted against him – There is no prayer for possession either in the original plaint or in the amended plaint against defendant-2 – Defendant-2 being predecessor-in-title of the appellants, no relief can be granted against them – Besides, the possession of suit property remained with predecessor-in-title of the appellants since 1950 and continued with the appellants who have been residing therein since 1964 after the constructions thereon were made and the suit came to be filed in 1975 – Judgment of High Court set aside and that of trial court dismissing the suit restored.

The plaintiffs-respondents nos. 1, 2 and 3 filed a suit bearing O. S. No. 164 of 1976 against the predecessor-in-interest of respondents nos. 4/1 and 4/2 pleading that the patta in respect of the suit land {bearing Survey no. 129/55 (old), new Survey No. 165} admeasuring 3 acres and 26 guntas was transferred in the name of their father in 1340 Fasli and the latter transferred the land to his wife, i.e., the mother of the plaintiffs, by a settlement deed registered in 1347 Fasli corresponding to the year 1930; that after the death of the mother of the plaintiffs on

24.7.1973, respondents 4/1 and 4/2 illegally occupied the suit land. The defendant filed a written statement stating that she was the bona fide purchaser of the suit land, and that on 20.6.1973 she transferred the land to the predecessor-in-title of the appellants. The latter was impleaded as defendant no. 2 by an order dated 4.11.1982. Defendant no. 2 filed his written statement claiming himself as transferee of defendant no. 1 who had perfected her title by adverse possession against the plaintiffs. The trial court dismissed the suit. On appeal, the Single Judge of the High Court decreed the suit for possession holding that the defendants had failed to establish their case of adverse possession. Aggrieved, the heirs and legal representatives of defendant no. 2 filed the appeal.

Allowing the appeal, the Court

HELD: 1.1. It stands proved that there is no prayer for decree of possession either in the original plaint or amended plaint against original defendant no.2. It is clear that in the amended plaint the prayer is against the defendant, therefore, the prayer is only against defendant no.1 and not against defendant no.2. In a case where prayer is not made against a particular defendant, no relief possibly can be granted against him. This point goes to the root of the matter and for its consideration no further investigation in the facts of the case is necessary. This point actually appears from the admitted records of the case and is based on the provisions of the Code of Civil Procedure [O.7, rr 5 and 7]. No relief was claimed against defendant-2, who was the predecessor-in-title of the appellants, and, therefore, no relief can be granted against them. In this view of the matter, the judgment of the High Court is not sustainable in law. [para 17,18. 21, 22, 26] [849-E-H; 850-A-B-H; 851-A-B; 852-A]

Sheikh Abdul Kayum and others v. Mulla Alibhai and others **1963 SCR 623 =AIR 1963 SC 309;** *Scotts Engineering, Bangalore v. Rajesh P. Surana and others* **(2008) 4 SCC 256;** *Badri Prasad and others v. Nagarmal and others* **1959 Suppl. SCR 709 =AIR 1959 SC 559; and** *Tarinikamal Pandit and others v. Perfulla Kumar Chatterjee (dead) by L.Rs.* **1979 (3) SCR 340 = AIR 1979 SC 1165 – relied on.**

Surajmull Nagoremull v. Triton Insurance Co. Ltd., **52 Indian Appeals 126 – referred to.**

1.2 Besides, this Court finds that the appellants had been in peaceful possession of the property in dispute from July 1963 and their predecessor-in-interest was in possession of the same property from 1950 till the property was transferred by her to the predecessor-in-title of the appellants. After such transfer the construction started on the property and the appellants have been residing there since 1964 and the suit came to be filed only in 1975. Even in that suit after impleading the original defendant no.2 no relief has been claimed against him. In view of the admitted factual position and the legal questions this Court cannot affirm the views taken by the High Court. The judgment of the High Court is set aside and that of the trial court is affirmed. [para 27-28] [852-B-D]

Case Law Reference:

1963 SCR 623	**relied on.**	**Para 20**
(2008) 4 SCC 256	**relied on.**	**Para 21**
52 Indian Appeals 126	**referred to.**	**Para 23**
1959 Suppl. SCR 709	**relied on.**	**Para 24**
1979 (3) SCR 340	**relied on.**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6409 of 2002.

From the Judgment & Order dated 3.4.2002 of the High Court of Judicature of Andhra Pradesh at Hyderbad in C.C.C. Appeal No. 14 of 1986.

Huzefa Ahmadi, Ejaz Maqbool, Wajid Ali Kamil, Sakshi Banga for the Appellants.

Dr. A.M. Singhvi, V. Giri, Roy Abraham, Kishore Rai, Jaiveer Shergill, Himinder Lal for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. This appeal is from a judgment dated 3rd April 2002 by the High Court of Andhra Pradesh in a First Appeal. The material facts of the case, as appear from the records, are discussed hereinbelow.

2. As asserted by the appellants, the suit land (Original Suit No.164/76) falls under Survey No.129/64. The respondents No.1, 2 and 3 were the original plaintiffs and according to them the suit land falls in Survey No.129/55. The appellants herein are the legal heirs of original defendant No.2. The respondents 4/1 and 4/2 are the legal heirs of original defendant No.1. Respondents 1, 2 and 3, as noted above, are the original plaintiffs. The case of the appellants is that the suit land belonged to one Dr. Zafar Hussain who transferred the same to one Sajid Hassan by a registered sale deed dated 20.1.1950. Thereupon, Sajid Hassan sold on or about 22.7.1963 the said land to Razia Begum, the predecessor-in-title of original defendant no.1 by a registered sale deed for a total consideration of Rs.6000/-. Razia Begum remained in uninterrupted and peaceful possession of the said property from the date of her purchase. On or about 11.08.1963 Razia Begum obtained house construction loan from the Housing

Cooperative Society, Mellapelly Limited and thereafter permission for construction was accorded on or about 18.02.1964 by the Hyderabad Municipal Corporation. The original defendant no.1 was in possession and enjoyment of the property till it was transferred on 20.6.1973 to one Lateef Hassan Burney, the predecessor-in-title of the appellants (original defendant No.2) as the nominee of the defendant no.1 in terms of the rules of the Housing Society. Then, on 4.12.1975, the original suit (O.S.164 of 1976), out of which this proceeding arises, was instituted in the Court of the 4th Additional Judge, City Civil Court, Hyderabad by the plaintiffs against Razia Begum alleging that the plaintiffs' father Saiyed Shah Abdul Khader was the Pattedar and Landlord of land bearing Survey No.129/55 (old), New Survey No.165 admeasuring 3 Acres and 26 guntas situated at Kachcha Tattikhana Sivar village Shaikpet and the then Taluk West, now Hyderabad Urban Taluk. It was also alleged that the patta was transferred in the name of the father of the plaintiffs by Sarafe-e-Khas Mubarak on 25th Azur in 1340 Fasli and the father of the plaintiffs through a registered document Tamleeknama (Settlement Deed) on 10th Aban, in 1347 Fasli which corresponds roughly to the year 1930 transferred the land to his wife Fatima Sogra, the mother of the plaintiffs. It was further alleged that after the aforesaid transfer the said Fatima Sogra, the plaintiffs' mother, remained in continuous and exclusive possession of the same till her death on 24.07.1973. On her death the respondents no.4/1 and 4/2 illegally occupied the suit land. In the said suit Razia Begum, the predecessor-in-title of respondent no.4/1 and 4/2, filed her written statement pleading therein that she is a bone fide purchaser of the suit land by Rs.6000/- after issuing a public notice in the Daily Siyasat on 19.06.1963. No objections were received from anybody and the sale deed was finally registered with the plan on 22.07.1963. It was also pleaded in the written statement that she obtained the necessary permission for construction and obtained a loan from Housing Cooperative Society and had completed the construction till the basement level. No objection was raised by the plaintiffs with the

construction and she has perfected her title against the plaintiffs by way of adverse possession. In her written statement she also pleaded that she transferred on 20.6.1973 the property in favour of Lateef Hassan Burney, predecessor-in-title of the appellants. On the filing of the written statement, Lateef Hassan Burney was impleaded as defendant no.2 by an order of the Court dated 4.11.1982.

3. Thereupon, on 18.12.1982, the original plaintiffs filed an amended plaint impleading Lateef Hassan Burney. Thereafter, another suit was instituted on 15.1.1983 by the plaintiffs against one Prahlad Singh, who had illegally occupied a portion of their property falling under Survey No.129/55 (old). It may be noted that in the subsequent suit Prahlad Singh did not dispute the fact that the suit property is part of Survey No.129/55 (old). Thereupon, in O.S. No.164 of 1976, the defendant no.2, predecessor-in-title of the appellants, filed his separate written statement stating therein that the property belongs to Razia Begum, the original defendant no.1, before it was transferred in his name and the Razia Begum had perfected her title by adverse possession against plaintiffs.

4. Then, the witnesses were examined by the Trial Court. Then by an order dated 19.12.1983 the trial Court appointed a Court Commissioner. The Court Commissioner with the help of a surveyor submitted a report on 25.4.1984.

5. Ultimately, by judgment dated 19.9.1985, the suit was dismissed and being aggrieved by the same an appeal was filed before the High Court in the year 1986. The High Court again by an order dated 5.2.2002 appointed an Advocate Commissioner to determine the location of the property which, according to the original plaintiffs-respondent, was falling in Survey No. 129/55(old). However, the contention of the appellants is that the property was falling in Survey No. 129/64.

6. The Advocate-Commissioner appointed by the High

Court submitted a report along with a Map in which it has been shown that the suit property falls under Survey No. 129/55(old) but that finding has been reached on the basis of the judgment and order in O.S.No. 331/1980 which was between the original plaintiffs and one Sardar Prahlad Singh. In that suit (Suit No. 331/1980) no issue relating to the fact that the property of Prahlad Singh was in any other survey number than Survey No. 129/55(Old) was raised.

7. The learned Judge of the High Court framed the following three issues for consideration:

(a) Whether the suit land is in S.No.129/55 as claimed by the plaintiffs or in S. No.129/64 as claimed by the defendants?

(b) Whether the defendants have perfected their title in respect of the suit land by adverse possession?

(c) What is the relief that the plaintiffs are entitled to?

8. On the aforesaid three issues, the High Court in the impugned judgment gave a finding in respect of each one of the issues. In respect of issue (a), the High Court held that the suit property fell in Survey No. 129/55 (old) new No. 165 situated at Kachcha Tattikhana Sivar village Saikpet, Hyderabad and not in Survey No. 129/64. In respect of issue (b), the High Court came to a finding that the defendants have failed to establish their plea by way of adverse possession. In respect of issue (c), the High Court came to a finding that the plaintiffs are entitled to a decree for possession in the suit.

9. Against the said judgment, the present appellants filed a Letters Patent Appeal before the Division Bench of the High Court. But in view of the judgment of the High Court in *S. Shivraja Reddy and ors. v. Raghuraj Reddy and Ors.,* the Division Bench of the High Court held that after the amendment of Section 100 of the C.P.C., the Letters Patent Appeal filed

after 1.7.2002 is not maintainable. The Letters Patent Appeal of the appellant was returned by the High Court and the appellants on 7.9.2002 filed a Special Leave Petition before this Court in which on 27.9.2002 leave was granted and the special leave was converted into this appeal.

10. Mr. Huzefa Ahmadi, learned counsel appearing on behalf of the appellants, assailing the impugned judgment raised various issues.

11. The first issue which was raised was that no pleading and no prayer for a decree of possession was made against Lateef Hassan Burney, Original Defendant No.2 (the Predecessor in title of the Appellants). Attention of this Court was drawn to the original prayer in the plaint and also the prayer in the amended plaint. It was, therefore urged that in the absence of any pleading and prayer for relief against the Defendant No.2 (Predecessor-in-title of the Appellants), the suit is liable to be dismissed as against Defendant No.2 in view of the provisions of Order VII of Code of Civil Procedure.

12. The second point urged was that the respondent Nos. 1 to 3 (contesting respondents) who are the legal representatives of the Original Plaintiffs, did not prove that the disputed land falls within Survey No. 129/55(old).

13. The third point on which the impugned judgment was assailed was that the contesting respondents (original plaintiffs) did not succeed in proving their title in respect of Survey No. 129/55.

14. It was also urged that the suit was barred by limitation under Article 65 of the Limitation Act, 1963 and the High Court should have held that the appellants had perfected their title by way of adverse possession and even on the ground of equity no decree for possession can be passed in favour of the contesting respondents who are the successor –in-title of the original plaintiff.

15. Mr. Giri, learned senior counsel for the respondents submitted that the suit is for recovery of possession on the strength of title and not a suit for recovery of possession on the strength of possession. According to the learned counsel the judgment of the High Court is clear that the evidence is not adequate for the Trial Court to prove the title to survey No.129/55 nor it is adequate to prove that the plaint schedule property is survey No.129/55. The learned counsel further questioned the locus standi of the second defendant to maintain this appeal. The learned counsel also submitted that there is nothing on record to show the transfer of property in Survey No.129/64. The learned counsel ultimately submitted the matter should be remanded to the High Court for rehearing in view of inadequate evidence on record.

16. Considering these rival submissions, this Court is of the view that some of the submissions of the learned counsel for the appellants deserve acceptance.

17. The submissions of the learned counsel for the appellant that there is no prayer for decree of possession either in the original plaint or amended plaint against original defendant no.2 stands proved. The prayers in the original plaint and the amended plaint were placed before us. The prayer in the amended plaint is set out hereinbelow:-

> "(1) that a decree to be passed in favour of the petitioners against the defendant for possession of land measuring 2180 square yards situate at village Shaikpet, Banjara Hills, Jubilee Hills, Hyderabad bounded by East: Road, West: Plaintiff's land, North: Road No.3, South: Road No.14, as per annexed plan attached to the plaint, in survey No.129/55 (old), New Survey No.165, situate at Shaikpet, village, Hyderabad Urban by demolishing the illegal structures on the land;"

18. It is clear that in the amended plaint the prayer is against the defendant, therefore, the prayer is only against

defendant no.1 and not against defendant no.2. In a case where prayer is not made against a particular defendant, no relief possibly can be granted against him. Reference in this connection can be made to the provisions of Order VII of the Code of Civil Procedure. In this connection, Order VII, Rule 5 is relevant and is set out below:-

> *"5. Defendant's interest and liability to be shown.* – The plaint shall show that the defendant is or claims to be interested in subject-matter, and that he is liable to be called upon to answer the plaintiff's demand."

19. Order VII, Rule 7 of CPC is also relevant and which is also set out below:-

> *"7. Relief to be specifically stated.*- Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

20. In *Sheikh Abdul Kayum and others v. Mulla Alibhai and others* [AIR 1963 SC 309] it has been held by this Court that it does not lie within the jurisdiction of a Court to grant relief against defendant against whom no reliefs have been claimed [See paragraph 13, page 313 of the report].

21. Same propositions have been reiterated recently by a judgment of this Court in *Scotts Engineering, Bangalore v. Rajesh P. Surana and others* [(2008) 4 SCC 256]. In paragraph 10 at page 258 of the report this Court found that even after the appellant was arrayed as defendant 6, the plaintiff did not care to amend the plaint except making the appellant as defendant 6. No relief was claimed against defendant 6. If we follow the said principle in the facts of this case we have to hold that no relief having been claimed against defendant 2,

who is the predecessor-in-title of the present appellant, no relief can be granted against the present appellant.

22. The objection of the respondent that such point is taken only before this Court and not at an earlier stage of the proceeding cannot be countenanced since this point goes to the root of the matter and for consideration of this point no further investigation in the facts of the case is necessary. This point actually appears from the admitted records of the case and this point is based on the provisions of the Code of Civil Procedure.

23. In this connection principles which have been laid down by Lord *Sumner in Surajmull Nagoremull v. Triton Insurance Co. Ltd.,* [52 Indian Appeals 126] are very pertinent. The learned Law Lord summarized the proposition so lucidly that we should do nothing more than quote it:

> "…No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset:"

24. The aforesaid propositions have been quoted with approval by this Court in *Badri Prasad and others v. Nagarmal and others* reported in AIR 1959 SC 559 at page 562.

25. Similar views have been expressed by this Court again in *Tarinikamal Pandit and others v. Perfulla Kumar Chatterjee (dead) by L.Rs.* [AIR 1979 SC 1165]. After considering several decisions, including the one rendered in Badri Prasad (supra) this Court held as follows:-

> "…As the point raised is a pure question of law not involving any investigation of the facts, we permitted the learned counsel to raise the question…." (para 15 at page 1172)

26. In our view this point is sufficient to hold that the judgment of the Hon'ble High Court is not sustainable in law.

27. Apart from this, this Court finds that the appellants had been in peaceful possession of the disputed property from July 1963 and their predecessor-in-interest was in possession of the same property from 1950 till the property was transferred by her to Lateef Hassan Burney, predecessor-in-title of the appellant. After such transfer the construction started on the property and the appellants have been residing there since 1964 and the suit came to be filed only in 1975. Even in that suit after impleading the original defendant no.2 no relief has been claimed against him.

28. In view of the aforesaid admitted factual position and the legal questions discussed above, this Court cannot affirm the views taken by the High Court. The judgment of the High Court is set aside and that of the Trial Court is affirmed. The appeal is allowed. There will be no order as to costs.

R.P. Appeal allowed.

UNION OF INDIA & ORS.
v.
M/S. MASTER CONSTRUCTION CO.
(Civil Appeal No. 3541 of 2011)

APRIL 25, 2011

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

ARBITRATION AND CONCILIATION ACT, 1996:

s. 11(6) – Application for appointment of arbitrator after submitting 'no-claim certificate' and receipt of payment of final bill – Arbitrator appointed – Held: Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all – It may not be proper to burden a party, who contends that dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by claimant, as mere plea is not enough and the claimant must prima facie establish the same by placing material before the Chief Justice/ his designate – In the instant case, the conduct of contractor clearly shows that 'no claim certificates' were given by it voluntarily and it accepted the amount of the final bill voluntarily and the contract was discharged voluntarily – Order appointing the arbitrator u/s 11(6) cannot be sustained and is set aside.

The respondent-contractor completed the contract on 31.8.1998. The completion certificate was issued on 9.9.1999. Thereafter the contractor furnished 'no claim certificates' on 3-4-2000, 28-4-2000 and 4-5-2000, signed the final bill on 4-5-2000, and received payment under the

final bill on 19.6.2000. However, immediately on release of the bank guarantee on 12.7.2000, the same day the contractor wrote to the appellant-employers withdrawing the 'no claim certificate' and also lodged certain claims. The Chief Engineer declined to entertain the claims. The contractor made an application u/s 11 of the Arbitration and Conciliation Act, 1996 before the Civil Judge (Senior Division). The application was dismissed. The contractor's writ petition was also dismissed by the High Court. The contractor's S.L.P was disposed of by the Supreme Court with the direction that the application be placed before the Chief Justice of the High Court. The Chief Justice decided the application u/s 11(6) holding that all disputes between the parties to the contract would be referred to the arbitration and appointed the arbitrator. Aggrieved, the employers filed the appeal.

In the instant appeal filed by the employers, the question for consideration before the Court was: whether after furnishing 'no-claim certificates' and the receipt of payment of final bill, as submitted by the contractor, any arbitrable dispute between the parties survived or the contract stood discharged.

Allowing the appeal, the Court

HELD: 1.1 There is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/ his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears

to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all. [para 24] [866-D-F]

National Insurance Company Limited v. Boghara Polyfab Private Limited **2008 (13) SCR 638 = (2009) 1 SCC 267;** *The Union of India v. Kishorilal Gupta & Bros Limited* **AIR (1959) SC 1362;** *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath* **AIR (1968) SC 522;** *Damodar Valley Corporation v. K.K. Kar* **1974 (2) SCR 240 =(1974) 1 SCC 141;** *M/s. Bharat Heavy Electricals Limited, Ranipur v. M/s. Amar Nath Bhan Prakash* **(1982) 1 SCC 625;** *Union of India & Anr. v. M/s. L.K. Ahuja & Co.* **1988 (3) SCR 402 = (1988) 3 SCC 76;** *State of Maharashtra v. Nav Bharat Builders* **1994 Supp (3) SCC 83;** *M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, National Thermal Power Corpn.* **1994 Supp (3) SCC 126;** *Nathani Steels Ltd. v. Associated Constructions,* **1995 Supp (3) SCC 324;** *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. & Ors.* **1995 (5) Suppl. SCR 189 = (1996) 1 SCC 54;** *United India Insurance v. Ajmer Singh Cotton & General Mills & Ors.,* **1999 (1) Suppl. SCR 385 = (1999) 6 SCC 400;** *Jayesh Engineering Works v. New India Assurance Co. Ltd.* **(2000) 10 SCC 178;** *SBP & Co. v. Patel Engineering Ltd. & Anr.* **2005 (4) Suppl. SCR 688 = (2005) 8 SCC 618;** *National Insurance Co. Ltd. v. Nipha Exports (P) Ltd.* **2006 (6) Suppl. SCR 719 = (2006) 8 SCC 156; and** *National Insurance Company Limited v. Sehtia Shoes* **2008 (3) SCR 451 = (2008) 5 SCC 400 – referred to**

Chairman & M.D., NTPC Ltd. v. Reshmi Constructions, Builders and Contractors **2004 (1) SCR 62 = (2004) 2 SCC 663 and** *Ambica Construction v. Union of India* **2006 (9) Suppl. SCR 188 = (2006) 13 SCC 475 - cited**

1.2 It cannot be overlooked that the cost of arbitration is quite huge. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of

discharge of contract, with huge cost of arbitration merely because the plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there. [para 24] [866-G-H; 867-A-B]

1.3 In the instant case, the certificates furnished by the contractor leave no manner of doubt that upon receipt of the payment, there has been full and final settlement of the contractor's claim under the contract. That the payment of final bill was made to the contractor on June 19, 2000 is not in dispute. After receipt of the payment on June 19, 2000, no grievance was raised or lodged by the contractor immediately. The authority concerned, thereafter, released the bank guarantee in the sum of Rs. 21,00,000/- on July 12, 2000. It was then that on that day itself, the contractor lodged further claims. This appears to be a case falling in the category of exception noted in the case of Boghara Polyfab Private Limited, as to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute. [para 28-29] [868-A-D]

1.4 The conduct of the contractor clearly shows that 'no claim certificates' were given by it voluntarily; the

contractor accepted the amount voluntarily and the contract was discharged voluntarily. Thus, the order of the Chief Justice in the proceedings u/s 11(6) of the 1996 Act cannot be sustained and is set aside. [para 30 to 32] [868-E-H]

Case Law Reference:

2008 (13) SCR 638	**referred to**	**para 16**
2004 (1) SCR 62	**cited**	**para 16**
2006 (9) Suppl. SCR 188	**cited**	**para 16**
AIR (1959) SC 1362	**referred to**	**para 19**
1974 (2) SCR 240	**referred to**	**para 19**
(1982) 1 SCC 625	**referred to**	**para 19**
1988 (3) SCR 402	**referred to**	**para 19**
1994 Supp (3) SCC 83	**referred to**	**para 19**
1994 Supp (3) SCC 126	**referred to**	**para 19**
1995 Supp (3) SCC 324	**referred to**	**para 19**
1995 (5) Suppl. SCR 189	**referred to**	**para 19**
1999 (1) Suppl. SCR 385	**referred to**	**para 19**
(2000) 10 SCC 178	**referred to**	**para 19**
2005 (4) Suppl. SCR 688	**referred to**	**para 19**
2006 (6) Suppl. SCR 719	**referred to**	**para 19**
2008 (3) SCR 451	**referred to**	**para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3541 of 2011.

From the Judgment & Order dated 08.12.2006 of the High Court of Punjab and Haryana at Chandigarh in Arbitration Case No. 87 of 2006.

Brijender Chahar, Nishant Patel, C.S. Khan, Shamsuddin Khan (for D.S. Mahra) for the Appellants.

Indu Malhotra, Jyoti Mendiratta, Prerna Priyadarshini for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. This appeal, by special leave, arises from the order dated December 8, 2006 passed by the Chief Justice of the Punjab and Haryana High Court in the proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, '1996 Act') whereby he held that all disputes between the parties to the contract have to be referred to the arbitration and appointed Mr. M.S. Liberahan, retired Chief Justice of Andhra Pradesh High Court, as sole arbitrator to decide the disputes between the parties.

3. The respondent — M/s. Master Construction Company (for short, 'the contractor') — was awarded a contract (CA No. CEBTZ—14/95-96) on September 17, 1995 by the first appellant—Union of India — for the work, 'provisions of OTM accommodation and certain essential technical buildings' to be erected and installed at Bhatinda. The first phase of the work was to be completed by July 20, 1996 and the second phase by January 20, 1997.

4. The agreement between the parties made IAFW—2249 an integral part of the contract. Condition 70 thereof provided mode for resolution of disputes and differences between the parties through arbitration.

5. The work is said to have been completed by the contractor, albeit belatedly, on August 31, 1998. The completion

certificate was issued on September 9, 1999.

6. The contractor furnished no-claim certificates on April 3, 2000, April 28, 2000 and May 4, 2000 and the final bill was signed on May 4, 2000.

7. The payment of final bill was released to the contractor on June 19, 2000. Thereafter, the bank guarantee amounting to Rs. 21,00,000/- was also released on July 12, 2000. Immediately after release of the bank guarantee, on that very day, i.e. July 12, 2000, the contractor wrote to the appellants withdrawing 'no-claim certificates'; it also lodged certain claims.

8. The Chief Engineer, Bhatinda Zone, Bhatinda (Appellant No. 3 herein) vide his letter dated July 13, 2000 declined to entertain the claims of the contractor on the ground that the final bill has been accepted by the contractor after furnishing the 'no-claim certificates' and no claim under the contract remained.

9. The contractor vide its letter dated September 10, 2000 requested the Engineer-in-Chief, Army Headquarters, Kashmir House, New Delhi (Appellant No. 2 herein) to refer the disputes between the parties for resolution to the arbitrator. The contractor stated in that letter that if the arbitrator was not appointed within 30 days from the date of request, it may be constrained to seek the remedy as may be available under the law.

10. As no arbitrator was appointed by the appellants despite the request made in the letter dated September 10, 2000, the contractor made an application under Section 11 of the 1996 Act before the Civil Judge, (Senior Division), Bhatinda on January 10, 2001. The application, after contest, was dismissed by the Civil Judge, Senior Division, Bhatinda on January 6, 2003.

11. Being not satisfied with the order dated January 6,

2003, the contractor challenged that order by filing a writ petition before the High Court of Punjab and Haryana.

12. The Division Bench of the High Court heard the parties and by its order dated May 20, 2004 dismissed the contractor's writ petition.

13. The contractor challenged the High Court's order by filing a special leave petition before this Court. This Court disposed of the special leave petition on January 3, 2006 by directing that the application filed by the contractor under Section 11 of the 1996 Act shall be placed before the Chief Justice of the Punjab and Haryana High Court, for appropriate order thereon. This Court, consequently, set aside the orders of the High Court and the lower court.

14. It was then that the Chief Justice of the Punjab and Haryana High Court decided the application filed by the contractor under Section 11(6) of the 1996 Act and passed the order impugned in the present appeal.

15. Mr. Brijender Chahar, learned senior counsel for the appellants made two-fold submission : (i) that no arbitrable dispute existed between the parties as full and final payment has been received by the contractor voluntarily after submission of 'no-claim certificates' and the final bill, and (ii) that, in any case, the Chief Justice in exercise of his power under Section 11(6) ought to have given due regard to the arbitration clause and appointed the arbitrator in terms thereof.

16. Ms. Indu Malhotra, learned senior counsel for the contractor, on the other hand, vehemently contended that the whole case of the contractor from the very beginning had been that 'no-claim certificates' were given by the contractor under the financial duress and coercion as the appellants had arbitrarily withheld the payment. She would submit that the issue whether 'no-claim certificates' were given voluntarily or under financial duress, is an issue which must be decided by the

arbitrator alone and it is for this reason that the Chief Justice, in the proceedings under Section 11(6), has referred the disputes between the parties to the arbitrator. In this regard, she heavily relied upon a recent decision of this Court in the case of *National Insurance Company Limited v. Boghara Polyfab Private Limited*[1]. She also referred to two earlier decisions of this Court, namely, *Chairman & M.D., NTPC Ltd. v. Reshmi Constructions, Builders and Contractors*[2] and *Ambica Construction v. Union of India*[3].

17. That IAFW—2249 was made an integral part of the contract between the parties and condition 70 thereof provided for mode of resolution of disputes and differences between the parties through arbitration is not in dispute. Condition 70 (arbitration clause) reads as under :

> "70. Arbitration-All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.
>
> Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the works or termination or determination of the contract under Condition Nos. 55, 56 and 57 hereof.
>
> Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 52,53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

1. (2009) 1 SCC 267.
2. (2004) 2 SCC 663.
3. (2006) 13 SCC 475.

> Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.
>
> If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.
>
> The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.
>
> The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.
>
> The Arbitrator may, form time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.
>
> The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters, referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.
>
> The venue of Arbitrator shall be such place or places as may be fixed by the Arbitrator in his sole discretion.
>
> The award of the Arbitrator shall be final and binding on both parties to the contract.
>
> If the value of the claims or counter claims in an arbitration

referred exceeds Rs. 1 lakh the arbitrator shall give reasons for the award".

18. The controversy presented before us does not concern the existence of arbitration agreement but it relates to whether after furnishing 'no-claim certificates' and the receipt of payment of final bill, as submitted by the contractor, any arbitrable dispute between the parties survived or the contract stood discharged. Before we turn to the factual aspect, it is appropriate to carefully consider the decision of this Court in *Boghara Polyfab Private Limited*[1] at some length as the learned senior counsel for the contractor placed heavy reliance on it.

19. In *Boghara Polyfab Private Limited*[1], this Court surveyed a large number of earlier decisions of this Court, namely, *The Union of India v. Kishorilal Gupta & Bros*[4]., *The Naihati Jute Mills Ltd. v. Khyaliram Jagannath*[5], *Damodar Valley Corporation v. K.K. Kar*[6], *M/s. Bharat Heavy Electricals Limited, Ranipur v. M/s. Amar Nath Bhan Prakash*[7], *Union of India & Anr. v. M/s. L.K. Ahuja & Co.*[8], *State of Maharashtra v. Nav Bharat Builders*[9], *M/s. P.K. Ramaiah & Company v. Chairman & Managing Director, National Thermal Power Corpn.*[10], *Nathani Steels Ltd. v. Associated Constructions*[11], *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. & Ors.*[12], *United India Insurance v. Ajmer Singh Cotton & General Mills & Ors.*[13], *Jayesh Engineering*

4. AIR (1959) SC 1362.
5. AIR (1968) SC 522.
6. (1974) 1 SCC 141.
7. (1982) 1 SCC 625.
8. (1988) 3 SCC 76.
9. 1994 Supp (3) 83.
10. 1994 Supp (3) SCC 126.
11. 1995 Supp (3) SCC 324.
12. (1996) 1 SCC 54.
13. (1999) 6 SCC 400.

Works v. New India Assurance Co. Ltd.[14], *SBP & Co. v. Patel Engineering Ltd. & Anr.*[15], *National Insurance Co. Ltd. v. Nipha Exports (P) Ltd.*[16] and *National Insurance Company Limited v. Sehtia Shoes*[17]. With regard to the jurisdiction of the Chief Justice/his designate in the proceedings under Section 11 of the 1996 Act, this Court culled out the legal position in paragraph 51 (page 294) of the report as follows :

> "51. The Chief Justice/his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice/his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud/coercion/ undue influence, he will have to hold that there was no discharge of the contract and consequently, refer the dispute to arbitration. Alternatively, where the Chief Justice/his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the Arbitral Tribunal with a specific direction that the said question should be decided in the first instance."

20. The Bench in Boghara Polyfab Private Limited1 in paragraphs 42 and 43 (page 291), with reference to the cases cited before it, inter alia, noted that there were two categories of the cited cases; (one) where the Court after considering the facts found that there was a full and final settlement resulting in accord and satisfaction, and there was no substance in the allegations of coercion/undue influence and, consequently, it

14. (2005) 10 SCC 178.
15. (2005) 8 SCC 618.
16. (2006) 8 SCC 156.
17. (2008) 5 SCC 400.

was held that there could be no reference of any dispute to arbitration and (two) where the court found some substance in the contention of the claimants that 'no dues/claim certificates' or 'full and final settlement discharge vouchers' were insisted and taken (either in printed format or otherwise) as a condition precedent for release of the admitted dues and thereby giving rise to an arbitrable dispute.

21. In *Boghara Polyfab Private Limited*[1], the consequences of discharge of the contract were also considered. In para 25 (page 284), it was explained that when a contract has been fully performed, then there is a discharge of the contract by performance and the contract comes to an end and in regard to such a discharged contract, nothing remains and there cannot be any dispute and, consequently, there cannot be reference to arbitration of any dispute arising from a discharged contract. It was held that the question whether the contract has been discharged by performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, such question is arbitrable. The Court, however, noted an exception to this proposition. The exception noticed is that where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Yet another exception noted therein is with regard to those cases where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim. It was observed that issuance of full and final discharge voucher or no-dues certificate of that kind amounts to discharge of the contract by acceptance or performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.

22. In paragraph 26 (pages 284-285), this Court in Boghara Polyfab Private Limited1 held that if a party which has executed the discharge agreement or discharge voucher, alleges that the execution of such document was on account of fraud/coercion/undue influence practised by the other party, and if that party establishes the same, then such discharge voucher or agreement is rendered void and cannot be acted upon and consequently, any dispute raised by such party would be arbitrable.

23. In paragraph 24 (page 284) in Boghara Polyfab Private Limited1, this Court held that a claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher has been executed by the claimant. The Court stated that such dispute will have to be decided by the Chief Justice/his designate in the proceedings under Section 11 of the 1996 Act or by the Arbitral Tribunal.

24. In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be necessity to refer the dispute for arbitration at all. It cannot be overlooked that the cost of arbitration is quite huge – most of the time, it runs in six and seven figures. It may not be proper to burden a party, who contends that the dispute is not arbitrable on account of discharge of contract, with huge cost of arbitration merely because plea of fraud, coercion, duress or undue influence has been taken by the claimant. A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. If the Chief

Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. On the other hand, if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest then and there.

25. In light of the above legal position, we now turn to the facts of the present case.

26. At the time of receiving payment on account of final bill, the contractor executed the certificate in the following terms :

"a) I/we hereby certify that I/we have performed the work under the condition of the contract agreement No. CEBTZ-14/95-96, for which payment is claimed and that *I/we have no further claims under CA No. CEBTZ-14/95-96*.

b) Received rupees two lakhs fifteen thousand one hundred seventy eight only. *This payment is in full and final settlement of all money dues under CA No. CEBTZ-14/95-96 and I have no further claims in respect of the CA No. CEBTZ-14/95-96*."

(emphasis supplied by us)

27. The contractor also appended the following certificate:

"It is certified that I have prepared this final bill for claiming entire payment due to me from this contract agreement. The final bill includes all claims raised by me from time to time irrespective of the fact whether they are admitted/ accepted by the department or not. I now categorically certify that I have no more claim in respect of this contract beyond those already included in this final bill by me and the amount so claimed by me shall be in full and final satisfaction of all my claims under this contract agreement. I shall however, receive my right to raise claim to the extent disallowed to me from this final bill."

28. The above certificates leave no manner of doubt that upon receipt of the payment, there has been full and final settlement of the contractor's claim under the contract. That the payment of final bill was made to the contractor on June 19, 2000 is not in dispute. After receipt of the payment on June 19, 2000, no grievance was raised or lodged by the contractor immediately. The concerned authority, thereafter, released the bank guarantee in the sum of Rs. 21,00,000/- on July 12, 2000. It was then that on that day itself, the contractor lodged further claims.

29. The present, in our opinion, appears to be a case falling in the category of exception noted in the case of Boghara Polyfab Private Limited (Para 25, page 284). As to financial duress or coercion, nothing of this kind is established prima facie. Mere allegation that no-claim certificates have been obtained under financial duress and coercion, without there being anything more to suggest that, does not lead to an arbitrable dispute.

30. The conduct of the contractor clearly shows that 'no claim certificates' were given by it voluntarily; the contractor accepted the amount voluntarily and the contract was discharged voluntarily.

31. We are, thus, unable to sustain the order of the Chief Justice in the proceedings under Section 11(6) of the 1996 Act. In view of our finding above, it is not necessary to consider the alternative submission made by the senior counsel for the appellants that the Chief Justice in exercise of his power under Section 11(6) ought to have appointed the arbitrator in terms of the arbitration clause and the appointment of Mr. M.S. Liberahan, retired Chief Justice of Andhra Pradesh High Court, was not in accord with the arbitration agreement.

32. The appeal is, accordingly, allowed. The impugned order dated December 8, 2006 passed by the Chief Justice of the High Court of Punjab and Haryana is set aside. The parties shall bear their own costs.

R.P. Appeal allowed.

U.P. AVAS EVAM VIKAS PARISHAD
v.
SHEO NARAIN KUSHWAHA & ORS.
(Civil Appeal No. 3615 of 2011)

APRIL 25, 2011

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

Land Acquisition Act, 1894 – s. 54 – Appeal under – Acquisition of certain lands of respondent for benefit of appellant – Compensation of Rs. 10,250/- per bigha awarded by the Land Acquisition Collector, enhanced to Rs. 1,10,250 per bigha by the Reference Court – Appeal u/s. 54 – Division Bench of the High Court upholding the award of Rs. 1,10,250/- per bigha as compensation dismissed the appeal summarily by a non-speaking order – On appeal, held: Under s. 54, a party aggrieved by the award of the Reference Court is entitled to file an appeal against the award of the Reference Court as of right – Such appeals which mostly relate to the correctness of the quantum of compensation or apportionment, raise both questions of facts as well as questions of law – Provisions of Or. 41 CPC are made applicable to such appeals – Thus, if the High Court wants to dismiss an appeal summarily without issuing notice, it should assign brief reasons, though not required to render a 'brief judgment' – On facts, on the basis of the rate of Rs.45 per sq.yd. awarded by the Reference Court, the price of a bigha comprising 2250 sq.yds., would be Rs.1,01,250 and not Rs.1,10,250 – Thus, there is an error apparent on the face of the award of the Reference Court – Also, several other appeals relating to the same notification, against similar fixation of market value by the Reference Court were already admitted by the High Court – Thus, the appeal raised sufficient grounds which require to be dealt with and decided by the High Court on merits – Matter is remitted to the High Court for disposal of the appeal on merits – Code of Civil Procedure, 1908 – Or. 41 r. 11.

Land acquisition – Measurement of land area – Units of measurement – Held: A 'bigha' as a unit of measurement varies in extent in different parts of India – In public documents, deeds of conveyance and judicial orders, it is advisable to use units of measurement which have the same meaning in all parts of the country – Description by standard units of measurement would be the solution.

Judgment/Order: 'Summary decision' – Held: Is a decision which is short and quick and not elaborate but that does not mean 'non-reasoned dismissal.

Hari Shanker vs. Rao Girdhari Lal Chowdhury **AIR 1963 SC 698;** *Kiranmal Zumerlal Borana Marwadi vs. Dnyanoba Bajirao Khot* **1983 (4) SCC 223;** *Jayanmti De vs. Abani Kanta Barat* **AIR 2000 SC 3578 – referred to.**

The Advanced Law Lexicon by P. Ramanatha Iyer **3rd Edn, Vol.1 p 528 – referred to.**

Case Law Reference:

AIR 1963 SC 698	**Referred to**	**Para 3**
1983 (4) SCC 223	**Referred to**	**Para 8**
AIR 2000 SC 3578	**Referred to**	**Para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3615 of 2011.

From the Judgment & Order dated 20.12.2005 of the High Court of Judicature at Allahabad in First Appeal No. 390 of 2005.

Vishwajit Singh, Ritesh Agrawal, Abhindra Maheswari for the Appellant.

Dr. Madan Sharma, Vijay Kumar Pandita, J.P. Tripathi, Asha Upadhyay, R.D. Upadhyay, Sanjay Visen, Ashutosh Kr. Sharma, Gunnam Venkateswara Rao for the Respondents.

The Order of the Court was delivered by

O R D E R

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

2. The appellant, for whose benefit certain lands (including the land of respondents) at village Daulatpur, District Kanpur were acquired, filed an appeal before the Allabahad High Court challenging the judgment of the Reference Court which increased the compensation for the acquired land of respondents from Rs.10,250/- per bigha to Rs.1,10,250/- per bigha. The said appeal has been dismissed summarily by a division bench of the Allahabad High Court, by the impugned non-speaking order dated 20.12.2005 upholding the award of Rs.1,10,250/- per bigha as compensation. The High Court has stated that it was doing so, in exercise of the power under Order 41 Rule 11 of the Code of Civil Procedure (`Code' for short). The said order is challenged in this appeal by special leave.

3. The appeal in question was filed under section 54 of the Land Acquisition Act, 1894 (for short `LA Act') which provides that an appeal shall lie in any proceedings under that Act, to the High Court from the award of the Reference Court, subject to the provisions of the Code of Civil Procedure, applicable to appeals from original decrees. An appeal is a proceeding where a higher forum reconsiders the decision of a lower forum, on questions of fact and/or questions of law, with power to confirm, reverse, modify the decision or remand the matter to the lower forum for fresh decision. In Hari Shanker vs. Rao Girdhari Lal Chowdhury (AIR 1963 SC 698) this court held :

> "....A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done is second appeals arising under the Code of Civil Procedure."

4. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decisions of such court. Order 41 of the Code regulates appeals from original decrees. Rule 11 of Order 41 relates to power to dismiss appeals without sending notice to lower court and sub-rules (1) and (4) thereof, relevant for our purpose, are extracted below :

> "11. Power to dismiss appeal without sending notice to Lower Court.-
>
> (1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal.
>
> xxxxxxxx
>
> (4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment."

5. It is evident from sub-rule (1) that an appellate court can dismiss an appeal after a preliminary hearing without calling for the records of the trial court and without issuing notice to the respondent, if it is satisfied that the appeal has no merit. Sub-rule (1) does not however state that such dismissal can be without assigning any reasons.

6. Sub-rule (4) provides that where the appellate court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment recording in brief, its grounds for doing so. Sub-rule (4) by implication therefore provides that if the appellate court is the High Court, and it chooses to dismiss a first appeal at the stage of preliminary hearing, without

issuing notice to the respondent and without calling for records, it need not deliver a formal brief judgment as is required by other appellate fora. A `judgment', even a brief one, which is required to be rendered by appellate courts other than High Courts, should necessarily refer to the pleadings, nature of relief, the points for consideration and the decision thereon. But sub-rule (4) does not say that if the appellate court which dismisses the appeal is the High Court, no reasons be assigned for dismissing the appeal. Sub-Rule (4) of Rule 11 does not enable the High Court to dismiss first appeals by one line orders to the effect that `appeal is dismissed' or by non-speaking orders. The order of the High Court dismissing the first appeal should be sufficiently reasoned to disclose the application of mind to the grounds of appeal and make out that the High Court was resorting to dismissal in limine as it found the appeal either to be vexatious or wholly without merit. Order 41 Rule 11 of the Code, while relieving the High Court from the obligation to write a `judgment', does not dispense with the obligation to assign reasons in brief, when summarily dismissing the appeal.

7. Unless the order is reasoned, there will be no way of knowing whether the appellate court has examined the appeal before deciding that it did not deserve admission. As a limited right to appeal to Supreme Court is available against the appellate judgments of the High Court, unless there are reasons in the order of dismissal, it will not be possible for the Supreme Court to examine whether the High Court has rightly rejected the appeal. The appellant who has filed the first appeal in pursuance of a statutory right to file such appeal, paying necessary court fee, can legitimately expect reappreciation of the evidence and re-determination of the questions raised, unless the statute providing for the appeal provides otherwise.

8. This court has repeatedly pointed out that any dismissal of an first appeal even at the preliminary hearing stage, should be supported by brief reasons. In *Kiranmal Zumerlal Borana*

Marwadi vs. Dnyanoba Bajirao Khot - [1983 (4) SCC 223] this court observed : "As numerous points both of law and facts appear to have been raised in the appeal, which again were sought to be canvassed before us, in fairness to the parties and to us, some reasons ought to have appeared in the judgment indicating what appealed to the High Court to be in entire agreement with the learned trial Judge. Let it be remembered that it was the first appeal against the decision of the trial Court and therein the appellant can and has raised serious questions of law and disputed decision on facts. We, therefore, think that this is pre-eminently a fit case which ought to have been admitted and disposed of on merits."

In *Jayanmti De vs. Abani Kanta Barat* - AIR 2000 SC 3578, this Court observed thus :

> "We are not satisfied that the High Court has considered the appeal on merits. Even if the dismissal is under Order 41 Rule 11 and the High Court is not required under Sub-rule (4) to record in brief its grounds for doing so, it is not a carte blanche to enable the appellate court to avoid recording any reason whatsoever. We think that the appeal required consideration on merits. We, therefore, set aside the impugned order and remit the appeal to the High Court for disposal of the same on merits and in accordance with law by stating the reasons."

9. Under section 54 of the LA Act, a party aggrieved by the award of the Reference Court is entitled to file an appeal against the award of the Reference Court as of right. Such appeals which mostly relate to the correctness of the quantum of compensation or apportionment, raise both questions of facts as well as questions of law. The provisions of Order 41 of the Code are made applicable to such appeals. The High Court, should therefore, if it wants to dismiss an appeal summarily without issuing notice, assign brief reasons, though not required to render a `brief judgment'. Subject to the requirements and limitations placed by the statute providing for the appeals,

appeals may be disposed of summarily, where so provided. `Summary decision' refers to a decision which is short and quick and not elaborate. But it does not mean `non-reasoned dismissal', as any order appealable in law has to be reasoned. A dismissal in limine refers to dismissal at the outset. Summary dismissal or dismissal in limine does not refer to a dismissal without assigning reasons.

10. In this case the Land Acquisition Collector has awarded Rs.10,250 per bigha. The Reference Court awarded Rs.1,10,250 per bigha. The Reference Court stated that one bigha is equivalent to 2250 sq.yds. and it was awarding Rs.45/- per sq.yd. On that basis, that is at the rate of Rs.45 per sq.yd. the price of a bigha comprising 2225 sq.yds. would be Rs.1,01,250 and not Rs.1,10,250. Thus even without a detailed examination, there is an error apparent on the face of the award of the Reference Court. The other grounds raised by the appellant also deserved examination and consideration, particularly having regard to the fact that several other appeals relating to the same notification, against similar fixation of market value by the Reference Court were already admitted by the High Court and pending consideration.

11. We may refer to another unconnected but relevant aspect relating to the use of locally prevalent units of measurement. A `bigha' as a unit of measurement varies in extent in different parts of India. The Advanced Law Lexicon (P. Ramanatha Iyer: 3rd Edition, Vol.1; page 528) states that in upper India, one bigha refers to 3025 sq.yd. of land, whereas in Bengal, it is equal to 1600 sq.yd. We are informed in Delhi and Punjab, a Bigha equals 1008 sq.yd. The Reference Court states that a bigha is equal to 2250 sq.yds. In public documents, deeds of conveyance and judicial orders, it is advisable to use units of measurement which have the same meaning in all parts of the country. For example, the term `gunta' is prevalently used to refer to one-fortieth of an acre in Maharashtra, Karnataka and Andhra Pradesh. But the word refers to the same extent of

measurement in all states. On the other hand, a word like `Bigha', describing a unit of measurement which refers to different extents in different states, or different parts of the same state, should be avoided. Description by standard units of measurement will be the solution. Be that as it may.

12. We are of the view that the appeal filed by the appellant raised sufficient grounds which require to be dealt with and decided by the High Court on merits. We therefore allow this appeal, set aside the judgment of the High Court and remand the matter to the High Court for disposal of the appeal on merits.

N.J. Appeal allowed.

BAHADUR SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 2106 of 2008)

APRIL 26, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985: ss. 18, 50 – Recovery of contraband goods – Nakabandi held by police party under the supervision of Superintendent of police, PW-3 – Allegation that on seeing the police party, the appellant and one 'DK' ran in different directions – Both apprehended – 10 kgs of opium allegedly found in bag which the appellant was carrying – Recovery of 10 kgs of opium from 'DK' Both tried separately – Conviction of 'DK' attaining finality – Trial court acquitted appellant on the ground that prosecution story was doubtful and the provisions in local newspaper, 20 kgs of opium was recovered from 'DS' but there was no reference to the appellant – High Court reversed the order of acquittal on the ground that the press note could not be taken in evidence – On appeal, held: Provisions of s. 50 was not applicable in the instant case – The opium was allegedly recovered, from a bag, which the appellant was carrying – High Court wrongly proceeded on the basis that press note was a news items, whereas it was a press noted issued by the SSP, veracity of which was accepted by PW-3 – The finding of High Court that the press note could not be relied upon was not correct – Trial court took view in favour of the accused on a consideration of the evidence, and as that view was clearly possible, High Court ought not have interfered in the matter in an appeal against acquittal – Appeal against acquittal – Evidence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2106 of 2008.

From the Judgment and Order dated 29.05.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 231-DBA of 1998.

Pradeep Gupta, Suresh Bharti and K.K. Mohan for the Appellant.

Jayant Sud, AAG, Harender Singh and Kuldeip Singh for the Respondent.

The following order of the Court was delivered

O R D E R

1. This appeal is directed against the judgment and order dated 29th May, 2008 of the High Court of Punjab & Haryana, whereby the acquittal of the appellant-Bahadur Singh for an offence punishable under Section 18 of the Narcotic Drugs & Psychotropic Substances Act,1985, (hereinafter referred to as 'the Act') has been set aside and he has been convicted under that provision and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.one lakh and in default in payment of fine, to undergo further rigorous imprisonment for one year.

2. The facts are as under:-

3. At about 6.30 p.m. on the 5th December, 1995, a police party headed by SHO Rajbir Singh held a special nakabandi under the supervision of PW-3 Gurmeet Singh, Superintendent of Police (Headquarters). At about 6.45 p.m. two persons were spotted coming towards them. On seeing the police party, one of the persons ran towards the taxi stand, whereas the other attempted to turn towards Amloh Chowk. A party led by inspector Rajbir Singh followed the person proceeding towards Amloh Chowk and apprehended him. He turned out to be

Bahadur Singh, the appellant. He was also found to be carrying a bag in his right hand which was suspected to contain contraband. An offer under Section 50 of the Act was made to him by inspector Rajbir Singh. The appellant stated that he would like to be searched in the presence of a Gazetted Officer. PW-3 Gurmeet Singh was accordingly requested to be present. The bag was searched and 10 Kgs.of opium was found therein. A sample of 20 grams was separated and the balance of the opium was sealed and was entrusted to PW Mohinder Singh. It appears that the person who had run towards the taxi stand was also apprehended by another police party and 10 kg.of opium was also recovered from him. That man was Darshan Khan. Two trials were held thereafter, one with respect to the appellant, Bahadur Singh and the other with respect to Darshan Khan. It is the admitted position that Darshan Khan's conviction has attained finality. Bahadur Singh was, however, tried by the Additional Sessions Judge, Ludhiana, who held that the Prosecution story was doubtful and accordingly acquitted him. In arriving at this conclusion, the trial court observed that the provisions of Sections 50, 55 and 57 of the Act had been violated. It was further found that as per the press note published in the Daily "Jagbani", Jalandhar (Ex.DD) dated 8th December, 1995, it had been brought out that 20 kgs. of opium had been recovered from Darshan Khan by SI Bhupinder Singh and there was no reference to the appellant. The trial court's judgment has been reversed in appeal by the High Court by observing that the provisions of Section 50 of the Act were not applicable in the facts of the present case and that in any event, the press note, Exhibit DD could not be taken in evidence and no reliance could thus be placed thereon, with regard to its contents.

4. Having heard learned counsel for the parties and having gone through the records and materials placed before us, we find that provisions of Section 50 of the Act would not be applicable in the present case. The opium had allegedly been recovered, from a bag, which the appellant was carrying, as per

the prosecution story. We, however, find that the observations of the High Court that the press note, Exhibit DD, could not be relied upon appears to be unacceptable. We must note that the High Court had proceeded on the basis that Exhibit DD was a news item, whereas it is clear from this Exhibit that it was a press note issued by the SSP Khanna, Shri Arun Kumar Mittal. We have gone through this document and find that it clearly states that as per prior information that opium smugglers from Madhya Pradesh would be selling opium, a police naka had been organised and two persons had alighted from a bus and on seeing the police had run in the different directions and of them, one person was the appellant and the other was Darshan Khan and that 20 kilograms of opium had been recovered from the bag carried by Darshan Khan. PW3 SP Gurmeet Singh, in his cross-examination admitted that the press note had indeed been issued and published in the daily "Jagbani" dated 8th December, 1995. On reading the press note, he stated that it referred to the naka in which the alleged opium had been recovered. In our view, the High Court's observation that Exhibit DD being a news item could not be taken into evidence, is not correct, as the veracity of the contents of the document, had been accepted by PW-3. We accordingly find that the recovery of 10 Kgs. of opium from the appellant becomes suspect.

5. We may also highlight that the trial court had taken a view in favour of the accused on a consideration of the evidence, and as that view was clearly possible, the High Court should not have interfered in the matter in an appeal against acquittal.

6. We, accordingly, allow this appeal, set aside the order of the High Court and order the acquittal of the appellant.

7. We also direct that the appellant, who is in custody, shall be released forthwith if not wanted/required in connection with any other case.

D.G. Appeal allowed.

ZAHOOR & ORS.

v.

STATE OF U.P.

(Criminal Appeal No. 1331 of 2008)

APRIL 26, 2011

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

Penal Code, 1860 – s. 304 (I) read with s. 34 – Death due to gunshots – Three accused – Conviction u/s. 302 and sentence of life imprisonment by the trial court – However, the High Court modified the conviction to one u/s. 304 (I) read with s. 34 on the ground that the matter related to a sudden quarrel without pre-meditation – On appeal held: As regards two of the accused no overt act has been attributed to them – They did not cause any injury to the deceased or to anybody else and the only allegation against them is that they had exhorted their co-accused to shoot at the deceased – Thus, their conviction is set aside – Conviction of the third accused u/s 304(Part-1) does not call for interference – However, he was of tender age on the date of the incident and at present he is 60 years of age – In the interest of justice, his sentence is reduced from 10 to 5 years – Sentence/Sentencing.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1331 of 2008.

From the Judgment & Order dated 08.10.2007 of the High Court of Allahabad in Criminal Appeal No. 2630 of 1982.

J.P. Sharma, Naresh Bakshi for the Appellants.

R.K. Gupta, Pradeep Misra, Suraj Singh, Sandeep Singh for the Respondent.

The following order of the Court was delivered

O R D E R

In this appeal for the reasons mentioned hereunder, no detailed facts are necessary.

Suffice it to say that the appellants before us Zahoor, Subrati and Babu were brought to trial for an offence punishable under Section 302 of the IPC for having committed the murder of Mahipal Singh @ Puttan on the 18th May, 1979. The Trial court convicted them under Section 302 of the IPC and sentenced them to life imprisonment. The High Court has by the impugned judgment held that the appellants were liable to conviction under Section 304 (I) of the IPC read with Section 34 as the matter related to a sudden quarrel without premeditation and that a fine of Rs.5000/- would meet the ends of justice.. The matter is before us after the grant of special leave at the instance of the accused.

We have heard the learned counsel for the parties and find no reason to interfere with the conviction recorded by the High Court in so far as the appellant-Babu is concerned. However, in the light of the fact that the other two appellants i.e. Zahoor and Subrati have been brought in with the aid of Section 34 of the IPC, their conviction and sentence cannot be maintained as the vicarious liability under Section 34 cannot be fastened as Section 34 deals with common intention which pre-supposes some piror planning or pre-concept of minds even during the incident. Moreover, we find that Zahoor and Subrati had not caused any injury to the deceased or to anybody else and the only allegation against them that they had exhorted their co-accused to shoot at the deceased Puttan. In other words no overt act has been attributed to them.

We also see from the record that the appellant-Babu was of tender age on the date of the incident. The incident happened in the year 1979 which would now make him about 60 years of age as of now. We quite appreciate that one man

has been shot dead but in the overall picture we feel that the ends of justice would be met if the sentence is reduced from 10 to 5 years under Section 304 Part-I of the IPC. The appeal against Zahoor and Subrati is allowed in toto but insofar as the appellant-Babu is concerned, the appeal is dismissed with the reduction in the sentence.

In the meantime, we direct that the appellants-Zahoor and Subrati, who are in custody, shall be released forthwith if not required in connection with any other case. The appellant-Babu be released on the completion of his sentence of 5 years.

The appeal is disposed of accordingly.

N.J. Appeal disposed of.

MRITUNJOY SETT (D) BY LRS.

v.

JADUNATH BASAK (D) BY LRS.

(Civil Appeal No. 3617 of 2011)

APRIL 26, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

WEST BENGAL PREMISES TENANCY ACT 1956:

s. 13(6) – Suit for eviction on ground of bona fide requirement – Notice – Tenant resisting the suit as not maintainable, as one month's clear notice according to Bengali Calendar was not given – Landlord claiming tenancy as per English Calendar – Trial court dismissed the suit holding that one month's clear time was not given to the tenant – First appellate court decreed the suit – High Court allowed the second appeal of the tenant – Held: There has been compliance of s. 13(6) and once tenant's tenancy was determined, on his failure in compliance thereof, suit was maintainable and rightly decreed by first appellate court – Ground of bona fide requirement had already been held by trial court in favour of landlord – Judgment of High Court cannot be sustained and is set aside – Evidence Act, 1872 – ss. 17,21 and 32 (2) – Code of Civil Procedure, 1908 – s. 100.

EVIDENCE ACT, 1872:

ss. 17,21 and 32(2) – 'Admission' – Suit for eviction of tenant – Tenant, on the basis of rent receipts claiming that notice for ejectment was bad as one month's clear notice according to Bengali Calendar was not given – Landlord on basis of lease deed claiming tenancy according to English Calendar – Neither of the two examining the predecessor-in-interest of landlord either to prove the rent receipts or the

lease deed – Tenant admitting in another suit the tenancy as per English Calendar – Held: In the circumstances, the 'admission' of tenant is the best possible form of evidence – West Bengal Premises Tenancy Act, 1956 – s.13(6).

CODE OF CIVIL PROCEDURE, 1908

s.100 – Second appeal – Scope of – Single Judge of High Court setting aside judgment of lower appellate court – Held: Single Judge failed to point out any perversity in the judgment of lower appellate court – In the light of the categorical finding that no substantial question was involved having been recorded by the Single Judge, the necessary consequence would have been to dismiss the tenant's second appeal – West Bengal Premises Tenancy Act, 1956 – s.13(6).

The appellant-landlord sent a notice to the respondent-tenant as contemplated u/s 13(6) of the West Bengal Premises Tenancy Act, 1956, on 28.8.1991 by registered post A/D, determining his tenancy and asking him to vacate the premises on or before the expiry of the last day of October, 1991. Though the notice was served on the tenant, he did not vacate the premises and the landlord filed a suit for eviction on the ground of personal use and occupation. The tenant besides resisting the ground of reasonable requirement of the premises by the landlord, took the specific plea that the tenancy being in accordance with Bengali Calendar month, the notice was in contravention of s. 13(6) of the Act, which provided a clear one month's notice for determining the tenancy. The trial court though found the ground of ejectment for bona fide need of the landlord in his favour, but dismissed the suit holding that the notice was not served in accordance with the provisions of s. 13(6) of the Act. On appeal by the landlord, the first appellate court decreed the suit holding that the tenancy was regulated according to English Calendar and there was full compliance of the provisions of s. 13(6) of the Act. However, the High Court

in second appeal, set aside the judgment of the first appellate court.

Allowing the appeal of the landlord, the Court

HELD: 1.1 In the light of the categorical finding – that no substantial question of law was involved – having been recorded by the Single Judge of the High Court, the necessary consequence would have been to dismiss the respondent's second appeal. [para 10] [892-A]

1.2 Even though in the impugned judgment and order, the Single Judge failed to point out any perversity in the judgment and decree of the lower appellate court, yet wrongly placed reliance on the judgment of this Court in Ramlal's case* and committed a grave error of law in allowing the respondent's second appeal on absolutely flimsy and cursory ground. [para 13] [892-E]

Ramlal & Anr. Vs. Phagua & Anr.* **(2006) 1 SCC 163 – held inapplicable.

2.1 The Single Judge was also wrong in his approach in giving undue weightage to the rent receipts issued as compared to the categorical and unequivocal admission made by the same respondent in his written statement filed in title Suit No. 203/88, that the rent was being paid per English Calendar month. Since an admission originates (either orally or in written form) from the person against whom it is sought to be produced, it is the best possible form of evidence. In the factual context of the case, it may also be noted that the 'rent receipts' issued by the predecessor-in-interest of the appellant, being the documentary evidence adduced by the respondent to prove his case that the tenancy was as per the Bengali Calendar, was never substantiated by the witness' testimony. [para 15-16] [893-B-C, F-H]

2.2 There is no particular reason given by either party as to why the predecessor-in-interest of the appellant-landlord was not produced as a witness before the trial court or the lower appellate court, either to prove the tenancy as per Bengali Calendar through rent receipts, as claimed by the tenant, or that the tenancy was based on English Calendar as claimed by the landlord as per lease deed. Ordinarily, therefore, without her testimony, both, the copies of the rent receipts produced by the respondent and the lease deed produced by the appellant, have little evidentiary value vis-a-vis the factual question of whether the tenancy was as per the Bengali or the English Calendar. [para 18] [894-D-E]

2.3 Even otherwise, assuming that legitimate circumstances existed for non-appearance of the predecessor-in-interest of the appellant-landlord as a witness, in which case her alleged affirmations in the rent receipts and the lease would be governed under the special provision contained in s. 32 (2) of the Evidence Act, by no stretch can any of these affirmations be said to carry greater weight than the admission in the written statement made by the respondent himself in the earlier suit. This is what has been contemplated u/s 17 of the Evidence Act which defines "admission" of a party and s.21 thereof prescribes the procedure of proving such an admission. [para 18] [894-E-H]

2.4 Section 13(6) of the West-Bengal Premises Control Act, 1956 requires giving of one month's notice to the tenant. From perusal of the Notice, dated 27.8.1991 sent by appellant on 28.8.1991, it is clear that one month's clear notice was given to the respondent seeking upon him to vacate the premises. Thus, there has been compliance of s. 13(6) of the Act and once the respondent's tenancy was determined, on his failure in compliance thereof, the suit was maintainable. The

ground of bona fide requirement was already held in favour of the appellant. The appellant's suit was rightly decreed by the lower appellate court and the decree could not have been set aside by the Single Judge, moreso when he had noticed that there was no substantial question of law involved in the second appeal. The impugned judgment and decree of the Single Judge cannot be sustained in law and are set aside. The judgment and decree of the lower appellate court are restored and appellant's suit for eviction is decreed. [paras 20,22 and 23] [895-D-F; 896-A-C]

Case Law Reference:

(2006) 1 SCC 163	**held inapplicable Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3617 of 2011.

From the Judgment & Order dated 07.02.2006 of the High Court at Calcutta in S.A. No. 110 of 2005.

Dhruv Mehta, Sriram Krishna, Malashree Ghosh, B.P. Yadav (for Sarla Chandra) for the Appellant.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. Leave granted.

2. In this appeal, the question that arises for our consideration is whether the Notice of eviction served by the appellant-landlord upon the respondent-tenant under Section 13 (6) of the West Bengal Premises Tenancy Act, 1956 (hereinafter shall be referred to as the "Act"), thereby determining his tenancy, was valid, legal and in accordance with law or not?

3. Factual matrix giving rise to the present appeal, bereft of unnecessary details are mentioned hereinbelow:-

Original Appellant was the owner and landlord of the premises bearing Municipal Corporation No. 43F Nilmoni Mitra Street, Kolkata – 700 006. The original Respondent was tenant in respect of two rooms on the ground floor at a monthly rent of Rs. 75/-. Before filing the present Ejectment suit, the Appellant had served a notice upon the Respondent determining his tenancy, as contemplated under Section 13 (6) of the Act. The said Notice was sent to the Respondent on 28.8.1991 by registered Post with A/D, directing him to vacate the premises on or before the expiry of the last day of October, 1991. The said Notice was duly served on the Respondent. In the said Notice, it was further averred by the Appellant that he reasonably required the said two rooms under occupation of the Respondent, for his own use and occupation. It is to be noted that the said Notice categorically mentioned that the respondent's tenancy was in accordance with English Calendar. The said Notice also mentioned that for all purposes, apart from being a notice under the provisions of the Act, it would also be deemed to be one given under Section 106 of the Transfer of Property Act. It is not clear from the record, if any reply was sent to the said notice by the Respondent but obviously as he failed to comply with the said Notice, the Appellant was constrained to file Ejectment Suit No. 124 of 1992 (later renumbered as 1612 of 2000) before the 6th Bench, Court of Small Causes, Calcutta for his ejectment on the ground mentioned in the aforementioned Notice.

4. On service of the summons from Court on the Respondent, he appeared and denied the averments as made by the Appellant. Respondent herein contended that there was absolutely no reasonable requirement of the premises by the Appellant and furthermore, he took a specific plea that the suit was not maintainable inasmuch as it was in contravention of Section 13 (6) of the Act, which provides a clear one month's Notice for determining the tenancy, as the tenancy was in accordance with Bengali Calendar month and not as per the English Calendar month as averred and pleaded by the

Appellant. To buttress this contention further, Respondent placed heavy reliance on the rent receipts issued by Smt. Kamala Bala Sett, the erstwhile owner of the property in question, who was accepting rent earlier for and on behalf of the Appellant, wherein a categorical endorsement was made that tenancy was according to Bengali calendar month.

5. On the averments of the respective parties, the Trial Court was pleased to frame issues. Issue No. 1 and 2 dealt with the question of maintainability of the suit by the Appellant and whether the Notice of ejectment served by Appellant on the Respondent was valid, legal and in accordance with law.

6. However, learned Trial Court after recording the evidence and after perusal of the records available, came to the conclusion that the Notice was not served in accordance with the provisions of section 13 (6) of the Act as one month's clear time was not given to the Respondent for vacating the premises. Thus, it was found that the very genesis of the suit was defective, and hence the suit was dismissed on this ground alone, even though the ground of ejectment with regard to bona fide need of the Appellant was found to be in his favour.

7. Feeling aggrieved by the judgment and decree of the trial court, Appellant was constrained to file an appeal before the appellate court. The appellate court considered the matter in full detail, and in particular, the single point therein, namely, with regard to satisfaction of Section 13 (6) of the Act. On consideration of the material on record, as also the certified copy of the written statement filed by Respondent herein in Title Suit No. 203/88, the Appellate Court came to the conclusion that tenancy right in favour of the Respondent was regulated according to English Calendar. Accordingly, there was full and complete compliance of the provisions of Section 13 (6) of the Act. In this view of the matter, judgment and decree of the Trial Court was set aside and the Appellant's Suit for Respondent's ejection from the Suit premises was decreed in his favour.

8. Then came the turn of the Respondent-defendant to challenge the same in the High Court by filing a Second Appeal No. 110 of 2005 under Section 100 of the Code of Civil Procedure, 1908 (referred to as "CPC" hereinafter). From the impugned judgment, it appears that in the Appeal Memo even though several questions of law were formulated but additional substantial questions of law Nos. XIII and XVII were later formulated for consideration, reproduced hereinbelow:

> "XIII. For that the learned Judge of the First Appellate Court ought to have held that the Notice of Ejectment (Exh-4) is bad in law and no decree can be passed thereon in as much as the said Notice was served on the basis that tenancy month is according to English Calendar while the Rent Receipts (Exhibit B Series and C) clearly indicates that the tenancy month is according to Bengali Calendar month.
>
> XVII. For that the appellate court on the materials before it should have considered that partial eviction of the premises would meet plaintiff's reasonable requirement."

9. It is pertinent to mention herein that while considering the appeal, the learned Single Judge found that no substantial question of law was involved in the appeal, yet proceeded to decide the same and that too against the Appellant. The following observations made by Learned Single Judge in this regard, are necessary to be mentioned :

> "On the reflection as aforesaid, this Court is of the view that there is no substantial question of law involved in this case as it is simply a legal question involved, namely, giving weightage to the evidentiary value of the rent receipts vis-a-vis written statement of another Suit wherein it was alleged that the defendant admitted the mode of tenancy. That cannot be a substantial question of law involved."

10. In fact, in the light of the said categorical finding having been recorded by the learned Single Judge, the necessary consequence would have been to dismiss the Respondent's Second Appeal but instead, the same has been allowed answering the aforesaid questions of law in favour of the Respondent. Hence this appeal, at the instance of landlord.

11. We have accordingly heard Mr. Dhruv Mehta, learned Senior Advocate ably assisted by Mr. Sriram Krishna, for the Appellant. Despite service of notice on the Respondent by various modes, including publication in the newspaper, he failed to appear.

12. It may be mentioned that during the pendency of Appeal in this Court, both original Appellant and Respondent have died and are being represented through their legal representatives but for the sake of convenience the parties shall still be referred to as Appellant and Respondent.

13. Even though in the impugned judgment and order, learned Single Judge failed to point out any perversity in the judgment and decree of the lower appellate court, yet wrongly placed reliance on a judgment of this Court reported in (2006) 1 SCC 163 titled *Ramlal & Anr. Vs. Phagua & Anr.* and proceeded to allow the same.

14. We have carefully gone through the said judgment and find that in any case, it does not favour the Respondent nor its ratio could be taken advantage of by the Respondent. Basically, and mainly it dealt with the proposition as to how and when concurrent findings of fact recorded by two courts can be interfered with by the High Court in a Second Appeal filed under Section 100 of the CPC. It was held in the said judgment that if any material piece of evidence that goes to the root of the matter, has not been appropriately considered by both the subordinate courts then and only then High Court would be justified in upsetting the judgment and decree of the two courts and not otherwise. In the aforesaid judgment, the question was

with regard to a disputed sale deed as is manifest from reading of paras 12 and 14 thereof. Thus, in our considered opinion, reliance on the aforesaid judgment was highly misplaced by the learned Single Judge.

15. Even though, it is not necessary to explore the matter on merits at this stage, nevertheless we find that the Learned Single Judge was also wrong in his approach in giving undue weightage to the rent receipts issued by Smt. Kamla Bala Sett to the Respondent, as compared to categorical and unequivocal admission made by the same Respondent in his Written statement filed in title Suit No. 203/88. His unequivocal admission relevant to this case in para 6 of the said written statement is reproduced herein below:

> "This defendant has been paying rent at the rate of Rs.6/- to the landlady Smt. Kamala Sett for occupying and using the northern outer wall of the tenancy of the defendant situated at 43/F, Nilmoni Mitra Street, Calcutta-6. This defendant also is a tenant comprising of two rooms at 43/F, Nilmoni Mitra Street, Calcutta – 6 *under Smt. Kamala Sett and the rent is Rs. 75/- per English Calendar month.*"
>
> (Underlining supplied by us)

16. In the light of Respondent's own admission, it leaves no doubt in our mind that it will hold good as long as it was not withdrawn or clarified by him. It is too well settled that an admission made in a court of law is a valid and relevant piece of evidence to be used in other legal proceedings. Since an admission originates (either orally or in written form) from the person against whom it is sought to be produced, it is the best possible form of evidence. In the factual context of this case, it may also be noted here that the 'rent receipts' issued by Smt. Kamala Sett, the predecessor-in-interest of the Appellant herein, being the documentary evidence adduced by the Respondent to prove his contention that the tenancy was as per the Bengali Calendar, was never substantiated by the witness'

testimony of the abovenamed Smt. Sett in the course of hearings.

17. Curiously enough, it was a fit case where both parties would have been greatly benefited if they had examined Smt. Kamala Sett as a witness. If she had deposed in favour of the Respondent then his contention that his tenancy was as per Bengali Calendar, would have been greatly strengthened. On the other hand, a Clause in the Deed of Conveyance executed between the Appellant and Smt. Kamala Sett, reveals that the tenanacy in favour of the Respondent was based upon the English Calendar – so if she had affirmed this fact during her examination, then the Appellant would have had an upper hand.

18. There is no particular reason given by either party as to why Smt. Kamala Sett was not produced as a witness before the Trial Court or the lower Appellate Court. Ordinarily therefore, without her testimony, both the copies of the rent receipts produced by the Respondent and the Lease Deed produced by the Appellant, have little evidentiary value vis-a-vis the factual question of whether the tenancy was as per the Bengali or the English Calendar. Even otherwise, assuming that legitimate circumstances existed for non-appearance of Smt. Kamala Sett as a witness in this case, in which case her alleged affirmations in the Rent Receipt (that the tenancy was as per the Bengali Calendar) and the Lease Deed (that the tenancy was as per the English Calendar) would be governed under the special provision contained in S. 32 (2) of the Indian Evidence Act, by no stretch can any of these affirmations be said to carry greater weight than the admission in the written stat ement made by the Respondent himself in the earlier suit. Thus, clearly, the admission of the Respondent would carry greater weight than the uncorroborated documentary evidence by way of rent receipts. This is what has been contemplated under Sections 17 which defines "admission" of a party and 21 prescribes the procedure of proving such an admission in the Indian Evidence Act, 1872.

19. Now, to understand whether the Notice purported to have been served under Section 13 (6) of the Act was in conformity with the aforesaid provision or not, we reproduce hereinbelow the relevant portion of Section 13 (6) :

> "S.13. Protection of tenant against eviction – (1) Notwithstanding anything to the contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant except on one or more of the following grounds namely.....
>
> (6) Notwithstanding anything in any other law for the time being in force, no suit of proceeding for the recovery of possession of any premises on any of the grounds mentioned in sub-section (1) except the grounds mentioned in clauses (j) and (k) of that sub-section shall be filed by the landlord unless he has given to the tenant one month's notice expiring with a month of the tenancy."

20. The aforesaid provision requires giving of one month's notice to the tenant. From perusal of the Notice, dated 27.8.1991 sent by Appellant on 28.8.1991, it is clear that one month's clear Notice was given to the Respondent seeking upon him to vacate the premises. Thus, there has been compliance of Section 13(6) of the Act and once the Respondent's tenancy was determined on his failure in compliance thereof, suit was maintainable.

21. Learned Single Judge of the High Court had not been able to point out any perversity in the Judgment and decree of the appellate Court, yet, committed a grave error of law in allowing the Respondent's Second Appeal on absolutely flimsy and cursory ground. The same cannot be sustained in law and in our opinion is against the well settled principles of law.

22. In this view of the matter, judgment and decree of the learned Single Judge do not appear to be in conformity with

law. Other ground of bona fide requirement was already held in favour of the Appellant. In our considered opinion appellant's suit was rightly decreed by the lower Appellate Court and the same could not have been set aside by the learned Single Judge, moreso when he had noticed that there was no substantial question of law involved in the second Appeal.

23. Thus, looking to the matter from all angles, we are of the considered opinion that the impugned judgment and decree of the learned Single Judge cannot be sustained in law. The same are hereby set aside and quashed. The judgment and decree of the lower appellate Court are hereby restored and Appellant's suit for eviction is decreed. Appeal is thus allowed.

24. In the facts and circumstances of the case, parties to bear their respective costs.

R.P. Appeal allowed.