

VIDEOCON INDUSTRIES LTD.  
v.  
UNION OF INDIA AND ANR.  
(Civil Appeal No. 4269 of 2011)

MAY 11, 2011

**[R.V. RAVEENDRAN AND G.S. SINGHVI, JJ.]**

*Arbitration and Conciliation Act, 1996 – s.9 – Jurisdiction for entertaining petition u/s.9 – Seat of arbitration – Production Sharing Contract (PSC) – Dispute between the parties – Matter referred to arbitral tribunal under clause 34.3 of PSC – In terms of clause 34.12 of the PSC, the seat of arbitration was Kuala Lumpur, Malaysia – However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this – Partial award passed – Respondent No.1 challenged the partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur – Thereafter, the respondents made request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but the request was rejected and it was declared that the remaining arbitral proceedings will be held in London – At that stage, the respondents filed application u/s.9 of the Act in Delhi High Court for stay of the arbitral proceedings – Appellant objected to the maintainability of the application and pleaded that the Courts in India did not have the jurisdiction to entertain challenge to the arbitral award – Delhi High Court overruled the objection of the appellant and held that the said High Court had the jurisdiction to entertain the petition filed u/s.9 – On appeal, held: As per the terms of agreement, the seat of arbitration was Kuala Lumpur – If the parties wanted to amend clause 34.12, they could have done so only by written instrument which was*

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A *required to be signed by all of them – Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12 – Mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration – In cases of international commercial arbitrations held out of India provisions of Part I of the Act would apply unless the parties by agreement, express or implied, exclude all or any of its provisions – In that case the laws or rules chosen by the parties would prevail – In the present case, the parties had agreed that notwithstanding Clause 33.1, the arbitration agreement contained in Clause 34 of PSC shall be governed by laws of England – This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act – As a corollary, the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents u/s.9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents -- English Arbitration Act, 1996 – ss.3 and 53.*

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**A Production Sharing Contract (PSC) was executed between respondent No.1-Government of India on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited (hereinafter referred to as “the Contractor”) in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydro carbon resources owned by respondent No.1. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India)**

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Private Limited and the name of the Videocon Petroleum Limited was changed to Petrocon India Limited, which merged the appellant – Videocon Industries Limited.

In 2000, disputes arose between the respondents and the contractor with respect to correctness of certain cost recoveries and profit. Since the parties could not resolve their disputes amicably, the same were referred to the arbitral tribunal under clause 34.3 of the said PSC. The arbitral tribunal fixed the date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic SARS, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London. Thereafter, various proceedings were held by the arbitral tribunal at London. Subsequently a partial award was passed.

Respondent No.1 challenged the partial award by filing a petition in the High Court of Malaysia at Kuala Lumpur. On being noticed, the appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of clause 34.12 of the PSC only the English Courts had the jurisdiction to entertain any challenge to the award.

After filing the petition before the High Court of Malaysia, the respondents made a request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but their request was rejected and it was declared that the remaining arbitral proceedings will be held in London. At that stage, the respondents filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 in Delhi High Court for stay of the arbitral proceedings. The appellant objected to the maintainability of the application and pleaded that the Courts in India did not have the jurisdiction to entertain challenge to the arbitral award. The Single

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A Judge of the Delhi High Court overruled the objection of the appellant and held that the said High Court had the jurisdiction to entertain the petition filed under Section 9 of the Act.

B The question which therefore arose for consideration in the present appeal was whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Arbitration and Conciliation Act, 1996 for grant of a declaration that Kuala Lumpur (Malaysia) was contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of clause 34 of PSC.

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D Allowing the appeal, the Court  
D HELD:1.1. The first issue is as to whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London. It is evident that in terms of clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held at London, the arbitral tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London would depend on a holistic consideration of the relevant clauses of the PSC. As per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend clause 34.12, they could have done so only by written instrument which was required to be signed by all of them. Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat

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A of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12. Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London. In this connection, reference can usefully be made to Section 3 of the English Arbitration Act, 1996. A reading of the above provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration. This is expressly indicated in Section 53 of the English Arbitration Act, 1996. [Paras 12, 13] [585-F-H; 586-H; 587-A-C]

F 1.2. The next issue is whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Act. In *Bhatia International v. Bulk Trading S.A.*, a three-Judge Bench of this Court held that the provisions of Part I of the Act would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would

A apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply. [Para 15] B [588-C-E; 593-C]

C 1.3. In the present case, the parties had agreed that notwithstanding Clause 33.1 of the PSC, the arbitration agreement contained in Clause 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents. In the result, the impugned order is set aside and the petition filed by the respondents under Section 9 of the Act is dismissed. [Paras 19, 20] [599-D-F]

F *Bhatia International v. Bulk Trading S.A. (2002) 4 SCC 105; 2002 (2) SCR 411; Dozco India P. Ltd. v. Doosan Infracore Co. Ltd. 2010 (9) UJ 4521 (SC) and Venture Global Engineering v. Satyam Computer Services Limited (2008) 4 SCC 190; 2008 (1) SCR 501 – relied on.*

G *Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited and others (2006) 1 GLR 658 – approved.*

H *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc. (2003) 9 SCC 79; National Thermal Power Corporation v. Singer Company (1992) 3 SCC 551; 1992 (3) SCR 106 – referred to.*

*Mulamchand v. State of Madhya Pradesh* (1968) 3 SCR 214 and *State of Haryana v. Lal Chand* (1984) 3 SCR 715 – cited.

**Case Law Reference:**

2002 (2) SCR 411 relied on Para 8, 9, 15, 16, 17,18 B  
(1968) 3 SCR 214 cited Para 10  
(1984) 3 SCR 715 cited Para 10  
2010 (9) UJ 4521 (SC) relied on Para 14 C  
2008 (1) SCR 501 referred to Para 16  
(2003) 9 SCC 79 referred to Para 17  
1992 (3) SCR 106 referred to Para 17 D  
(2006) 1 GLR 658 approved Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4269 of 2011.

From the Judgment and Order dated 30.04.2008 of the High Court of Delhi at New Delhi in O.M.P. No. 255 of 2006.

R.F. Nariman, Manu Nair, Mark D’Souza and Prashant Kalra (for Suresh A. Shroff & Co.) for the Appellant.

K.R. Sasiprabhu and R. Chandrachud for the Respondents.

The Judgment of the Court was delivered by

**G.S. SINGHVI, J.** 1. Leave granted.

2. Whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, “the Act”) for grant of a declaration that Kuala Lumpur (Malaysia) is

A contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of clause 34 of Production Sharing Contract (PSC) is the question which arises for consideration in this appeal.

B 3. Respondent No.1 – Government of India owns petroleum resources within the area of India’s territorial waters and exclusive economic zones. Respondent No.2 is an arm of the Ministry of Petroleum and Natural Gas. On 28.10.1994, a PSC was executed between respondent No.1 on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited, Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited (hereinafter referred to as “the Contractor”) in terms of which the latter was granted an exploration licence and mining lease to explore and produce the hydro carbon resources owned by respondent No.1. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India) Private Limited and the name of the Videocon Petroleum Limited was changed to Petrocon India Limited, which merged the appellant – Videocon Industries Limited. For the sake of convenience, the relevant clauses of Articles 33, 34 and 35 of the PSC are extracted below:

F “33.1 *Indian Law to Govern*

Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.

G 33.2 *Laws of India Not to be Contravened*

Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.

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34.3 *Unresolved Disputes*

Subject to the provisions of this Contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

34.12. *Venue and Law of Arbitration Agreement*

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.

35.2 *Amendment*

This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective.”

4. In 2000, disputes arose between the respondents and the contractor with respect to correctness of certain cost recoveries and profit. Since the parties could not resolve their disputes amicably, the same were referred to the arbitral tribunal under clause 34.3 of the PSC. The arbitral tribunal fixed 28.3.2003 as the date of hearing at Kuala Lumpur (Malaysia), but due to outbreak of epidemic SARS, the arbitral tribunal shifted the venue of its sittings to Amsterdam in the first instance and, thereafter, to London. In its meeting

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A held on 29.6.2003 at Amsterdam, the arbitral tribunal issued various directions in Arbitration Case No.1 of 2003. On the next day, the arbitral tribunal issued similar directions in Arbitration Case Nos.2 and 3 of 2003. On 19.8.2003, the arbitral tribunal issued revised time schedule for filing of the statement of claim, reply and counter claim, reply to counter claim, documents, affidavit of admission and denial of documents in Arbitration Case No.3 of 2003 and fixed the case for further proceedings to be held at London on 12.12.2003. By another order dated 30.10.2003, the arbitral tribunal directed that the hearing of the application filed by the claimants for taking on record the supplementary claim will take place at London on 15.11.2003, on which date, the following order was passed in Arbitration Case No.3 of 2003:

D “By consent of parties, seat of the Arbitration is shifted to London.

Parties will deposit Rs.25,000 each as administrative cost with the Presiding Arbitrator.”

E 5. Thereafter, the following proceedings were held by the arbitral tribunal at London:

(i) 6.2.2004 – Interim Award pronounced in Case No.1 of 2003 pronounced.

(ii) 7.2.2004 – proceedings held in Arbitration Case No.2 of 2003.

(iii) 17.3.2004 – Case No.2 of 2003 fixed for 13-19.5.2004 for final arguments.

(iv) 17.3.2004 – Case No.3 of 2003 fixed for recording of evidence from 3.6.2004 to 9.6.2004.

(v) 17.3.2004 – Case No.3 of 2003 fixed for arguments from 20-26.7.2004.

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- (vi) 27.3.2004 – final arguments rescheduled to 16-20.5.2004 in Case No.2 of 2003. A
- (vii) 25.11.2004 – Arbitral Tribunal declared that it will pass award in Case No.2 of 2003 and further partial award in Case No.1 of 2003. B
- (viii) 3.2.2005 – Case No.2 of 2003 fixed for 25-26.2.2005 for hearing on the application for clarification filed on behalf of the Government of India. C
- (ix) 12.3.2005 – The Tribunal declared that it will finalise the award in Case No.3 of 2003 and cross-objections in Case No.1 of 2003. D
- (x) 31.3.2005 – Partial award passed in Case No.3 of 2003. D

6. Respondent No.1 challenged partial award dated 31.3.2005 by filing a petition in the High Court of Malaysia at Kuala Lumpur. On being noticed, the appellant questioned the maintainability of the case before the High Court of Malaysia by contending that in view of clause 34.12 of the PSC only the English Courts have the jurisdiction to entertain any challenge to the award. E

7. After filing the petition before the High Court of Malaysia, the respondents made a request to the tribunal to conduct the remaining arbitral proceedings at Kuala Lumpur, but their request was rejected vide order dated 20.4.2006 and it was declared that the remaining arbitral proceedings will be held in London. F

8. At that stage, the respondents filed OMP No.255 of 2006 under Section 9 of the Act in Delhi High Court for stay of the arbitral proceedings. They filed another OMP No.329 of 2006 questioning award dated 31.3.2005 on the issue of G

A exchange rate. The appellant objected to the maintainability of OMP No.255 of 2006 and pleaded that the Courts in India do not have the jurisdiction to entertain challenge to the arbitral award. The learned Single Judge of the Delhi High Court overruled the objection of the appellant and held that the said High Court has the jurisdiction to entertain the petition filed under Section 9 of the Act. The learned Single Judge extensively referred to the judgment of this Court in *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105 and observed: B

C “The ratio of *Bhatia International*, in my understanding, is that the provisions of Part-I of the Indian Arbitration Act would apply to international commercial arbitrations held outside India, unless the parties by agreement express or implied, exclude all or any of its provisions. C

D It is noteworthy that the respondent, while challenging the jurisdiction of this Court to entertain the present petition, has not disputed the applicability of Part I of the Indian Arbitration Act to international commercial arbitrations held outside India. It is not the case of the respondent that section 9 of the Indian Arbitrations Act does not apply to international commercial arbitrations held outside India. What, in fact, learned senior counsel for the respondent has sought to contend before this Court is that the parties herein, by adopting the English Law as the proper law governing the arbitration agreement, have expressly excluded the applicability of the Indian Arbitration Act, and consequently, this Court has no jurisdiction to entertain the present petition. This contention of the respondent has been resisted by learned senior counsel for the petitioner on the ground that English law governs the substantive aspects of the arbitration agreement, whilst the procedural aspect thereof is governed by the curial law, that is, the procedural law of the country where the seat of D

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arbitration is. It is thus contended by learned senior A  
counsel for the petitioner that the juridical seat of A  
arbitration being in Kuala Lumpur, it is the Malaysian B  
laws that would govern the conduct of the arbitral B  
proceedings. Learned senior counsel for the respondent C  
has countervailed the said averment of the petitioner by C  
submitting that London, and not, Kuala Lumpur is the D  
'designated seat' of arbitration in view of the order D  
dated 15.11.2003 passed by the Arbitral Tribunal whereby the Arbitral Tribunal recorded the consent of the parties and shifted the seat of arbitration to London. In view of the petitioner having already conceded to London as the juridical seat of arbitration, it is thus contended by learned counsel for the respondent that the petitioner cannot know insist on Kuala Lumpur being the seat of arbitration.

The averments made by the respondent, without E  
prejudice to the veracity thereof, entail an examination E  
on merit and thus cannot be accepted at this preliminary F  
stage. Whether the Courts at Kuala Lumpur or London F  
have the jurisdiction to decide upon the seat of G  
arbitration squarely hinges on the procedural law G  
governing the arbitration agreement. However, in a H  
peculiar situation such as the present one where the H  
governing procedural law is yet to be determined, I am of the view that a question regarding the seat of arbitration can be best decided by the Court to which the parties or to which the dispute is most closely connected. It is important to recall that in the instant case the parties have expressly stated in Article 33.1 of the PSC that the laws applicable to the contract would be the laws in force in India and that the "Contract shall be governed and interpreted in accordance with the laws of India". These words are wide enough to engulf every question arising under the contract including the disputes between the parties and the mode of settlement. It was

A in India that the PSC was executed. The form of the A  
PSC is closely related to the system of law in India. It B  
is also apparent that the PSC is to be performed in B  
India with the aid of Indian workmen whose conditions C  
of service are regulated by Indian laws. Moreover, whilst C  
the petitioner is an important portfolio of the Government D  
of India, the respondent is also a company incorporated D  
under the Indian laws. The contract has in every respect E  
the closest and most real connection with the Indian E  
system of law and it is by that law that the parties have F  
expressly evinced their intention to be bound in all F  
respects. The arbitration agreement is contained in one G  
of the clauses of the contract, and not in a separate G  
agreement. In the absence of any indication to the H  
contrary, the governing law of the contract or the "proper H  
law" (in the words of Dicey) of the contract being Indian law, it is that system of law which must necessarily govern matters concerning arbitration, although in certain respects the law of the place of arbitration may have its relevance in regard to procedural matters.

E There is no gainsay that the Courts observe extreme E  
circumspection whilst affording relief under section 9 of F  
the Indian Arbitration Act, lest the annals of party F  
autonomy and sanctity of the arbitral tribunal – the G  
hallmarks of any arbitration – are jeopardized. It is to G  
be appreciated that the object underlying the grant of H  
interim measures under section 9 of the Indian H  
Arbitration Act is to facilitate and sub serve any ongoing arbitral proceedings.

G It is much apparent that the disparate stands taken by G  
both parties qua the seat of arbitration has resulted in H  
a veritable impasse in the arbitral proceedings in the H  
present case. The petitioner has brought to our notice H  
that the proceedings initiated by it at the High Court H  
Kuala Lumpur challenging the Partial award have been H  
virtually brought to a standstill owing the objections

raised by the respondent on grounds of jurisdiction. The petitioner has already expressed its dissidence about the English Court deciding the question of seat of arbitration for the reason that for the English Court to assume jurisdiction, it is the place of arbitration which is the relevant factor. In such a situation, of the Indian Court does not adjudicate upon the present petition, the arbitral proceedings between the parties will invariably end in a stalemate. This, I am afraid, would not only be inimical to the interests of the parties but also affront to section 9 of the Indian Arbitration, the underlying object whereof is to sub serve and facilitate arbitral proceedings.”

9. Shri R.F. Nariman, learned senior counsel appearing for the appellant argued that the impugned order is liable to be set aside because the learned Single Judge misconstrued and misapplied the judgment of this Court in *Bhatia International v. Bulk Trading S.A.* (supra) and erroneously held that the Delhi High Court has jurisdiction to decide O.M.P. No.255 of 2006. Learned counsel further argued that the learned Single Judge failed to appreciate that the reliefs prayed for in O.M.P. No.255 of 2006 could not have been granted on an application filed under Section 9 of the Act because stay of arbitral proceedings is beyond the scope of that section. Learned senior counsel emphasized that Section 5 of the Act expressly bars intervention of the Courts except in matters expressly provided for in the Act and, therefore, even if the petition filed by the respondents under Section 9 could be treated as maintainable, the High Court did not have jurisdiction over the arbitration proceedings because the same are governed by the laws of England. Shri Nariman then argued that after having expressly consented to the shifting of the seat of arbitration from Kuala Lumpur to Amsterdam in the first instance and effectively taken part in the proceedings held at London till 31.3.2005, respondent No.1 is estopped from

A claiming that the seat of arbitration continues to be at Kuala Lumpur. Learned senior counsel submitted that the learned Single Judge was not justified in rejecting objection to the maintainability of the petitions filed by respondent No.1 in the Delhi High Court merely because the appellant had earlier filed O.M.P. No.179 of 2003 before the High Court. He submitted that the doctrine of waiver and acquiescence cannot be pressed into service for deciding the issue relating to jurisdiction of the Delhi High Court to entertain the petition filed under Section 9 of the Act. Shri Nariman further submitted that if respondent No.1 felt aggrieved against partial award it could have filed petition under Sections 67 and 68 of the English Arbitration Act, 1996.

10. Shri Gopal Subramaniam, learned Solicitor General submitted that as per the arbitration agreement which is binding on all the parties to the contract, a conscious decision was taken by them that Kuala Lumpur will be the seat of any intended arbitration, Indian law as the law of contract and English law as the law of arbitration and the mere fact that the arbitration was held outside Kuala Lumpur due to the outbreak of epidemic SARS, the venue of arbitration cannot be said to have been changed from Kuala Lumpur to London. Learned Solicitor General emphasised that once Kuala Lumpur was decided as the venue of arbitration by written agreement, the same could not have been changed except by amending the written agreement as provided in clause 35.2 of the PSC. He then argued that the arbitral tribunal was not entitled to determine the seat of arbitration and the record of proceedings held on 15.11.2003 at London cannot be construed as an agreement between the parties for change in the juridical seat of arbitration. He further argued that the PSC was between the Government of India and ONGC Ltd., Videocon Petroleum Ltd., Command Petroleum (India) Pvt. Ltd. and Ravva Oil (Singapore) Pvt. Ltd. and, therefore, the venue of arbitration cannot be treated to have been changed merely on the basis

A of the so called agreement between the appellant and the  
respondents. Learned Solicitor General submitted that any  
B change in the PSC requires the concurrence by all the  
parties to the contract and the consent, if any, given by two  
of the parties cannot have the effect of changing the same.  
C He then argued that every written agreement on behalf of  
respondent No.1 is required to be expressed in the name  
of the President and in the absence of any written  
D agreement having been reached between the parties to the  
PSC to amend the same, the consent given for shifting the  
physical seat of arbitration to London did not result in change  
of juridical seat of the arbitration which continues to be  
Kuala Lumpur. In support of this argument, the learned  
Solicitor General relied upon the judgments of this Court in  
*Mulamchand v. State of Madhya Pradesh* (1968) 3 SCR  
214 and *State of Haryana v. Lal Chand* (1984) 3 SCR 715.  
E In the end, he argued that the provisions of the English  
Arbitration Act, 1996 would have applied only if the seat of  
arbitration was in England and Wales. He submitted that  
London cannot be treated as juridical seat of arbitration  
merely because the parties had decided that the arbitration  
agreement contained in Article 34 will be governed by the  
laws of England.

11. We have considered the respective submissions  
and perused the record.

F 12. We shall first consider the question whether Kuala  
Lumpur was the designated seat or juridical seat of  
arbitration and the same had been shifted to London. In  
terms of clause 34.12 of the PSC entered into by 5 parties,  
the seat of arbitration was Kuala Lumpur, Malaysia. However,  
G due to outbreak of epidemic SARS, the arbitral tribunal  
decided to hold its sittings first at Amsterdam and then at  
London and the parties did not object to this. In the  
proceedings held on 14th and 15th October, 2003 at  
H London, the arbitral tribunal recorded the consent of the

A parties for shifting the juridical seat of arbitration to London.  
Whether this amounted to shifting of the physical or juridical  
seat of arbitration from Kuala Lumpur to London? The  
decision of this would depend on a holistic consideration of  
the relevant clauses of the PSC. Though, it may appear  
B repetitive, we deem it necessary to mention that as per the  
terms of agreement, the seat of arbitration was Kuala  
Lumpur. If the parties wanted to amend clause 34.12, they  
could have done so only by written instrument which was  
required to be signed by all of them. Admittedly, neither there  
C was any agreement between the parties to the PSC to shift  
the juridical seat of arbitration from Kuala Lumpur to London  
nor any written instrument was signed by them for amending  
clause 34.12. Therefore, the mere fact that the parties to the  
particular arbitration had agreed for shifting of the seat of  
D arbitration to London cannot be interpreted as anything  
except physical change of the venue of arbitration from Kuala  
Lumpur to London. In this connection, reference can usefully  
be made to Section 3 of the English Arbitration Act, 1996,  
which reads as follows:

E **“3.The seat of the arbitration.**

In this Part “the seat of the arbitration” means the  
juridical seat of the arbitration designated—

- F (a) by the parties to the arbitration agreement, or  
G (b) by any arbitral or other institution or person vested  
by the parties with powers in that regard, or  
(c) by the arbitral tribunal if so authorised by the parties,  
or determined, in the absence of any such designation,  
having regard to the parties’ agreement and all the  
relevant circumstances.”

H 13. A reading of the above reproduced provision shows  
that under the English law the seat of arbitration means

juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. In contrast, there is no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur. Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration. This is expressly indicated in Section 53 of the English Arbitration Act, 1996, which reads as under:

**“53. Place where award treated as made.**

Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.”

14. In *Dozco India P. Ltd. v. Doosan Infracore Co. Ltd.* 2010 (9) UJ 4521 (SC), the learned designated Judge while exercising power under Section 11(6) of the Act, referred to the following passage from *Redfern v. Hunter*:

“The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings

A - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....

B It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence..... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.”

C 15. The next issue, which merits consideration is whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Act. In *Bhatia International v. Bulk Trading S.A.* (supra), the three-Judge Bench considered the important question whether Part I of the Act is applicable to the international arbitration taking place outside India. After noticing the scheme of the Act and argument of the appellant that Part I of the Act would apply only to the cases in which the venue of arbitration is in India, the Court observed:

E “A reading of the provisions shows that the said Act applies to arbitrations which are held in India between Indian nationals and to international commercial arbitrations whether held in India or out of India. Section 2(1)(f) defines an international commercial arbitration. The definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called “the convention country”). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Admittedly, Part II only

applies to arbitrations which take place in a convention country. Mr. Sen fairly admitted that Part II would not apply to an international commercial arbitration which takes place in a non-convention country. He also fairly admitted that there would be countries which are not signatories either to the New York Convention or to the Geneva Convention. It is not possible to accept the submission that the said Act makes no provision for international commercial arbitrations which take place in a non-convention country.

Now let us look at sub-sections (2), (3), (4) and (5) of Section 2. Sub-section (2) of Section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will “only” apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of

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Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. *Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied.*

If read in this manner there would be no conflict between Section 1 and Section 2(2). The words “every arbitration” in sub-section (4) of Section 2 and the words “all arbitrations and to all proceedings relating thereto” in sub-section (5) of Section 2 are wide. Sub-sections (4) and (5) of Section 2 are not made subject to sub-section (2) of Section 2. It is significant that sub-section (5) is made subject to sub-section (4) but not to sub-section (2). To accept Mr. Sen’s submission would necessitate adding words in sub-sections (4) and (5) of Section 2, which the legislature has purposely omitted to add viz. “subject to provision of sub-section (2)”. However read in the manner set out hereinabove there would also be no conflict between sub-section (2) of Section 2 and sub-sections (4) and/or (5) of Section 2.

That the legislature did not intend to exclude the applicability of Part I to arbitrations, which take place outside India, is further clear from certain other provisions of the said Act. Sub-section (7) of Section 2 reads as follows:

“2. (7) An arbitral award made under this Part shall be considered as a domestic award.”

As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians, and (b) international commercial arbitrations. As set out

hereinabove international commercial arbitrations may take place in India or outside India. Outside India, an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as “domestic awards” or “foreign awards”. Mr. Sen admits that provisions of Part II make it clear that “foreign awards” are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be “foreign awards” under the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a “domestic award”. There would thus be no need to define an award as a “domestic award” unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking, an award passed in an arbitration which takes place in a non-convention country would not be a “domestic award”. Thus the necessity is to define a “domestic award” as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a “domestic award”.

(emphasis supplied)

The Court then referred to Section 9 of the Act which empowers the Court to make interim orders and proceeded to observe:

“Thus under Section 9 a party could apply to the court (a) before, (b) during arbitral proceedings, or (c) after the making of the arbitral award but before it is enforced in accordance with Section 36. The words “in accordance with Section 36” can only go with the words

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“after the making of the arbitral award”. It is clear that the words “in accordance with Section 36” can have no reference to an application made “before” or “during the arbitral proceedings”. Thus it is clear that an application for interim measure can be made to the courts in India, whether or not the arbitration takes place in India, before or during arbitral proceedings. Once an award is passed, then that award itself can be executed. Sections 49 and 58 provide that awards covered by Part II are deemed to be a decree of the court. Thus “foreign awards” which are enforceable in India are deemed to be decrees. A domestic award has to be enforced under the provisions of the Civil Procedure Code. All that Section 36 provides is that an enforcement of a domestic award is to take place after the time to make an application to set aside the award has expired or such an application has been refused. Section 9 does suggest that once an award is made, an application for interim measure can only be made if the award is a “domestic award” as defined in Section 2(7) of the said Act. Thus where the legislature wanted to restrict the applicability of Section 9 it has done so specifically.

We see no substance in the submission that there would be unnecessary interference by courts in arbitral proceedings. Section 5 provides that no judicial authority shall intervene except where so provided. Section 9 does not permit any or all applications. It only permits applications for interim measures mentioned in clauses (i) and (ii) thereof. Thus there cannot be applications under Section 9 for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreements or the jurisdiction of the Arbitral Tribunal. All such challenges would have to be made before the Arbitral Tribunal under the said Act.”

The three-Judge Bench recorded its conclusion in the

following words:

“To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. *In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.*”

(emphasis supplied)

16. In *Venture Global Engineering v. Satyam Computer Services Limited* (2008) 4 SCC 190, a two-Judge Bench was called upon to consider whether the Court of Additional Chief Judge, City Civil Court, Secunderabad had the jurisdiction to entertain the suit for declaration filed by the appellant to set aside the award passed by the sole arbitrator appointed at the instance of respondent No.1 despite the fact that the arbitrator had conducted the proceedings outside India. The trial Court had entertained and allowed the application filed by respondent No.1 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) and rejected the plaint. The Andhra Pradesh High Court confirmed the order of the trial Court. Before this Court, reliance was placed by the appellant on the ratio of *Bhatia International v. Bulk Trading S.A.* (supra) and it was argued that the trial Court had the jurisdiction to entertain the suit. On behalf of the respondents, it was argued that the trial Court did not have the jurisdiction to entertain the suit because the award was made outside India. The Division Bench accepted the argument made on behalf of the appellant and observed:

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“On close scrutiny of the materials and the dictum laid down in the three-Judge Bench decision in *Bhatia International* we agree with the contention of Mr. K.K. Venugopal and hold that paras 32 and 35 of *Bhatia International* make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in *Bhatia International*.

The learned Senior Counsel for the respondent based on para 26 submitted that in the case of foreign award which was passed outside India is not enforceable in India by invoking the provisions of the Act or CPC. However, after critical analysis of para 26, we are unable to accept the argument of the learned Senior Counsel for the respondent. Paras 26 and 27 start by dealing with the arguments of Mr Sen who argued that Part I is not applicable to foreign awards. It is only in the sentence starting at the bottom of para 26 that the phrase “it must immediately be clarified” that the finding of the Court is rendered. That finding is to the effect that an express or implied agreement of parties can exclude the applicability of Part I. The finding specifically states: “But if not so excluded, the provisions of Part I will also

apply to all 'foreign awards.'" This exception which is carved out, based on agreement of the parties, in para 21 (placita e to f) is extracted below:

"21. ... By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to ally (sic allow) parties to provide by agreement that Part I or any provision therein will not apply. Thus in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set

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aside the award. As observed earlier, the public policy of India includes — (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement."

17. We may now advert to the judgment of the learned Single Judge of the Gujarat High Court in *Hardy Oil and Gas Limited v. Hindustan Oil Exploration Company Limited and others* (2006) 1 GLR 658. The facts of that case were that an agreement was entered into between Unocal Bharat Limited, Hardy Oil and Gas Limited, Netherland B.V. (Hardy), Infrastructure Leasing and Financial Services Limited, Housing Development Finance Corporation Limited and Hindustan Oil Exploration Company Limited on 14.10.1998. The agreement had an arbitration clause. A dispute having arisen between the parties, the matter was referred to the arbitral tribunal. During the pendency of the arbitration proceedings, an application was filed by the appellant in the District Court, Vadodara under Section 9 of the Act. A preliminary objection was raised to the maintainability of that petition. The learned District Judge accepted the objection. The learned Single Judge of Gujarat High Court referred to clause 9.5 of the agreement, which was as under:

"9.5 Governing Law and Arbitration

1. This Agreement (except for the provisions of Clause 9.5.4 relating to arbitration) shall be governed by and construed in accordance with the substantive laws of India.

2. Any dispute or difference of whatever nature arising under, out of, or in connection with this Agreement, including any question regarding its existence, validity or termination, which the parties are unable to resolve between themselves within sixty (60) days of notification

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by one or more Parties to the other(s) that a dispute exists for the purpose of this Clause 9 shall at the instance of any Party be referred to and finally resolved by Arbitration under the rules of the London Court of International Arbitration (SLCIA), which Rules (Rules) are deemed to be incorporated by reference into this clause.

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3. The Tribunal shall consist of two arbitrators who shall be Queen's Counsel, practicing at the English Bar in the Commercial Division of the High Court, one to be selected by the Parties invoking the Arbitration clause acting unanimously and one to be selected by the other shareholders acting unanimously, and one umpire who shall also be a Queen's Counsel, practicing at the English Bar in the Commercial Division of this High Court. If the parties are unable to agree on the identity of the umpire within 15 days from the day on which the matter is referred to arbitration, the umpire shall be chosen and appointed by LCIA. Notwithstanding Article 3.3 of the Rules, the Parties agree that LICA may appoint a British umpire. No arbitrator shall be a person or former employee or agent of, or consultant or counsel to, any Party or any Associated Company or any Party or in any way otherwise connected with any of the Parties.

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4. The place of arbitration shall be London and the language of arbitration shall be English. The law governing arbitration will be the English law.

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5. Any decision or award of an arbitral tribunal shall be final and binding on the Parties.”

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The learned Single Judge referred to various judgments of this Court including *Bhatia International v. Bulk Trading S.A.* (supra), *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.* (2003) 9 SCC 79, *National Thermal Power Corporation v. Singer Company* (1992) 3 SCC 551 and

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A upheld the order of the learned District Judge by observing that in terms of clause 9.5.4 of the agreement, the place of arbitration was London and the law governing arbitration was the English law. The learned Single Judge referred to paragraph 32 of the judgment in *Bhatia International v. Bulk Trading S.A.* (supra) and observed that once the parties had agreed to be governed by any law other than Indian law in cases of international commercial arbitration, then that law would prevail and the provisions of the Act cannot be invoked questioning the arbitration proceedings or the award. This is evident from paragraph 11.3 of the judgment, which is extracted below:

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“However, their Lordships observed in Para.32 that in cases of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case laws or rules chosen by the parties would prevail. Any provision, in Part-I, which is contrary to or excluded by that law or rules would not apply. Thus, even as per the decision relied upon by learned advocate for the appellant, if the parties have agreed to be governed by any law other than Indian law in cases of international commercial arbitration, same would prevail. In the case on hand, it is very clear even on plain reading of Clause 9.5.4 that the parties' intention was to be governed by English law in respect of arbitration. It is not possible to give a narrow meaning to this clause as suggested by learned Senior Advocate Mr. Thakore that it would apply only in case of dispute on Arbitration Agreement. It can be interpreted only to mean that in case of any dispute regarding arbitration, English law would apply. When the clause deals with the place and language of arbitration with a specific provision that the law governing arbitration will be the English law, such a narrow meaning cannot be given. No other view is possible in light of exception

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carved out of Clause 9.5.1 relating to arbitration. Term Arbitration, in Clause 9.5.4 cannot be taken to mean arbitration agreement. Entire arbitral proceedings have to be taken to be agreed to be governed by English law.”

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APM TERMINALS B.V.  
v.  
UNION OF INDIA & ANR.  
(Civil Appeal No. 4270 of 2011)

MAY 11, 2011

**[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]**

18. In our opinion, the learned Single Judge of Gujarat High Court had rightly followed the conclusion recorded by the three-Judge Bench in *Bhatia International v. Bulk Trading S.A.* (supra) and held that the District Court, Vadodara did not have the jurisdiction to entertain the petition filed under Section 9 of the Act because the parties had agreed that the law governing the arbitration will be English law.

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19. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents.

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20. In the result, the appeal is allowed. The impugned order is set aside and the petition filed by the respondents under Section 9 of the Act is dismissed.

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B.B.B. Appeal allowed.

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*Ports – Private monopolisation of port activities – Prevention of – Power of the Central Government to alter its policies for benefit of the public at large – Held: The Central Government is within its powers to strike a balance with regard to the control of the port facilities so that the same does not come to be concentrated in the hands of one private group or consortium – A change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason – The only qualifying condition is that such change in policy must be free from arbitrariness, irrationality, bias and malice and must be in conformity with the principle of Wednesbury reasonableness – In the instant case, however, as far as the appellant is concerned, it is because of certain fortuitous circumstances that it came to be excluded from the tender process for the Fourth Container Terminal – Under the revised policy, the appellant was entitled to participate in the alternate bids – The appellant having been excluded from participating in the bid for the Third Container Terminal on the basis of an existing policy, could not be debarred from participating in the next bid, by taking recourse to a different yardstick – Such a course of action would be contrary to public policy – Authorities of the JNPT directed to allow the appellant to continue to participate in the tender process for the Fourth Container Terminal.*

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The appellant-company (APM Terminals BV) filed writ petition challenging the validity and propriety of the decision taken by the Board of Trustees of Jawaharlal Nehru Port Trust (JNPT), to exclude the appellant from participating in the tender process for the development of the Fourth Container Terminal at the Bombay Port through public-private partnership and praying for quashing of the said decision with leave to the appellant to participate in the tender process in accordance with the policy indicated in Circular No. PD-12013/2/2005-JNPT dated 26th September, 2007, issued by the Union of India. The further prayer of the appellant was to read the provisions of the said Circular into the Licence Agreement dated 10th August, 2004, executed by the Board of Trustees, JNPT, in favour of the appellant, and, consequently, to release the appellant from the restrictions contained in Clause 8.31 of the Licence Agreement (which disqualified the appellant from participating in the Tender process relating to the Third Container Terminal) and/or to treat the same as not binding on the appellant. The appellant-company claimed that on account of subsequent resolutions adopted by the Board of Trustees of JNPT, which had the effect of altering the policy with regard to entrustment of operational facilities at the port to provide competition and to prevent monopolies, the provisions of Clause 8.31 required reconsideration in the light of the changed circumstances. The writ Petition filed by the appellant was dismissed by the High Court.

The question which arose for consideration before this Court was as to whether despite the contractual right vested in the appellant as well as in the petitioner in the connected Transferred cases i.e. PSA Sical Terminals Ltd. to participate in future tender processes for developmental work within the port area, such right

could be taken away and/or curtailed by a unilateral policy decision of the Central Government. The further question in the case of the appellant was whether having been debarred from participating in the bid for the Third Container Terminal in JNPT, it could also be excluded from the bidding process of the Fourth Container Terminal.

Allowing the appeal of APM Terminals BV and dismissing the Transfer Cases of PSA Sical Terminals Ltd., the Court

HELD:1.1. The Bombay High Court had found that the appellants were handling container terminals in Karachi and Sri Lanka and also at JNP and Chennai, thereby exercising control over 48% of the container traffic in India. The High Court held that the two existing terminals at JNP and Chennai are the biggest container terminals in the country and if the appellant and the petitioner in the Transferred Cases were permitted to operate the new container terminals also, they would have virtual monopoly of the container traffic in the entire country which would not be in the public interest. The High Court also took note of the fact that certain shipping agents and their associates had expressed concern regarding the increased tariff charged by the appellant at its container terminals at JNP and the possibility of a monopoly being created by it in the country. The High Court took note of the fact that port authorities all over the world had woken up to the possibility of private monopolies controlling the use of port facilities in such a manner so as to benefit their own ships to the detriment of world-wide shipping as a whole. The High Court took note of the fact that P&O Ports had been excluded from bidding for the Third Container Terminal in the Port of Melbourne on the ground that it would give the said operator a position of dominance which was to be

avoided in the interest of the shipping industry at large. Two other examples of Port Klang in Malaysia and Bhabange Port in Thailand, were also taken note of by the Bombay High Court where different independent operators were appointed to promote competition. [Paras 55, 56] [633-D-H; 634-A-B]

1.2. It is precisely for such reason that it had become necessary for the Central Government to alter its policy decision regarding entrusting control of the container terminals in the major ports of India in a manner so as to eliminate monopolisation and to encourage competition. [Para 57] [634-C-D]

*Delhi Cloth & General Mills Ltd. vs. Rajasthan State Electricity Board* (1986) 2 SCC 431: 1986 (1) SCR 633; *PTC India Ltd. vs. Central Electricity Regulatory Commission* (2010) 4 SCC 603: 2010 (3) SCR 609; *Punjab Communications Ltd. vs. Union of India & Ors.* (1999) 4 SCC 727 and *PTC India Limited vs. Central Electricity Regulatory Commission* (2010) 4 SCC 603: 2010 (3) SCR 609 – cited.

2. Insofar as the decision taken by the Central Government to alter its policy regarding the grant of licence for operating the container terminals in the Major Ports in India as against the contractual right embodied in the form of Clause 2.3 in the agreements executed or entered into between the Central Government and the appellant and the petitioner in the Transferred Cases, is concerned, the said controversy is no longer valid in regard to the appellant, since such point had not been taken on its behalf in the writ petition before the Bombay High Court. However, the same has been taken as a specific point on behalf of the petitioner in the Transferred Cases as far as the Tenders for the Second Container Terminal at the Tuticorin Port are concerned. The said question has to

A be considered in the light of Article 14 of the Constitution and the greater public interest as against the contractual right of the individual. [Para 58] [634-E-G]

B 3. In the absence of any arbitrariness in effecting the change in policy to prevent private mobilization and keeping in mind the larger public interest, this Court is of the view, that the Central Government was within its powers to strike a balance with regard to the control of the port facilities so that the same did not come to be concentrated in the hands of one private group or consortium which would be in a dominant position to control not only the rights of tariff, but also the entry of ships, not belonging to such group, into the Major Ports and thereby give an undue advantage to its own ships over other shipping agencies. [Para 59] [635-B-C]

E 4.1. Normally, the Courts do not interfere with policy decisions of the Government unless they are arbitrary or offend any of the provisions of the Constitution. In the present cases, the adoption of such a course would be apposite. [Para 60] [635-D]

F 4.2. It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. In both the cases under consideration, the same set of entrepreneurs are interested in gaining control over the different container terminals to the exclusion of other players. The Central Government in its Ministry of Shipping and Transport, therefore, took a decision not to permit licensees who have been granted a licence for running one of the container terminal berths from participating in the bid

process for the immediate next container terminal, with the intention of promoting healthy competition for the benefit of the shipping industry and the ports in India as well. The decision to alter its policy is based on sound reasoning and the Central Government has taken such decision for the benefit of the consumers as a whole. The changed policy would also have the effect of preventing cartelisation and dominant status, which could inevitably affect the ultimate pricing of consumer goods within the country. The Government was entitled to change its policies with changing circumstances and only on grounds of change a policy does not stand vitiated. [Para 61] [635-E-H; 636-A-C]

*Shimnit Utsch India Private Ltd. vs. West Bengal Transport Infrastructure Development Corporation Limited and Ors.* 2010 (6) SCR 1110 – relied on

5. The Government has the discretion to adopt a different policy, alter or change its policy to make it more effective. The only qualifying condition is that such change in policy must be free from arbitrariness, irrationality, bias and malice and must be in conformity with the principle of *Wednesbury* reasonableness. Although, it has been urged that such change in policy could be effected only by way of legislation, such a submission, if accepted, could stultify the powers of the Central Government to alter its policies with changing circumstances for the benefit of the public at large. It is not as if the right of a licensee to bid for a further container terminal berth has been excluded for the entire period of the Licence Agreement but in order to ensure proper competition and participation by all intending tenderers, the said policy has also been altered to enable such licensees to bid for the next but one tender as and when invited. [Para 62] [636-D-G]

6.1. However, as far as the appellant is concerned,

A it is because of certain fortuitous circumstances that it came to be excluded from the tender process for the Fourth Container Terminal. If the tender process for the Third Container Terminal had been concluded, the various complications could have been avoided since under the revised policy, the appellant was entitled to participate in the alternate bids. The appellant having been excluded from one bid on the basis of an existing policy, cannot be debarred from participating in the next bid, by taking recourse to a different yardstick. Such a course of action would be contrary to public policy. Accordingly, the authorities of the JNPT shall allow the appellant to continue to participate in the tender process for the Fourth Container Terminal and the decision to the contrary conveyed to the appellant on 29th June, 2009, is quashed. [Para 63] [636-H; 637-A-C]

6.2. As far as PSA Sical Terminals Ltd. is concerned, the submission as to the applicability of the doctrine of legitimate expectation is at best an expectation if there are cogent grounds to deny the same. The concept of legitimate expectation has no role to play where State action is based on public policy and in the public interest, unless the action taken amounted to an abuse of power. [Para 64] [637-D-F]

6.3. The Central Government was within its powers to adopt a policy to prevent the port facilities from being concentrated in the hands of one private group or consortium which could have complete control over the use of the facilities of the ports to the detriment of the shipping industry as a whole. The decision taken by the Tuticorin Port Trust Authorities to exclude PSA Sical Terminals Ltd. from bidding for the 8th Berth Container Terminal cannot, therefore, be said to be arbitrary or unreasonable so as to warrant interference.

In fact, the position of PSA Sical Terminals Ltd. is no different from that of A.P.M. Terminals B.V. which had been excluded from the bid for the Third Container Terminal at JNPT. [Para 65] [637-G-H; 638-A-B]

6.4. In the aforesaid circumstances, the appeal filed by APM Terminals BV is allowed and the decision of the Bombay High Court is set aside. However, the decision of the Madras High Court does not call for any interference and the Transfer Cases filed by PSA Sical Terminals Limited are accordingly dismissed. All interim orders are vacated. [Para 66] [638-C-D]

*Sethi Auto Service Station vs. Delhi Development Authority (2009) 1 SCC 180: 2008 (14) SCR 598 – relied on*

Case Law Reference:

1986 (1) SCR 633	cited	Para 41
2010 (3) SCR 609	cited	Para 41
1999 (2) SCR 1033	cited	Para 49
2010 (3) SCR 609	cited	Para 52
2010 (6) SCR 1110	relied on	Para 61
2008 (14) SCR 598	relied on	Para 64

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4270 of 2011.

From the Judgment & Order dated 10.3.2010 of the High Court of Bombay in W.P. No. 1551 of 2009.

WITH

T.C. (C) No. 36-37 of 2010

Arunabh Chowdhury, Anupam Lal Das, A.B. Singh,

A Sunita Dutta and Vikas Mehta for the Appellant.

H.P. Raval, ASG, Vikas Singh and Mukul Rohatgi, Ajay Sharma, A. Kumar, Asha G. Nair, S.S. Rawat, D.S. Mahra and R. Nedumaran for the Respondents.

B The Judgment of the Court was delivered by

**ALTAMAS KABIR, J.** 1. Leave granted in SLP(C)No.13893 of 2010, which is being heard along with Transferred Case (Civil) Nos.36-37 of 2010. While the appeal has been filed by APM Terminals B.V. against the decision of the High Court, dismissing its writ petition, challenging the decision of the Board of Trustees for the Jawaharlal Nehru Port Trust to exclude the appellant from participating in the tender process for the development of the Fourth Container Terminal at the Bombay Port through public-private partnership, the transfer petitions have been filed by PSA Sical Terminals Ltd. for transfer of Writ Petition Nos.19851 and 19384 of 2010 pending before the Madras High Court, to this Court. As the questions involved in the writ petitions pending before the Madras High Court were the same as those raised in the appeal filed by APM Terminals B.V., we had directed the transfer petitions to be heard along with SLP(C)No.13893 of 2010, out of which the present appeal arises.

F 2. In the appeal, the appellant has challenged the validity and propriety of the decision taken by the Board of Trustees of the Jawaharlal Nehru Port Trust, hereinafter referred to as the "JNPT", to exclude the appellant from participating in the tender process for the Fourth Container Terminal under the JNPT, through public-private partnership, and praying for quashing of the said decision with leave to the appellant to participate in the tender process in accordance with the policy indicated in Circular No. PD-12013/2/2005-JNPT dated 26th September, 2007, issued by the Union of India.

H The further prayer of the appellant was to read the provisions

of the said Circular into the Licence Agreement dated 10th August, 2004, executed between the appellant and JNPT, and, consequently, to release the appellant from the restrictions contained in Clause 8.31 of the Licence Agreement and/or to treat the same as not binding on the appellant. Clause 8.31 of the Licence Agreement which was executed by the Board of Trustees, JNPT, in favour of the appellant, provides as follows :

“8.31 The Licensee acknowledges and agrees that it shall forego the right to bid for either directly or indirectly, including being a Management Contractor through any associate company, whether such company is registered in India or any other country, or any company in which the Licensee has a shareholding for the Additional Facilities or existing facilities during the term of this Agreement. The Licensee also agrees that in the event of it or its parent company taking over/acquiring/amalgamating/merging with the licensee or the parent company to whom the Additional Facilities are awarded it shall be obliged to divest its stake in one of the two licenses to a third entity not linked to the Licensee within 6 months from the date of such change in control failing which it shall be deemed to be a Licensee Event of Default. The Licensee also agrees that in the event of it or its parent company being taken over/acquired/amalgamated/merged by another licensee operating container facilities at JNPT it shall be obliged to divest the License to a third entity not linked to the Licensee within 6 months from the date of such change in control failing which it shall be deemed to be a Licensee Event of Default. The Licensee acknowledges, agrees and accepts the above as essence of this Agreement and the Licence granted to the Licensee.”

3. Before the High Court, on behalf of the appellant Company, it was claimed that on account of subsequent

A resolutions adopted by the Board of Trustees of JNPT, which had the effect of altering the policy with regard to entrustment of operational facilities at the port to provide competition and to prevent monopolies, the provisions of Clause 8.31 would have to be reconsidered in the light of the changed circumstances. Before proceeding any further it will be worthwhile to briefly indicate the background in which the present lis has arisen.

4. The Jawaharlal Nehru Port Bulk Terminal was commissioned on 26th May, 1989, and was designed to handle goods imported in bulk, such as fertilizers, fertilizer raw materials and food grains, with the help of mechanized bulk-handling facilities. With the passage of time, the Central Government found it difficult to maintain the Bulk Terminal and decided to convert the Bulk Terminal into a Container Terminal and to remodel the same on a Build, Operate and Transfer (BOT) Basis on licence for a period of 30 years. Since 1996, it has been the policy of the Central Government to permit participation/investment by the private sector in utilizing the assets of the Port, construction and creation of additional assets, lease of equipment, pilotage, cargo handling, etc. In fact, guidelines had been issued from time to time by the Ministry of Surface Transport which was to be followed by the Major Ports for private sector participation. In pursuance of such policy, the Central Government introduced the process of privatization, subject however, to the regulatory role of the JNPT. Within the regulatory framework it was made clear that the Port authorities should ensure that private investment did not result in the creation of private monopolies and that private facilities were available to all users on equal and competitive terms.

5. The appellant is a Company incorporated under the laws of the Netherlands. Together with the Container Corporation of India Limited it formed a Joint Venture Company under the name and style of “Gateway Terminals

India Pvt. Ltd.” registered under the Companies Act, 1956. A  
The said Joint Venture Company, hereinafter referred to as  
the “GTI”, was the successful bidder in the Tender floated by  
JNPT for development of its existing Bulk Terminal into a  
Container Terminal. Thereafter, in keeping with the guidelines  
issued by the Central Government in 1996, which were B  
described as mandatory, the JNPT floated a Tender for the  
development of a new 600 meter Quay Length Container  
Terminal at Navi Mumbai and Nhava Sheva International  
Container Terminal, hereinafter referred to as the “NSICT”,  
was the successful bidder in respect of the said Tender. The C  
licence granted to NSICT to operate the first Container  
Terminal at JNPT culminated in a Build, Operate and  
Transfer Licence Agreement dated 3rd July, 1997 between  
JNPT and NSICT which was to subsist for a period of 30  
years from the date of the agreement. Clause 2.3 of the said  
Licence Agreement provides as follows : D

“The License will not bar the Licensee from participating  
in any subsequent bids invited by the Licensor for  
operation of Container Terminal.”

6. Accordingly, NSICT was given liberty to participate in  
any subsequent bid for operation of the Container Terminal. E

7. In 2002, JNPT floated another Tender for the  
development of the Second Container Terminal at JNPT and  
invited Requests for Qualification (RFQ) for the construction  
thereof. In order to prevent monopoly and promote  
competition, the JNPT subsequently incorporated Clause 1.3  
in the Tender documents for the development of the Second  
Container Terminal, which reads as follows : F

“Clause 1.3 : The port is desirous of entrusting the  
Project of redevelopment of the bulk terminal to a  
container terminal, on BOT basis, to another licensee  
other than the existing Private Terminal Operator G

(Licensee) at JNPT i.e. Nhava Sheva International  
Container Terminal (NSICT) Limited or their associates,  
P&O or the associates, interconnected or sister  
companies or either of them.”

8. The net result was that NSICT was precluded from  
participating in the Tender for the development of the Second  
Container Terminal at JNPT, despite the express provisions  
of Clause 2.3 of the Licence Agreement. B

9. The said decision of the JNPT was challenged by  
NSICT and its affiliate, P&O Australia Ports Pvt. Ltd., by way  
of Writ Petition No.3083 of 2002 in the Bombay High Court.  
During the hearing of the said writ petition, the Union of India  
and JNPT took the stand that the 1996 Policy and the  
guidelines would prevail over Clause 2.3 of the Licence  
Agreement between the said Respondents and the NSICT. D  
Upholding the decision of the Respondents to exclude P&O  
Australia Ports Pvt. Ltd. and NSICT from participating in the  
bid for the development of the Second Container Terminal,  
the Bombay High Court dismissed the writ petition by its  
order dated 28th January, 2003. The said decision of the  
Bombay High Court was challenged before this Court, which  
declined to interfere with the order of the Bombay High Court.  
However, the Petitioner’s Joint Venture Company, GTI Pvt.  
Ltd., was permitted to bid in the Tender for the development  
of the Second Container Terminal at JNPT. On completion  
of the bidding process, the work of development of the  
Second Container Terminal was awarded to GTI for a term  
of 30 years from the date of the Licence Agreement which  
also contained Clause 8.31, extracted hereinabove. In fact,  
before the Bombay High Court, JNPT had taken a stand that  
Clause 8.31 had been subsequently incorporated in the  
Licence Agreement in view of the guidelines promulgated in  
1996, which were then in force. E

10. In the meanwhile, on or about 26th September,  
2007, a decision was taken by the Union of India to alter H

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the 1996 policy and a Circular No.PD-12013/2/2005-JNPT, was issued indicating that the JNPT should proceed to invite global competitive bidding for an independent "Stand Alone" Container Terminal to expand the Container towards North of JNPT by 330 meters, which was designated as the Third Container Terminal. It also clarified the eligibility of existing private container terminal operators at JNPT to compete and bid for any project. In the said Circular dated 26th September, 2007, it was, inter alia, indicated as follows :

"In the instant case while JNPT is in the process of undertaking the bidding for the development of the 330 metre extension of container berth towards North of NSICT project as a stand alone project on BOT basis (330 metre extension project) there are two different private BOT operators operating container terminals in JN Port. As a rational and logical consequence of the stand taken earlier it has been decided that the successful bidder of the previous container terminal on BOT basis (Maersk A/S – CONCOR Consortium) and/or their subsidiaries/allied organizations should be excluded from bidding for the 330 metre extension project. This would mean that for the next BOT container terminal in JN Port in future, the successful bidder of the 330 metre extension project would be excluded and so on.

It has also been decided that the above convention shall be followed in all Ports in its true spirit with a view to avoid monopoly and promote competition till such time a formal Policy is finalized and notified."

11. As a result of the above, neither the appellant nor its affiliates and/or subsidiaries/allied organizations were permitted to participate in the bid for the Stand Alone Container Terminal. Thereafter, in the year 2000, the JNPT floated yet another Tender for development of the Third

A Container Terminal at JNPT, inviting Requests for Qualification for selection of a developer for the development of the said terminal in which it was categorically mentioned as follows:

B "JNPT is desirous of entrusting this project to a Licensee other than Maersk A/S-Concor Consortium and/or their subsidiaries/allied organizations including GTIPL."

C 12. The explanation given for the insertion of the said clause was to implement the Circular dated 26th September, 2007. GTI's plea to allow it to participate in the bid was rejected. The appellant was, therefore, subsequently barred from participating in the Tender process for the development of the Third Container Terminal at JNPT. NSICT was, D however, allowed to participate in the said Tender process for the development of the Third Container Terminal at the JNPT UN, but such Tender has not yet been finalized.

E 13. In the meantime, on 2nd March, 2009, JNPT floated Tender No. PD/N-14th CT/C-60/2009 and issued a global invitation of a Request for Qualification for development of the Fourth Container Terminal at JNPT. The said Tender contained the following clause.

F "The successful bidder/consortium members and/or their subsidiaries/allied organizations in the project for the development of a Stand Alone Container Handling Facility with a key length of 330 meters towards North at JNPT was to be excluded from the bidding in respect of Fourth Container Terminal either as a single applicant or as a consortium."

G 14. On a plain understanding of the above mentioned clause, neither the appellant nor its associate companies/allied organizations and/or consortium of GTI was precluded from participating in the said Tender for the development of

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A the Fourth Container Terminal and raising its bid therein. The  
appellant, thereupon, along with its letter dated 5th March,  
2009, addressed to the JNPT, forwarded a Demand Draft  
for Rs.10,000/- towards purchase of the RFQ document for  
participation in the bidding process for the Fourth Container  
Terminal. The appellant was provided with a copy of the RFQ  
documents, wherein, in Clause 2.2.1(e), it was categorically  
stipulated as follows :

C “2.2.1(e) To avoid private monopoly and to promote  
competition, the successful bidder/consortium members  
and/or their subsidiaries/allied organization in th project  
for the “Development of a stand alone contasiner  
handling facility with a quay length of 330-m towards  
North at NJPT” shall be excluded from the bidding for  
DEVELOPMENT OF FOURTH CONTAINER TERMINAL  
either as a single applicant or as a consortium. Further,  
D for the next BOT container terminal in JN Port in future,  
the successful bidder/consortium members in the  
DEVELOPMENT OF FOURTH CONTAINER TERMINAL  
Project would be excluded and so on.”

E 15. Even at this stage, JNPT did not preclude the  
appellant from participating in the said tender in respect of  
the Fourth Container Terminal at JNPT. The appellant was,  
thereafter, invited to participate in the process for grant of  
licence for the Fourth Container Terminal. However, to the  
surprise of the appellant, on 29th June, 2009, the appellant  
was informed that GTI and/or its associates/allied  
organizations had been disqualified from bidding for the  
Fourth Container Terminal in view of Clause 8.31 of the  
Licence Agreement. As indicated hereinbefore, it was after  
such decision that the appellant, who was worried about the  
rights and entitlements arising out of the said Circular, filed  
Writ Petition No.1551 of 2008 before the Bombay High  
Court on 29th July, 2009. The said Writ Petition was listed  
before the Bombay High Court on 25th August, 2009, which  
dismissed the same on 10th March, 2010, relying solely on  
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A the provisions of Clause 8.31 of the Licence Agreement,  
which disqualified the appellant from participating in the  
Tender process relating to the Third Container Terminal.

B 16. It is the said order of the High Court which has been  
challenged in this appeal.

C 17. Appearing for the appellant, Mr. F.S. Nariman,  
Senior Advocate, submitted that JNPT had awarded NSICT,  
owned by P&O Ports, the licence for the development of the  
First Container Terminal at JNPT. Pursuant thereto, JNPT  
had entered into a Licence Agreement dated 3rd July, 1997,  
with NSICT, wherein Clause 2.3, which provided that the said  
licence would not bar the licensee from participating in any  
subsequent bids invited by the licensor for operation of the  
container terminal, was incorporated. Mr. Nariman submitted  
D that despite the 1996 Policy, which aimed at preventing  
monopoly and promoting competition, the Licence  
Agreement dated 3rd July, 1997, permitted NSICT to  
participate in the subsequent bids invited by the JNPT for  
operation of the Container Terminal.

E 18. Mr. Nariman submitted that on 26th September,  
2007, the Union of India issued Circular No. PD-12013/2/  
2005-JNPT to JNPT indicating that it should invite global  
competitive bidding for an independent, Stand Alone  
Container Terminal involving a 330 meter extension of  
F container berth towards the North of JNPT. The said Circular  
clarified that existing private Container Terminal Operators in  
JNPT would also be entitled to bid for any project but the  
JNPT was required to ensure that private investment did not  
result in the creation of private monopoly and that private  
G facilities were available to all users on equal and competitive  
terms. Paragraph 5 of the 2007 Policy clearly provided that  
the successful bidder of the previous Container Terminal on  
BOT basis and/or their subsidiaries/allied organizations,  
should be excluded from bidding for the 330 meter extension  
H project. The immediate fall-out of the same would mean that

A for the next BOT Container Terminal in JN Port in future, the  
successful bidder of the 330 meter extension project would  
be excluded and so on. What was also emphatically stated  
in paragraph 6 is that it had also been decided that the  
aforesaid guideline should be followed in all Ports in its true  
spirit with a view to avoiding monopoly and promoting  
competition, till such time a formal policy was finalized and  
notified. The 2007 Policy, therefore, provided that MAERSK  
S/T CONCOR Consortium and/or their subsidiary/allied  
organizations would be excluded from bidding for the Third  
Container Terminal and the successful bidder of the Third  
Container Terminal would be excluded from bidding for the  
next project and so on. Hence, a successful bidder would be  
ineligible to bid for the next but one subsequent tender after  
the immediate one awarded to it.

D 19. Mr. Nariman submitted that in accordance with the  
guidelines contained in the 2007 Policy, the appellant was  
specifically barred from participating in the tender process  
for the development of the Third Container Terminal at JNPT.  
NSICT who was the successful bidder for the first container  
was allowed to participate in the tender process for the  
development of the Third Container Terminal at JNPT, though  
the said tender is yet to be finalised.

F 20. Certain problems arose when on 2nd March, 2009,  
JNPT floated Tender No. PPD/M-1/4TH CT/C-60/2009 and  
issued a global invitation for Request for Qualification for  
development of the Fourth Container Terminal at JNPT, which  
contained a clause to the effect that the successful bidder/  
consortium members and/or their subsidiaries/allied  
organizations in the project for the development of a "Stand  
Alone Container handling facility with a Quay length of 330  
meter towards North at JNPT should be excluded from the  
bidding for the development of the Fourth Container Terminal  
either as a single applicant or as a Consortium.

A 21. Mr. Nariman submitted that the Request for  
Qualification excludes only the successful bidder for the Third  
Container Terminal (which is yet to be awarded) from bidding  
at the tender for the development of the Fourth Container  
Terminal. Consequently, the appellant and/or its Associate  
B Company/allied organizations and/or consortium of GTI were  
not precluded from participating in the tender for the  
development of the Fourth Container Terminal having been  
precluded from bidding for the "Stand Alone" Container  
Terminal, in accordance with the 2007 Policy. It was at this  
C stage that JNPT wrote to the appellant on 29th June, 2009,  
indicating that it has been decided not to allow GTI Pvt. Ltd.  
and/or its associates to participate in the bidding for the  
Fourth Container Terminal. Mr. Nariman further submitted that  
D in spite of the decision in NSICT's case, wherein the Union  
of India had relied on the 1996 Policy, it subsequently  
changed its stand on the strength of the 2007 Policy  
indicating that having regard to Clause 8.31 of the  
Agreement the appellant was barred from bidding for the  
Fourth Container Terminal.

E 22. It was submitted that the stand of JNPT was clearly  
wrong, arbitrary and discriminatory. It was further submitted  
that the apprehension of the JNPT in regard to creation of  
monopoly was erroneous and unrealistic since monopoly  
means the power to determine one's own prices. In the case  
F of Ports, the prices for various Port Services are determined  
by the Tariff Authority for the Major Ports (TAMP) and  
periodically operators are required to submit their proposed  
prices to TAMP and cannot charge more than the TAMP  
approved prices for any of their services. It was urged that  
G without the power to fix one's own price, the question of  
monopoly did not arise.

H 23. Mr. Nariman submitted that the problem has arisen  
on account of the fact that the tender for the Third Container  
Terminal is yet to be finalised, and, in the meantime the

tender for the Fourth Container Terminal was floated. Consequently, the Fourth tender was treated by the concerned Respondents to be the tender for the Third Container Terminal which meant that the appellant Company stood disqualified from participating in the said tender also, since under the 2007 Policy it could only participate in the next but one subsequent tender after the one awarded to it, thereby suffering double prejudice on account of no fault on its part. Mr. Nariman submitted that to debar the appellant Company from participating in both the Third as well as the Fourth Container Terminals was not justified and it should be allowed to participate in the Fourth tender in accordance with Clause 2.3 of its Licence Agreement. Furthermore, if the stand taken on behalf of the Respondent was to be accepted, despite the supersession of the 1996 Policy by the 2007 Policy, the appellant would also be barred from participating in future tenders for 30 years by virtue of Clause 8.31 of the Licence Agreement, which would only have the effect of reducing the extent of competition which is, in fact, the object of the 2007 Policy of the Union of India.

24. Mr. Nariman also contended that Clause 8.31 of the Licence Agreement had been imposed upon the appellant based on the principles of public policy and keeping in mind the then prevailing Policy of the Government of India, i.e., the 1996 Policy and not out of the free will of the parties. In any event, Clause 8.31 of the Licence Agreement would have to be read with the 2007 Policy and could not be read in isolation.

25. Mr. Nariman urged that when the tender for the Second Container Terminal was floated by the Respondent No.2, it relied heavily on the 1996 Policy to prevent NSICT from bidding at the said tender. When NSICT challenged the said decision by filing a writ petition in the Bombay High Court, the Respondents successfully urged before the Court in the said Writ Petition that the 1996 Policy would prevail

A over Clause 2.3 of the NSICT contract. On the other hand, as stated hereinbefore, in Writ Petition No.1551 of 2009 filed by the appellant, the Respondents took a contrary stand by contending that Clause 8.31 of the Licence Agreement would prevail over the 2007 Policy.

B 26. Mr. Nariman lastly contended that by allowing the appellant to raise the technical bid and to participate in the pre-bid meeting for the development of the Fourth Container Terminal, the Respondents had given the appellant cause for legitimate expectation of being eligible to bid for and be awarded the contract. Mr. Nariman submitted that the Respondents had acted in a manner engineered to preclude the appellant from participating in the tender for the development of the Fourth Container Terminal at JNPT.

D 27. Appearing for the Petitioner, PSA Sical Terminals Ltd., in Transferred Case Nos.36-37 of 2010, learned Senior Counsel, Ms. Nalini Chidambaram urged that, although, there was a good deal of similarity in the issues raised in the Special Leave Petition filed by APM Terminals B.V. and the Transferred Cases filed by PSA Sical Terminals Ltd., the substantial question in the Transferred cases was whether a contractual right could be superseded by a general policy decision under Section 111 of the Major Port Trusts Act, 1963, without any legislation. In other words, in the facts of this case, could the Petitioner with whom a Licence Agreement had been signed on 15th July, 1998, by the Respondent No.2, Tuticorin Port Trust, with the previous sanction of the Central Government under Section 42(3) of the Major Port Trusts Act, 1963, be prevented from participating in the tender for additional facilities in the Tuticorin Port, by virtue of a policy decision taken in the teeth of the provisions of the Licence Agreement which vested the Licensee with the right to participate in future tenders.

H 28. Ms. Chidambaram urged that after the policy of liberalization adopted by the Central Government, the Port

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Trusts permitted private operators to operate Container Terminals on a Build, Operate and Transfer basis, through a process of tender. PSA Sical participated in the Tender invited by the Tuticorin Port Trust in 1997 for operating the Seventh Berth at Tuticorin, which was the First Container Terminal and was granted licence to operate the said Berth for 30 years. During the subsistence of the guidelines issued by the Government of India on 28th October, 1996, the Tuticorin Port Trust entered into a Licence Agreement with the Petitioner on 15th July, 1998, to operate the Seventh berth and specifically granting a right to the Petitioner to participate in any subsequent bids invited by the said Trust for operation of additional facilities in the same port under Clauses 2.3 and 6.2.3 of the Licence Agreement. For the sake of convenience, the said two clauses in the Licence Agreement are reproduced hereinbelow :

“2.3 License Period

The Licence Period shall be for the period of 30 years (including the time taken for the erection of container handling equipments at the Container Terminal) commencing from the Date of Award of License.

The license will not bar the licensee from participating in any subsequent bids invited by the licensor for development, designing, engineering, constructing, equipping, maintaining and operating any berth or related facility at the port”.

“6.2.3

The Licensor agrees that it shall not commission additional berths for handling containers until the traffic potential does not appear to exceed 90% of the maximum volume 1, 25,000 TEUs. Provided however that the Licensor shall always consider future expansions of the container berths to reasonably match the market

A demands and allow the Licensee to participate in its operation without any discrimination. This condition shall be applicable only within the port limits of the Licensor as notified under Indian Ports Act, 1908 and Major Port Trusts Act, 1963.”

B 29. Ms. Chidambaram submitted that it would, therefore, be evident from the above clauses that notwithstanding the 1996 guidelines, while executing the Licence Agreement, the Tuticorin Port Trust consciously granted the Petitioner a specific right to bid in Tenders for future development in the same port and did not consider that the same would result in the creation of a private monopoly.

C 30. It was submitted that at about the same time, the issue relating to the disqualification of Nhava Sheva International Container Terminal (NSICT), which was operating the Container Terminal at the JNPT and its Associate or interconnected or sister companies, including P&O Ports, from participating in the bid for the re-development of the Bulk Terminal into a Container Terminal at JNPT was taken up for consideration by the Bombay High Court. In the said matter, the JNPT took the stand that since P&O Ports was controlling 48% of the Container traffic in India and was operating the existing private Container Terminals at Jawaharlal Nehru Port Trust and Chennai, a policy decision had been taken by the Port Trusts of the JNPT to debar an existing operator from bidding for the next Container Terminal with the object of avoiding concentration of control in one party and to increase competition and efficiency in the public interest. The said proposal was forwarded to the Central Government which approved the same vide its letter dated 11th November, 2002.

G 31. Ms. Chidambaram submitted that since P&O Ports and its associates were controlling 48% of the Container business in India, the Bombay High Court upheld the policy of the Central Government aimed at preventing

monopolisation of the container business in India by a private party. Ms. Chidambaram submitted that the appeal filed by P&O Ports before this Court was also dismissed, with this Court upholding the comprehensive guidelines that were issued by the Government of India, Ministry of Surface Transport on 26th October, 1996. Ms. Chidambaram, however, urged that the P&O Ports' case was decided on facts which were specific to P&O Ports and could not, therefore, be treated as a precedent for the Petitioner's case. However, the question as to whether a policy decision could supersede the contractual right was not considered by the Bombay High Court or by this Court.

32. Ms. Chidambaram submitted that on 31st May, 2005, the Tuticorin Port Trust invited Tenders for development of Berth No.8 into a Container Terminal and permitted the Petitioner to participate in the tender process. The tender process remained incomplete for over four years and in 2007 a draft policy was formulated to promote inter port and intra port competition in which it was stipulated as follows :-

"Wherever the second terminal is to be set up at the same major port, or first terminal in an adjacent major port e.g. JN Port and Mumbai, Chennai and Ennore Ports, the existing terminal operator would be excluded to ensure competition. If there are a minimum of two private operators in any major port, no restriction would be placed on the existing operators to bid for the subsequent terminal, subject to the condition that a single private operator will not be allowed to operate more than two terminals at the same Major Port including terminals at adjacent major port."

33. Further to the aforesaid approved policy, the Government of India wrote to the Tuticorin Port Trust that it had been decided to debar the existing operator, the Petitioner herein, who was operating the first Private Terminal, from the bidding process for the second Container

A Terminal at Tuticorin Port in line with the aforesaid policy decision. The Petitioner was, therefore, denied permission from further participation in the tender for the 8th Berth on account of the aforesaid policy, notwithstanding the specific provision in the Licence Agreement permitting the Petitioner to participate in subsequent Tenders.

34. The Petitioner challenged the aforesaid decision denying permission to the Petitioner from participating in the bid for the 8th Berth in Writ Petition No.9746 of 2009. The learned Single Judge dismissed the Writ Petition relying on the decision in the P&O Ports case. In the Writ Appeal No.996 of 2009 filed by the Petitioner against the decision of the learned Single Judge of the Madras High Court, it was submitted on behalf of the Union of India that the need for having a second Private Container Terminal had been reassessed and that it had been decided to scrap the project at the RFP stage itself. The Petitioner's writ appeal was, therefore, dismissed as infructuous.

35. Subsequently, the Union of India issued a new policy guideline under Section 111 of the Major Port Trusts Act, 1963, on 2nd August, 2010, and immediately thereafter on 4th August, 2010, the Tuticorin Port Trust floated re-tender for the 8th Berth and restrained the Petitioner from participating therein in keeping with the new policy guidelines. Ms. Chidambaram submitted that the 2010 Policy provided that if there was one private Container/Berth Operator in a Port for a specific cargo, the Operator of that Berth or his Associates would not be allowed to bid for the next Terminal/Berth for handling the same cargo in the same Port. Ms. Chidambaram submitted that the Petitioner was informed of the said decision of the Tuticorin Port Trust by its letter dated 21st August, 2010.

36. Aggrieved by the aforesaid decision to debar the Petitioner from participating in the bidding process for the 8th Berth/Container Terminal, the Petitioner filed Writ Petition

Nos.19384 of 2010 and 19851 of 2010, inter alia, for a direction upon the Respondents to permit the Petitioner to participate in the bid process for the development of the 8th Berth at Tuticorin Port as a Container Terminal and for a further direction upon the authorities of the Tuticorin Port Trust to provide the Request for Qualification documents and to quash the decision not to provide the same.

37. In the background of the aforesaid facts, Ms. Chidambaram contended that a right given to a contractor could be nullified only by a legislation specifically indicating that the agreement stood nullified and not by a general policy decision. Ms. Chidambaram submitted that while the 1996 Policy categorically indicated that the Port should ensure that private investment did not result in the creation of private monopolies, in the Licence Agreement with the petitioner Clauses 2.3 and 6.2.3 were included giving the Petitioner a right to participate in the bid for additional Container Terminals in the same Port.

38. Ms. Chidambaram submitted that a draft Policy was prepared by the Central Government on 10th February, 2005, to promote inter port and intra port competition, but the said Policy was never notified and remained a draft. However, based on the draft Policy, the Tuticorin Port Trust invited tenders for the 8th Berth/Container Terminal at Tuticorin and allowed the Petitioner to participate in the tender process for about 3 years until it suddenly took a unilateral decision to debar the Petitioner from the bidding process on the strength of a communication received from the Deputy Secretary, Ministry of Shipping, dated 22nd May, 2009. Ms. Chidambaram submitted that in between the aforesaid decision by which the Petitioner was debarred from participating in the bidding for the 8th Berth/Container Terminal at Tuticorin, the Vizag Port on 5th June, 2008, took a decision to shortlist the existing BOT Operators while recording that the same should not be taken as a precedent.

39. Ms. Chidambaram submitted that it was unreasonable on the part of the Respondents to debar the Petitioner from participating in the 8th Berth/Container Terminal without formalising a formal policy with regard to the intention of promoting competition and avoiding monopoly. It was also urged that P&O Ports, which had earlier been debarred from participating in the bidding for the Second Container Terminal at the JNPT, was allowed to participate in the bid for the Third Container Terminal, although the P&O Ports and its Associates were controlling 48% of the Container Terminal business in India and by allowing it to participate in the Third Tender, the Central Government was, in fact, going back on its desire to eliminate monopoly by private Operators within the Indian Ports.

40. Ms. Chidambaram urged that it would be apparent from the changing policies adopted by the Central Government that they were made to suit a particular situation and possibly a particular tenderer. It was submitted that even though the First Respondent was entitled to change its policies from time to time, such changes had to be informed by reason, which was absent in the instant case. Ms. Chidambaram added that the decision in the P&O Ports' case could not be taken to be a precedent as far as the Petitioner, PSA Sical Terminals Ltd., was concerned, since P&O Ports was not a party to the Licence Agreement at JNP and had no contractual right to bid for the Second Container Terminal there. Although, NSICT had such a right in view of Clause 2.3 of its Licence Agreement to bid for Container Terminal No.7, it did not assert its right and the same was not also considered in the judgment delivered by the High Court.

41. In support of her submissions, Ms. Chidambaram first referred to the decision of this Court in *Delhi Cloth & General Mills Ltd. Vs. Rajasthan State Electricity Board* [(1986) 2 SCC 431], wherein the High Court had quashed

A the decision of the Rajasthan Electricity Board to charge  
uniform tariff despite the prevailing concessional rates  
granted to a consumer under an agreement, upon holding  
that only a legislative amendment could override a contractual  
right by specifically overriding the contractual terms. Ms.  
Chidambaram also referred to the decision of this Court in  
*PTC India Ltd. Vs. Central Electricity Regulatory  
Commission* [(2010) 4 SCC 603], wherein, in the context of  
determination of tariff under the Electricity Act, 2003, this  
Court held that the making of a Regulation under Section 178  
of the Act became necessary because a Regulation made  
under Section 178 had the effect of interfering with and  
overriding the existing contractual relationship between the  
regulated entities. This Court held that a Regulation under  
Section 178 is in the nature of subordinate legislation which  
could even override the existing contracts, including Power  
Purchase Agreements, which had to be aligned with a  
Regulation under Section 178 and could not have been done  
only on the basis of an order of the Central Commission.

E 42. Ms. Chidambaram reiterated that while the Central  
Government was entitled to alter its policies regarding  
participation of candidates in the bid process for the Second  
Container Terminal at the Tuticorin Port, such alteration would  
have to be informed by reason and not on the whims of the  
authorities, which is so apparent in the facts of the present  
case. Accordingly, in the absence of a formal policy regarding  
the participation of candidates in the bid process for the  
Second Container Terminal of the Tuticorin Port Trust and,  
in particular, the Petitioner, which was covered by Clause 2.3  
of the Licence Agreement, the Petitioner could not have been  
barred from participating in the tender process for being  
awarded the contract for the Second Container Terminal at  
Tuticorin Port. Ms. Chidambaram submitted that the decision  
of the Tuticorin Port Trust Authorities to debar the Petitioner  
from participating in the tender process suffered from the  
view of Wadnesbury unreasonableness and was liable to be

A quashed.

B 43. The learned Solicitor General, Mr. Gopal  
Subramaniam, appearing for the Union of India in both the  
matters, submitted that the case of the appellant, APM  
Terminals B.V., and that of the Petitioner, PSA Sical  
Terminals Ltd., stand on a similar footing, despite Ms.  
Chidambaram's efforts to prove otherwise. The learned  
Solicitor General submitted that the same policy decisions  
taken by the Central Government in regard to private  
participation in the development and operation of Container  
Terminals in the Major Indian Ports governed both the cases,  
though at different ports. The learned Solicitor General  
submitted that on 26th October, 1996, the Union of India  
issued guidelines for all Major Port Trusts regarding private  
sector participation in the major ports. In the preamble of the  
said guidelines it was indicated that in order to improve  
efficiency, productivity and quality of service, as well as to  
bring in competitiveness in port service, it had been decided  
to throw open the port sector to private sector participation.  
It was, however, made clear in Clause 4 of the policy  
statement that ports would have to ensure that private  
investment did not result in the creation of private monopolies  
and that private facilities were available to all users on equal  
and competitive terms.

F 44. Pursuant to the said policy decision, the JNPT  
decided to convert the Bulk Terminal which had been  
commissioned on 26th May, 1989, and had been designed  
to handle imported fertilizers, fertilizer raw materials and food  
grains through mechanized bulk handling facilities, into a  
Container Terminal on Build, Operate and Transfer (BOT)  
basis on licence for a period of 30 years. Tenders were  
invited and, ultimately, NSICT proved successful and was  
granted such licence by the JNPT for the First Container  
Terminal. The learned Solicitor General submitted that at the  
said point of time, Clause 2.3 was included in the Licence  
Agreement which provided that the Licence Agreement to

NSICT would not prevent it from participating in any subsequent bid invited by JNPT for operation of Container Terminals. However, in order to give effect to its policy decision to prevent private monopolisation, the JNPT floated another Tender on 28th October, 2002, for construction of a Second Container Terminal in which Clause 1.3 of the Tender documents provided that JNPT was desirous of entrusting the project to another Licensee other than the existing Licensee at JNPT or its associates and interconnected or sister companies. The learned Solicitor General submitted that in the said process, GTI, a Joint Venture Company of APM Terminals and CONCOR proved to be the successful bidder.

45. Mr. Subramaniam also indicated that Clause 1.3, referred to hereinabove, was challenged by NSICT in Writ Petition No.3083 of 2002, before the Bombay High Court which dismissed the same and upheld the decision to exclude NSICT. The said decision of the Bombay High Court was also upheld by this Court.

46. The learned Solicitor General submitted that in the agreement entered into with GTI it was specifically mentioned in Clause 8.3 that the Licensee would forego the right to bid for, either directly or indirectly, the additional facilities or existing facilities, during the term of the agreement. It was submitted that certain other conditions were also stipulated in the said clause which were aimed at preventing private monopolisation of the facilities of the port.

47. The learned Solicitor General submitted that in keeping with its aforesaid policy decision, while allowing the JNPT to invite Global Tenders for a "Stand Alone" project, the Central Government reminded JNPT of the Government policy formulated in October, 1996, to ensure that private investment did not create private monopolies. It was also clarified that the policy adopted to exclude the existing container operator from the tender for the next container,

A would continue till such time a formal policy was finalised and notified. It was submitted that in the light of such decision, a Global invitation was issued by JNPT on 2nd March, 2009, for development of the Fourth Container Terminal at JNPT, and those who had been permitted to participate for the Third Container Berths were excluded. The learned Solicitor General submitted that it was only a question of fortuitous circumstances which resulted in the tender for the Third Container Terminal remaining unfinalised. Since GTI had been granted licence for the Second Container Terminal, it was only in keeping with the policy decision of the Respondents that the appellant, APM Terminals B.V., was barred from participating in the Tender for the Third Container Terminal and was allowed to participate in the bid for the Fourth Container Terminal. If the Tender process for the Third Container Terminal had been concluded, the present situation would not have arisen. It is only because of the fact that the Tender for the Third Container Terminal could not be concluded that the Tender for the Fourth Container Terminal was treated to be the Tender for the Third Container Terminal and as a result, the appellant stood disqualified.

48. The learned Solicitor General submitted that the Central Government was only following its decision to ensure healthy competition and to prevent the concentration of control of the Major Port Trusts in the hands of the private sector which could result in unintended discrimination, since the private operators had been given the right to give priority berthing to their own ships and other ships could be serviced on a 'First come First served' basis.

49. Countering the submissions made by Mr. Nariman and Ms. Chidambaram regarding the doctrine of legitimate expectation and the right of the Government to alter its policy, the learned Solicitor General referred to the decision of this Court in *Punjab Communications Ltd. Vs. Union of India & Ors.* [(1999) 4 SCC 727], wherein, it was held that a change in policy could defeat a substantive legitimate

expectation if it could be justified on Wednesbury A  
reasonableness. The learned Solicitor General, therefore, B  
submitted that the decision taken by the Government to C  
prevent private monopoly in the handling of port activities was D  
fully justified and could have an overriding effect over E  
contractual terms arrived at by the Government with a private F  
party.

50. On behalf of the JNPT, it was submitted by Mr. Vikas G  
Singh, learned Senior Advocate, that the challenge thrown to H  
the order passed by the Bombay High Court, upholding the I  
decision of JNPT to exclude the appellant from participating J  
in any Tender for development of the port facilities for a K  
period of 30 years from the date of signing of the L  
agreement, was fully justified. Mr. Vikas Singh submitted that M  
in view of Clause 8.3.1 of the Agreement entered into N  
between JNPT and the appellant, it was not open to the O  
appellant to resile from the same. Furthermore, global P  
tenders had been invited for the construction of the Fourth Q  
Container facility on 2nd March, 2009 and as per the said R  
agreement, the appellant remained ineligible to participate in S  
the said Tender also. Mr. Vikas Singh submitted that it is no T  
doubt true that originally the appellant was provided with RFQ U  
documents, but subsequently it was informed that in view of V  
Clause 8.3.1 in its Agreement dated 10th August, 2004, it W  
was not entitled to participate in the tender process for the X  
Fourth Container facility.

51. While adopting the submissions made by the Y  
learned Solicitor General, Mr. Vikas Singh also submitted Z  
that since the Tender for the Third Container facility had not AA  
been proceeded with, the Tender for the Fourth Container AB  
Terminal would be treated to be the Tender for the Third AC  
Container Terminal from which the appellant and its AD  
associates stood excluded on account of the existing policy AE  
dated 26th September, 2007.

52. Mr. Vikas Singh submitted that while deciding the AF

A Writ Petition filed by NSICT, neither the Bombay High Court  
nor this Court had the benefit of the subsequent Constitution  
Bench decision of this Court in *PTC India Limited Vs.  
Central Electricity Regulatory Commission* [(2010) 4 SCC  
603], in which this court had held that “regulatory intervention  
B into the existing contracts across-the-board could have been  
done only by making Regulations under Section 178 and not  
by passing an Order under Section 79(1)(j) of the 2003 Act”.  
Mr. Vikas Singh submitted that the appeal filed by APM  
Terminals B.V. was without merit and was liable to be  
C dismissed.

53. We have carefully considered the submissions made  
on behalf of the respective parties and are ad idem with the  
learned Solicitor General that the appeals and the  
Transferred Cases raise the same issue and the only  
D difference between the two is that the appellant had not  
referred to or sought the benefit of Clause 2.3 of its  
agreement, which permitted it to participate in future tenders  
in relation to development work within the port area, while  
in the petitioner’s case the same formed the main plank of  
E its claim. In substance, the question that we are faced with  
is whether despite the contractual right vested in the  
appellant as well as in the petitioner in the Transferred cases  
to participate in future tender processes for developmental  
work within the port area, such right could be taken away  
F and/or curtailed by a unilateral policy decision of the Central  
Government. The further question in the case of the appellant  
is whether having been debarred from participating in the  
bid for the Third Container Terminal in JNPT, it could also  
be excluded from the bidding process of the Fourth  
G Container Terminal.

54. Both the Bombay High Court as well as this Court  
have held that in public interest it was open to the  
Government to alter its policies in order to subserve the  
common good and that contractual rights would have to give  
H way to the greater public interest, which in this case was to

prevent the creation of private monopolies in the management of port facilities in the Major Ports in the country, as this could have far-reaching and disastrous consequences as far as shipping in such ports was concerned. As already indicated hereinabove, the policy decision of 26th October, 1996, made provision for privatisation and also gave private operators the right to give priority berthing to their own ships. The said decision had the potential of substantially disrupting the schedule of other ships intending to use the port facilities and could discourage foreign ships from coming to Indian Ports and thereby disturb the very pattern of the shipping trade in India.

55. While disposing of Writ Petition No.8083 of 2002, filed by P&O Australia Ports Pty. Limited against the Board of Trustees of JNPT, the Division Bench of the Bombay High Court examined the question raised herein at length. It found that the appellants were handling container terminals in Karachi and Sri Lanka and also at JNP and Chennai, thereby exercising control over 48% of the container traffic in India. The High Court held that the two existing terminals at JNP and Chennai are the biggest container terminals in the country and if the appellant and the petitioner in the Transferred Cases were permitted to operate the new container terminals also, they would have virtual monopoly of the container traffic in the entire country which would not be in the public interest.

56. The High Court also took note of the fact that certain shipping agents and their associates had expressed concern regarding the increased tariff charged by the appellant at its container terminals at JNP and the possibility of a monopoly being created by it in the country. The High Court took note of the fact that port authorities all over the world had woken up to the possibility of private monopolies controlling the use of port facilities in such a manner so as to benefit their own ships to the detriment of world-wide shipping as a whole. The High Court took note of the fact that P&O Ports itself

had been excluded from bidding for the Third Container Terminal in the Port of Melbourne on the ground that it would give the said operator a position of dominance which was to be avoided in the interest of the shipping industry at large. Two other examples of Port Klang in Malaysia and Bhabange Port in Thailand, were also taken note of by the Bombay High Court where different independent operators were appointed to promote competition.

57. It is precisely for such reason that it had become necessary for the Central Government to alter its policy decision regarding entrusting control of the container terminals in the major ports of India in a manner so as to eliminate monopolisation and to encourage competition. The decision of the High Court was duly endorsed by this Court in SLP(C)No.7488 of 2003 and it was observed that the High Court had rightly dismissed the writ petition.

58. Insofar as the decision taken by the Central Government to alter its policy regarding the grant of licence for operating the container terminals in the Major Ports in India as against the contractual right embodied in the form of Clause 2.3 in the agreements executed or entered into between the Central Government and the appellant and the petitioner in the Transferred Cases, is concerned, the said controversy is no longer valid in regard to the appellant, since such point had not been taken on its behalf in the writ petition before the Bombay High Court. However, the same has been taken as a specific point on behalf of the petitioner in the Transferred Cases as far as the Tenders for the Second Container Terminal at the Tuticorin Port are concerned. The said question has to be considered in the light of Article 14 of the Constitution and the greater public interest as against the contractual right of the individual.

59. The provisions of Clause 2.3 in the Agreements signed between the Tuticorin Port Trust and PSA Sical cannot be read in isolation of the other provisions in the agreement

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which prevented the Licensee from bidding for other work within the port area during the period of the licence. In fact, in our view, the change in policy to prevent private mobilization has been held to be justified by the Bombay High Court as well as this Court. In the absence of any arbitrariness in effecting such change in policy and keeping in mind the larger public interest, we are of the view, that the Central Government was within its powers to strike a balance with regard to the control of the port facilities so that the same did not come to be concentrated in the hands of one private group or consortium which would be in a dominant position to control not only the rights of tariff, but also the entry of ships, not belonging to such group, into the Major Ports and thereby give an undue advantage to its own ships over other shipping agencies.

60. Normally, the Courts do not interfere with policy decisions of the Government unless they are arbitrary or offend any of the provisions of the Constitution. In the present cases, the adoption of such a course would, in our view, be apposite.

61. It has been the consistent view of this Court that a change in policy by the Government can have an overriding effect over private treaties between the Government and a private party, if the same was in the general public interest and provided such change in policy was guided by reason. Several decisions have been cited by the parties in this regard in the context of preventing private monopolisation of port activities to an extent where such private player would assume a dominant position which would enable them to control not only the berthing of ships but the tariff for use of the port facilities. In both the cases under consideration, the same set of entrepreneurs are interested in gaining control over the different container terminals to the exclusion of other players. The Central Government in its Ministry of Shipping and Transport, therefore, took a decision not to permit licensees who have been granted a licence for running one

A of the container terminal berths from participating in the bid process for the immediate next container terminal, with the intention of promoting healthy competition for the benefit of the shipping industry and the ports in India as well. The decision to alter its policy is based on sound reasoning and the Central Government has taken such decision for the benefit of the consumers as a whole. The changed policy would also have the effect of preventing cartelisation and dominant status, which could inevitably affect the ultimate pricing of consumer goods within the country. As was held in *Shimnit Utsch India Private Ltd. Vs. West Bengal Transport Infrastructure Development Corporation Limited and Ors.* [(2010) 6 SCC 303], the Government was entitled to change its policies with changing circumstances and only on grounds of change a policy does not stand vitiated.

D 62. It was further held that Government has the discretion to adopt a different policy, alter or change its policy to make it more effective. The only qualifying condition is that such change in policy must be free from arbitrariness, irrationality, bias and malice and must be in conformity with the principle of *Wednesbury* reasonableness. Although, it has been urged by Ms. Chidambaram that such change in policy could be effected only by way of legislation, such a submission, if accepted, could stultify the powers of the Central Government to alter its policies with changing circumstances for the benefit of the public at large. It is not as if the right of a licensee to bid for a further container terminal berth has been excluded for the entire period of the Licence Agreement but in order to ensure proper competition and participation by all intending tenderers, the said policy has also been altered to enable such licensees to bid for the next but one tender as and when invited.

63. However, as far as the appellant is concerned, it is because of certain fortuitous circumstances that it came to be excluded from the tender process for the Fourth Container

Terminal. If the tender process for the Third Container Terminal had been concluded, the various complications could have been avoided since under the revised policy, the appellant was entitled to participate in the alternate bids. The appellant having been excluded from one bid on the basis of an existing policy, cannot be debarred from participating in the next bid, by taking recourse to a different yardstick. Such a course of action would be contrary to public policy. Accordingly, the authorities of the JNPT shall allow the appellant to continue to participate in the tender process for the Fourth Container Terminal and the decision to the contrary conveyed to the appellant on 29th June, 2009, is quashed.

64. As far as PSA Sical Terminals Ltd. is concerned, Ms. Chidambaram's submission as to the applicability of the doctrine of legitimate expectation is at best an expectation if there are cogent grounds to deny the same. The said doctrine has been explained by this Court in *Sethi Auto Service Station Vs. Delhi Development Authority* [(2009) 1 SCC 180], and it was held that the appellant in the said case had certain expectations which were duly considered and favourable recommendations had also been made, but the final decision-making authority considered the matter when the policy had undergone a change and the cases of the appellants therein did not meet the new criteria for allotment laid down in the new policy. It was also observed that the concept of legitimate expectation has no role to play where State action is based on public policy and in the public interest, unless the action taken amounted to an abuse of power.

65. As we have indicated earlier, the Central Government was within its powers to adopt a policy to prevent the port facilities from being concentrated in the hands of one private group or consortium which could have complete control over the use of the facilities of the ports to the detriment of the shipping industry as a whole. The decision taken by the Tuticorin Port Trust Authorities to

A exclude PSA Sical Terminals Ltd. from bidding for the 8th Berth Container Terminal cannot, therefore, be said to be arbitrary or unreasonable so as to warrant interference. In fact, the position of PSA Sical Terminals Ltd. is no different from that of A.P.M. Terminals B.V. which had been excluded from the bid for the Third Container Terminal at JNPT.

66. In the aforesaid circumstances, the appeal filed by APM Terminals BV is allowed and the decision of the Bombay High Court is set aside. However, we are also of the view that the decision of the Madras High Court does not call for any interference and the Transfer Cases filed by PSA Sical Terminals Limited are accordingly dismissed, but without any order as to costs.

66. All interim orders are vacated.

D B.B.B. Matters disposed of.

RANGKU DUTTA @ RANJAN KUMAR DUTTA A  
 v.  
 STATE OF ASSAM  
 (Criminal Appeal No. 2307 of 2009)

MAY 20, 2011 B

**[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]**

*Terrorist and Disruptive Activities (Prevention) Act, 1987 – s.20-A(1) – Conviction of appellant-accused by Designated TADA Court – Challenged on ground of violation of the provisions contained under s.20(A)(1) – Held: The Parliament through s.20-A has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under s.20-A(1), notwithstanding anything contained in the CrPC, no information about the commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police – It is not the requirement under s.20-A(1) to have the prior approval only in writing – Prior approval may be either in writing or oral also – S.20(A)(1) is a mandatory requirement of law – First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression “No” after the overriding clause – Whenever the intent of a statute is mandatory, it is clothed with a negative command – Also, the requirement of s.20(A)(1) was introduced by way of an amendment with a view to prevent abuse of the provisions of TADA – Thus, the Court while examining the question of complying with the said provision must examine it strictly – The requirement of prior approval must be satisfied at the time of recording the information – If there is absence of approval at the stage of recording the information, the same cannot be cured by subsequent carrying on of the investigation by the DSP – In the instant case, even verbal approval of the concerned authority was not obtained before recording the information –*

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A *Therefore, the entire proceeding right from the registering of the FIR, filing of the charge-sheet and the subsequent trial was vitiated by a legal infirmity and there was a total miscarriage of justice in holding the trial, ignoring the vital requirement of law – Judgment of the Designated TADA Court therefore set aside.*  
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**Appellant was allegedly an ULFA extremist. Placing reliance upon the FIR lodged by PW15-Office-in-charge of police station, against the appellant and other accused, the Designated TADA Court convicted the appellant under Section 120B/302 IPC read with Section 3(2)(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and sentenced him to undergo imprisonment for life.**

**In the instant appeal, the appellant challenged the judgment of the Designated TADA Court on the ground that the FIR had been recorded in clear violation of the provisions contained under Section 20(A)(1) of the TADA Act, as a result whereof, the entire proceeding subsequent thereto was vitiated and this also vitiated the judgment and order of the designated TADA court. The appellant urged that in accordance with the provisions contained under Section 20(A)(1) of the TADA Act, no information about the commission of any offence under the said Act should be recorded by the Police without prior approval of the District Superintendent of Police and that in the present case, it was clear from the evidence of PW 15 that he did not take the approval of the Superintendent of Police before recording the FIR.**

**The question which therefore arose for consideration was whether in this case the mandatory requirement of Section 20(A)(1) of the TADA was complied with.**

**Allowing the appeal, the Court**

**HELD:1. The requirement of Section 20(A)(1) of the**

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TADA was introduced by way of an amendment with a view to prevent abuse of the provisions of TADA. The Parliament, through Section 20-A of TADA has clearly manifested its intention to treat the offences under TADA seriously inasmuch as under Section 20-A(1), notwithstanding anything contained in the Code of Criminal Procedure, no information about the commission of an offence under TADA shall even be recorded without the prior approval of the District Superintendent of Police and under Section 20-A(2), no court shall take cognizance of any offence under TADA without the previous sanction of the authorities prescribed therein. It is not the requirement under Section 20-A(1) of the TADA Act to have the prior approval only in writing. Prior approval is a condition precedent for registering a case, but it may be either in writing or oral also. It is clear that approval has to be taken, even if it is an oral approval. [Paras 14, 15, 16] [647-F-G; 648-B-C-F-H]

*State of A.P. v. A. Satyanarayana and Others* 2001(10) SCC 597; *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others* 1994 (4) SCC 602: 1994 (1) Suppl. SCR 360 – relied on.

2. The submission made by the State that the investigation was conducted by the DSP, therefore, the requirement of section 20(A)(1) was complied with, cannot be accepted. Section 20(A)(1) is a mandatory requirement of law. First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression “No” after the overriding clause. Whenever the intent of a statute is mandatory, it is clothed with a negative command. Apart from that, since the said section has been amended in order to prevent the abuse of the provisions of TADA, this Court while examining the question of complying with the said provision must examine it strictly. No information about

A the commission of an offence under the TADA Act can be recorded by the Police without the prior approval of the District Superintendent of Police. Therefore, the requirement of prior approval must be satisfied at the time of recording the information. If a subsequent investigation is carried on without a proper recording of the information by the DSP in terms of Section 20(A)(1), that does not cure the inherent defect of recording the information without the prior approval of the District Superintendent of Police. The requirement of approval must be made at the initial stage of recording the information. If there is absence of approval at the stage of recording the information, the same cannot be cured by subsequent carrying on of the investigation by the DSP. [Paras 19, 20, 22 and 23] [649-D-F; 650-E-H; 651-A-B]

*Benjamin Leonard MacFoy v. United Africa Co. Ltd.* [1961(3) Weekly Law Reports 1405] – referred to.

G.P. Singh’s Principles of Statutory Interpretation, 12th Edition, p.404 – referred to.

3. The Designated TADA Court came to a finding that there was verbal approval from the Superintendent of Police even after noting that the I.O. concerned (PW 15) admitted that he did not obtain approval. It is nobody’s case that PW 15 was confronted with the FIR while he was giving his evidence. Therefore, the prosecution in this case has failed to bring on record that verbal approval was obtained. PW 15 has not been declared hostile. Therefore, having regard to the clear evidence of PW 15, this Court is constrained to hold that even verbal approval of the concerned authority was not obtained in the case before recording the information. Therefore, the entire proceeding right from the registering of the FIR, filing of the charge-sheet and the subsequent trial is vitiated by a legal infirmity and there is a total miscarriage

of justice in holding the trial, ignoring the vital requirement of law. Therefore, the impugned judgment of the Designated TADA Court is set aside. [Para 26, 27 and 28] [651-F-H; 652-A-B]

Case Law Reference:

2001(10) SCC 597 relied on Para 14

1994 (1) Suppl. SCR 360 relied on Para 16

[1961(3) Weekly Law Reports 1405] referred to Para 23

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2307 of 2009.

From the Judgment & Order dated 10.09.2009 of the Designated Court, Assam, Gauhati in TADA Sessions Case No. 116 of 2000.

Manish Goswami, Map & Co., for the Appellant.

Vartika Sahay (Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

**GANGULY, J.** 1. Heard learned counsel for the parties.

2. This is a statutory appeal under Section 19 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the said Act") impugning an order dated 10.9.2009 passed by the Designated Court TADA. The learned counsel appearing for the sole appellant has impugned the judgment of the designated court (TADA) on various grounds but at the time of arguments, he made emphasis on a particular ground, namely, that in the instant case, the FIR has been recorded in clear violation of the provisions contained under Section 20(A)(1) of the said Act, as a result whereof, the entire proceeding subsequent thereto has been vitiated and this has also vitiated the judgment and order of the designated court.

A 3. The material facts of the facts are these.

B 4. That FIR was lodged on 6.11.1993 by one Ajit Kumar Sarma, Office-in-Charge of Bihpuria Police Station against several persons including the appellant. Of the four accused persons, no charges were framed against Moni Pathak. In so far as Bhaben Gogoi @ Bikram was concerned, he was acquitted by the designated court and Indreswar Hazarika @ Babul Handique died during the pendency of the proceedings before the designated court. Only Rangku Dutta @ Ranjan Kumar Dutta was convicted and is the appellant before us.

C 5. The FIR which has been lodged on 6.11.1993 runs as follows:

D "I beg to report that on 5.11.93 at 2150 hrs. while SI AQM Zahingir I/C Dholpur O.P. along with the PSO Hav. Loknath Konwar and other police personnel were informed law and order duty in connection with Debraj Theatre show at Dhalpur circle in open place by the side of Hill, some ULFA extremist fired at SI AQM Zahingir and PSO Hav. Loknath under simultaneously from a close range behind them and as a result both of them succumbed to injuries.

F Earlier of this incident on 5.10.93 an encounter took place between the ULFA with Dhalpur O.P. Place and under the leadership of SI AQM Zahangir I/C Dhalpur O.P. where Lakhimpur Dist. ULFA commander Jogen Gogoi killed and since then the banned ULFA activists associates of Jogen Gogoi were planning with criminals conspiracy to liquidate SI AQM Zahingir.

G On 5.11.93 evening the said ULFA activists with the help of Sri ranku Dutta got identified SI AQM Zahingir and then ULFA extremist namely (1) Sri Indreswar Hazarika @ Babul Handique (2) Sri Nobel Gogoi @ Bikram under the leadership of Sri Moni Pathak @ Debo Pathak taking advantage of darkness attacks simultaneously with fire

arms and killed SI AQM Zahingir and PSO Hav. Loknath Knowar. A

So I request to register a case under Section 120(B)/302 IPC R/W 3/4/5 TADA(P) Act, 1987 against the (illegible) ULFA activist and four others associates, I have already taken up the investigation of the case.” B

6. On the basis of the FIR, a case being Bihpuria Police Station Case No. 497 of 1993, was initiated under Section 120B/302 IPC read with Section 3 / 4 and 5 TADA (P) Act and the designated court vide order dated 31st October, 2002 framed charges against the appellant, inter alia, under Section 120(B)/302 of the Indian Penal Code and Section 3(2)(1) of the said Act. Thereafter, the designated court by impugned judgment dated 10th September, 2009 passed in TADA Sessions Case No. 116 of 2000 found the appellant guilty of offences punishable under Section 120B/302 IPC read with Section 3(2)(1) of the said Act and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 2000/-, in default further imprisonment for two months. C D

7. Learned counsel appearing for the appellant urged that in accordance with the provisions contained under Section 20(A)(1) of the said Act, no information about the commission of any offence under the said Act shall be recorded by the Police without prior approval of the District Superintendent of Police. E F

8. Learned Counsel submitted that the said provision under Section 20(A)(1) was incorporated by way of an amendment vide Section 9 of Act 43 of 1993. The said amendment came into effect on 23.5.1993 and the FIR was recorded on 6.11.1993. G

Therefore, at the time when the FIR was recorded, the provision of Section 20(A)(1) was clearly attracted.

9. It will be in the fitness of things that to appreciate the H

A points urged by the appellant, Section 20(A) is set out below:

20-A Cognizance of offence – (1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police. B

(2)No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, Commissioner of Police. C

10. Relying on the said section, the learned Counsel for the appellant submitted that from the evidence of PW 15 Ajit Kumar Sarma who recorded the FIR, it is clear that he did not take the approval of the Superintendent of Police before recording the FIR. In his cross-examination, PW 15 clearly stated “I did not obtain the approval from the concerned SP for registering the case.” From the evidence of PW 11, who is one Sanjit Sekhar Roy, learned counsel stated that the said PW 11 was working on 22.6.2000 as DSP Headquarter at North Lakhimpur. In his cross- examination, he stated that the occurrence took place on 6.11.1993 and prior to the filing of the Ejahar which is the FIR, the written approval of the SP concerned was not obtained and in the Ejahar itself, There is no approval of SP, North Lakhimpur. D E

11. We have looked into the original FIR Exhibit P-12. In the original FIR, the following endorsement which has been made by Ajit Kumar Sarma is quoted below: F

“Received and registered Bihpuria PS Case no. 0497/93 u/s 120(B)/302 I.P.C. R/W 3/4/5 TADA (P) Act, 1987 with the approval of SP(I) NL.” G

12. It is an admitted position in this case that even though the aforesaid endorsement has been made in the FIR, the SP(I), North Lakhimpur, whose approval is alleged to have been taken by PW 15 Ajit Kumar Sarma has not been examined by H

A the prosecution. Apart from that, in the substantive evidence  
before the Court, PW 15, Ajit Kumar Sarma has categorically  
stated that he has not obtained approval of SP before  
registering the case. He rather said that he registered the case  
and himself took up the investigation of the case, prepared the  
seizure list and recorded the statement of witnesses and at that  
point of time, the rank of Ajit Kumar Sarma was that of SI of  
police. B

C 13. We have already referred to the evidence of PW 11  
who has also deposed that written approval of SP was not  
obtained. C

D 14. In the background of these facts, the question is  
whether in this case the mandatory requirement of Section  
20(A)(1) was complied with. Attention of this Court has been  
drawn to certain decisions of the Court where from it appears  
that there was a controversy and divergence of judicial view as  
to whether written approval or oral approval is required. The  
said divergence of judicial view has been set at rest by the  
judgment of a three-Judge Bench of this Court in *State of A.P.  
Vs. A. Satyanarayana and Others* 2001(10) SCC 597. E

15. A Three-Judge Bench of this Court setting out the  
controversy in this matter ultimately came to hold as follows in  
paragraph 8:

F “Having applied our mind to the aforesaid two  
judgments of this Court, we are in approval of the latter  
judgment and we hold that it is not the requirement under  
Section 20-A(1) to have the prior approval only in writing.  
Prior approval is a condition precedent for registering a  
case, but it may be either in writing or oral also, as has  
been observed by this Court in *Kalpanath Rai* case  
1997(8) SCC 732 and, therefore, in the case in hand, the  
learned Designated Judge was wholly in error in refusing  
to register the case under Sections 4 and 5 of TADA. We,  
therefore, set aside the impugned order of the learned  
H

A Designated Judge and direct that the matter should be  
proceeded with in accordance with law.”

B 16. It is, therefore, clear that approval has to be taken, even  
if it is an oral approval. Attention of this Court has also been  
drawn to a decision rendered in *Hitendra Vishnu Thakur and  
Others Vs. State of Maharashtra and Others* 1994(4)SCC 602  
as to the requirement of the provision of Section 20(A)(1). The  
learned Judges of this Court after considering various  
provisions of the said Act held that the requirement of Section  
20(A)(1) of TADA was introduced by way of an amendment with  
a view to prevent abuse of the provisions of TADA. We,  
therefore, reiterate the principles laid down by this Court in  
paragraph 12 by Justice Dr. A.S. Anand(as His Lordship then  
was), which is set out below: C

D “Of late, we have come across some cases where  
the Designated Courts have charge-sheeted and/or  
convicted an accused person under TADA even though  
there is not even an iota of evidence from which it could  
be inferred, even prima facie, let alone conclusively, that  
the crime was committed with the intention as  
contemplated by the provisions of TADA, merely on the  
statement of the investigating agency to the effect that the  
consequence of the criminal act resulted in causing panic  
or terror in the society or in a section thereof. Such orders  
result in the misuse of TADA Parliament, through Section  
20-A of TADA has clearly manifested its intention to treat  
the offences under TADA seriously inasmuch as under  
Section 20-A(1), notwithstanding anything contained in the  
Code of Criminal Procedure, no information about the  
commission of an offence under TADA shall even be  
recorded without the prior approval of the District  
Superintendent of Police and under Section 20-A(2), no  
court shall take cognisance of any offence under TADA  
without the previous sanction of the authorities prescribed  
therein. Section 20-A was thus introduced in the Act with  
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a view to prevent the abuse of the provisions of TADA.” A

17. Learned counsel appearing on behalf of the State wanted to urge that in the instant case, the requirement of Section 20(A)(1) has been complied with and in support of her submissions, the learned counsel has drawn the attention of this Court to the evidence of PW 4 and PW 6. In his evidence, PW 4 Nitul Gogoi has said that on 21.10.94 he was working as D.S.P. H.Q. at Lakhimpur. On that day, the S.P. Lakhimpur handed over the CD of this case to him to hold “remaining part of investigation of the case.” B

18. PW 6 Nirmal Dr. Das also deposed that on 25.9.99, he was working as Head Quarter DSP at North Lakhimpur. On that day, S.P. Lakhimpur entrusted the investigation of the case in his name and accordingly, he got the CD from R.S.I. C

19. Relying on the aforesaid deposition of PW 4 and PW 6, the learned counsel urged that in the instant case, the investigation was conducted by the DSP, therefore, the requirement of section 20(A)(1) has been complied with. We are unable to appreciate the aforesaid submission. D

20. It is obvious that Section 20(A)(1) is a mandatory requirement of law. First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression “No” after the overriding clause. Whenever the intent of a statute is mandatory, it is clothed with a negative command. Reference in this connection can be made to G.P. Singh's Principles of Statutory Interpretation, 12th Edition. At page 404, the learned author has stated: E

“As stated by CRAWFORD: “Prohibitive or negative words can rarely, if ever, be directory. And this is so even though the statute provides no penalty for disobedience. As observed by SUBBARAO, J.: “Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative”. Section 80 and F

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A Section 87-B of the Code of Civil Procedure, 1908, section 77 of the Railways Act, 1890; section 15 of the Bombay Rent Act, 1947; section 213 of the Succession Act, 1925; section 5-A of the Prevention of Corruption Act, 1947; section 7 of the Stamp Act, 1899; section 108 of the Companies Act, 1956; section 20(1) of the Prevention of Food Adulteration Act, 1954; section 55 of the Wild Life Protection Act, 1972, the proviso to section 33(2)(b) of the Industrial Disputes Act, 1947 (as amended in 1956); section 10A of Medical Council Act, 1956 (as amended in 1993), and similar other provisions have therefore, been construed as mandatory. A provision requiring 'not less than three months' notice is also for the same reason mandatory.” B

21. We are in respectful agreement with the aforesaid statement of law by the learned author. C

22. So there can be no doubt about the mandatory nature of the requirement of this Section. Apart from that, since the said section has been amended in order to prevent the abuse of the provisions of TADA, this Court while examining the question of complying with the said provision must examine it strictly. D

23. Going by the aforesaid principles, this Court finds that no information about the commission of an offence under the said Act can be recorded by the Police without the prior approval of the District Superintendent of Police. Therefore, the requirement of prior approval must be satisfied at the time of recording the information. If a subsequent investigation is carried on without a proper recording of the information by the DSP in terms of Section 20(A)(1), that does not cure the inherent defect of recording the information without the prior approval of the District Superintendent of Police. Whether the Deputy Superintendent of Police is a District Superintendent of Police or not is a different question which we need not decide in this case. But one thing is clear that the requirement E

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A of approval must be made at the initial stage of recording the information. If there is absence of approval at the stage of recording the information, the same cannot be cured by subsequent carrying on of the investigation by the DSP. Reference in this connection is made to the principles laid down by Lord Denning speaking for the Judicial Committee of Privy Council in *Benjamin Leonard MacFoy Versus United Africa Co. Ltd.* [1961(3) Weekly Law Reports 1405]. Lord Denning, speaking for the unanimous Bench, pointed out the effect of an act which is void so succinctly that I better quote him:

C “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

D 24. We are in respectful agreement with the aforesaid view.

E 25. Therefore, the evidence of PW 4 and PW 6 do not come to any aid of the State Counsel in the facts of the present case.

F 26. We are, however, surprised to find that the Designated Court in the impugned judgment has come to a finding that there has been verbal approval from the Superintendent of Police even after noting that the I.O. In this case (PW 15) admitted that he did not obtain approval. It is nobody's case that PW 15 was confronted with the FIR while he was giving his evidence. Therefore, the prosecution in this case has failed to bring on record that verbal approval was obtained. It may be noted that PW 15 has not been declared hostile.

H 27. Therefore, having regard to the clear evidence of PW 15, this Court is constrained to hold that even verbal approval

A of the concerned authority was not obtained in the case before recording the information.

B 28. Therefore, the entire proceeding right from the registering of the FIR, filing of the charge-sheet and the subsequent trial is vitiated by a legal infirmity and there is a total miscarriage of justice in holding the trial, ignoring the vital requirement of law. We have, therefore, no hesitation in setting aside the impugned judgment of the Designated Court.

C 29. The appeal is, therefore, allowed. The appellant who is in jail must be set at liberty forthwith, if not required in connection with any other case.

B.B.B. Appeal allowed.

HUMANITY AND ANR.  
v.  
STATE OF WEST BENGAL AND ORS.  
(Civil Appeal No. 4782 of 2011.)

MAY 26, 2011

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

*Administrative Law – Government action – Allotment of land by State Government, without open advertisement and public offer – Challenge to – The State Government issued advertisement for allotment of land for setting up of an intergrated ICSE affiliated school to which ‘SG’, a cricketer of great repute, responded – A Committee of Government Officials considered all the applications and decided to allot the land in favour of ‘SG’ – Subsequently, ‘SG’, the allottee, wrote a letter to the State Government stating that after going through the norms of ‘ICSE’ norms he felt that allotment of a bigger plot was needed for getting affiliation and accordingly he made prayer for allotment of a bigger plot – ‘SG’ stated that he ‘would like to surrender’ the plot already allotted to him and would at the same time ‘apply for a plot of a bigger area’ – Within a month, the State Government allotted ‘SG’ a different plot, of a much bigger size, and in a different area, which was challenged by public interest litigants before the High Court in several writ petitions – High Court upheld the new/second allotment of bigger plot of land – On appeal, held: The new allotment of bigger plot in favour of ‘SG’, the allottee, cannot be sustained – The action of the Government was one of granting largesse inasmuch as land of which the Government is owner and which was allotted is a very scarce and valuable property – In the matter of granting largesse, Government has to act fairly and without even any semblance of discrimination – Admittedly, no advertisement was issued and no offer was sought to be obtained from the members of the public in respect of the new allotment of a much bigger*

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*plot – The second allotment was not brought about by the Government in its own discretion, assuming the Government could exercise its discretion in such a fashion but was in response to a written request of the allottee – The Government was so anxious to oblige the allottee by giving bigger plot that too with no loss of time, the said allotment was made by the Government admittedly without verifying whether the allottee had surrendered the previous plot allotted to him – From the facts disclosed, it is clear that such surrender took place much later – The Government made allotment of the new plot to the allottee on terms which were even more generous than the ones suggested by the allottee in his letter – Such action of the Government definitely smacks of arbitrariness and falls foul of Article 14 – The allottee selectively sought compliance of the ICSE norms only in asking for a bigger plot – Insofar as other norms were concerned, they were clearly flouted as seen in the constitution of the Trust set up by ‘SG’ to run the proposed school – Also, the new plot was marked in the working map as one meant for a college yet the same was given to the allottee for establishing an ICSE school – In making the impugned allotment in favour of ‘SG’, the State failed to discharge its constitutional role – Once the Government had initiated the process of advertisement, it could not jettison the same and allot a new plot to the allottee without any advertisement – The allottee may be a well-known sportsman but does not claim any expertise as an educationist – The impugned allotment of a different and bigger plot by the government in favour of the allottee without any advertisement, when initially advertisement was resorted to, and then it was given up and everything was rushed through in hot haste, was unreasonable and arbitrary, and the High Court was wrong in upholding the same – Constitution of India, 1950 – Article 14.*

**An advertisement was issued by the Government of West Bengal, Urban Development Department, earmarking a plot of land measuring about 50 kathas in**

Plot No. BF-158 in Sector-I, Salt Lake (Bidhannagar), Kolkata, for the setting up of an integrated ICSI affiliated school. It was stated in the advertisement that the intending Organization /Institution/Body/Registered Society/Trust which were capable of running and managing such a school by their own resources, may apply to the Principal Secretary, Urban Development Department, Government of West Bengal giving details of the project.

Mr. Sourav Ganguly, a cricketer of great repute, applied in response to the said advertisement. In the project report submitted by him, it was stated that the school would be owned by a Registered Society/Trust. A Committee consisting of several Government officials considered about 20 applications, filed pursuant to the aforesaid advertisement. Thereafter, vide a resolution, the aforesaid Committee selected Mr. Sourav Ganguly and an allotment order in respect of plot no. BF-158 was issued by the Joint Secretary, Urban Department to him. Subsequently, on 19.1.2009, a letter was written to Minister for Urban Development and Municipal Affairs by the said allottee by stating that after going through the norms of 'ICSE' he felt that allotment of a bigger plot was needed for getting affiliation and a prayer was made for allotment of another bigger plot. In this letter, the allottee stated that he 'would like to surrender' the plot already allotted to him and would at the same time 'apply for a plot of a bigger area'. This the allottee said he was seeking to do in order to comply with the norms of ICSE.

By a communication dated 17.2.2009, issued from the Urban Development Department, the allottee was informed about allotment of a different plot, of a much bigger size, and in a different area, which was challenged by public interest litigants before the High Court in several writ petitions on various grounds.

The first ground of challenge was that there was no advertisement for allotment of the subsequent plot being plot No. CA-222, which is much bigger than the initial plot and allotment of this different and bigger plot, without any advertisement by the Government, only on the prayer of the allottee was arbitrary, discriminatory and violative of Article 14 of the Constitution. The second ground of challenge was that even though the impugned allotment was made on 17.2.2009 "subject to execution of registration of deed of surrender," the possession of the plot was made over to the allottee on 30.4.2009 while a draft deed of surrender was sent by the State Government to the allottee and was signed by the allottee on 5.3.2009 but the same was not presented for registration and the same was registered only after filing of the petition before the High Court. The complaint of the petitioner was that the plot was surrendered only after the writ petition was admitted by the High Court and direction for filing of affidavit was given.

The third ground of challenge was that when the allottee initially applied and was allotted the previous plot, the norms of ICSE affiliation were already notified and the allottee claiming to set up a school for ICSE affiliation must be aware of those norms. The fourth ground was that the claim of the allottee for complying with the ICSE norm was just a specious plea, in fact the Trust which the allottee had set up for the school did not at all comply with the ICSE norms. The fifth ground was that in allotting the subsequent plot, to the allottee, the authorities flouted the working plan available for Salt Lake City in the absence of a master plan.

The High Court upheld the allotment of plot of land being plot no. CA-222. Hence the present appeals.

Allowing the appeals, the Court

HELD:1.The allotment of plot no. CA-222 in favour of

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the allottee cannot be sustained. [Para 23] [669-B] A

2.1. When the Government decided to allot a substantial plot for setting up of a school by private organizations and when on the basis of an advertisement to that effect various organizations responded, the action of the Government was one of granting largesse in as much as land of which the Government is owner and which was allotted is a very scarce and valuable property. In the matter of granting largesse, Government has to act fairly and without even any semblance of discrimination. [Paras 24, 25] [669-C-E] B C

2.2. Even the allottee in his letter dated 19.1.2009 made it clear that he was applying for a plot of bigger area after surrendering the previous plot. The sequence suggested in the allottee's letter is that he would surrender the already allotted land and at the same time apply for a plot of bigger area. Therefore, the request of the allottee is to give another plot of land. Pursuant to such request of the allottee, another plot of land was allotted to him with exemplary speed by the Government, within a month. The request was made by the allottee for a bigger plot of land on 19.1.2009 to the Minister of Urban Development and Municipal Affairs and from the said department a communication was sent to the allottee on 17.2.2009, to the effect that after considering the request of the allottee, the Government was pleased to cancel its previous order of allotment and in lieu thereof was allotting a new plot of land being no. CA-222 measuring 62 kathas (which is actually 63.04 kathas). [Para 30] [671-B-E] D E F

2.3. Admittedly, no advertisement was issued and no offer was sought to be obtained from the members of the public in respect of the new allotment of a much bigger plot. The impugned allotment is clearly in breach of the principles of Article 14 of the Constitution. This court G H

A cannot persuade itself to hold that this allotment is in exercise of the right of the Government in the first advertisement dated 5.11.2006, where the Government reserved its right to change the location of the land. The second allotment is not only about a change in the location of the land, but the subsequent allotment is also of a much larger plot of land, brought about in terms of the request of the allottee for a bigger plot. The subsequent change was not brought about by the Government in its own discretion, assuming but not admitting that the Government could exercise its discretion in such a fashion but was in response to a written request of the allottee. [Paras 31, 32] [671-F-H; 672-A] B C

2.4. The Government was so anxious to oblige the allottee by giving bigger plot that too with no loss of time, the said allotment was made by the Government admittedly without verifying whether the allottee had surrendered the previous plot allotted to him. From the facts disclosed, it is clear that such surrender took place much later on 17.12.2009, when the allottee sent a forwarding letter the registered deed of surrender in respect of the previous plot no. BF-158. The Government made allotment of the new plot to the allottee on terms which were even more generous than the ones suggested by the allottee in his letter dated 19.1.2009. Such action of the Government definitely smacks of arbitrariness and falls foul of Article 14. [Paras 33, 34] [672-B-D, G] D E F

2.5. As regards the third ground of challenge about compliance with ICSE norms, the ICSE norms were in place as early as 28.4.2006 and those norms have been disclosed by the counter-affidavit filed by the allottee before this court in the SLP filed by C.A. Block Citizens' Association. Therefore, much before the application was made by the allottee on 17.11.2006, those norms were G H

available on record. Even then he applied for a plot of 50 kathas of land in terms of the advertisement dated 5.11.2006 issued by the State Government. [Para 36] [673-B-C]

2.6. As regards the fourth ground of challenge, according to clause 2 of the ICSE norms, the school should be run by a Registered Society/Trust or a Company (under section 25(1)(a) of the Companies Act, 1986) for educational purposes. It must not be run for profit. The constitution of the Society/Trust/Company running the school should be such that it does not vest control in a single individual or members of the same family. But in the instant case, the Society set up by 'SG' and registered for running the proposed school under the name of 'Ganguly Education and Welfare Society' consists of 7 members, out of which 5 are all in the family and stay in the same address. The sixth member is also a relation of the family and only the seventh member, the Chartered Accountant, is outside the family. Therefore, constitution of such a Trust to run the school is clearly against the ICSE norms. [Paras 37, 38, 39, 40] [673-C-H; 674-A-B]

2.7. The allottee is selectively seeking compliance of the ICSE norms only in asking for a bigger plot. In so far as other norms are concerned, they are clearly flouted as seen in the constitution of the Trust set up to run the school. Hence, the argument on behalf of the appellant that the plea of the allottee to ask for a bigger plot in the name of complying with ICSE norms is not a bona fide plea is of some substance. The allottee has not been able to meet the said argument as to how the ICSE norms are complied with if the school is to be run by such a Trust, which consists of members of the family and this court finds that there is a lot of substance in this argument of the appellants. This point was also urged before the High Court but unfortunately the High Court brushed aside this objection. [Para 41] [674-C-E]

2.8. A challenge to the legality of an order of allotment of land by the Government must be decided by the Court on the basis of material available when the High Court is examining the challenge. The High Court cannot refuse to examine the challenge on the basis of what may happen in future. By doing so, High Court refused to exercise a jurisdiction which is vested in it. [Para 42] [674-H; 675-A]

2.9. In connection with the fifth ground of challenge, a map was produced before this Court by the appellant, which is a working map in the absence of a master plan for sector-I of Salt Lake area, dated 2.9.2004. In that map, the plot CA-222 is marked as one meant for a college yet the same has been given to the allottee for establishing an ICSE school. The appellant submits that such allotment is clearly in violation of the aforesaid plan. The State has not been able to refute the aforesaid contention of the appellant. However, it has been repeatedly urged, both by the State and also that of the allottee that both the State Government and the allottee had bona fide intentions of establishing a school. Therefore, the court in public interest should uphold allotment and allow the school to be set up and should refrain from interfering in public interest. This court is unable to accept the aforesaid contention. [Paras 43, 44, 45] [675-B-E]

2.10. It is axiomatic that in order to achieve a bona fide end, the means must also justify the end. Bona fide ends cannot be achieved by questionable means, specially when the State is involved. This court has not been able to get any answer from the State why on a request by the allottee to the Hon'ble Minister for Urban Development, the Government granted the allotment with remarkable speed and without considering all aspects of the matter. This court does not find any legitimacy in the action of the Government, which has to act within the discipline of the constitutional law. In making the

impugned allotment in favour of the allottee, in the facts and circumstances of the case, the State has failed to discharge its constitutional role. The High Court fell into an error by holding that by allotting plot no. CA-222 without open advertisement and public offer the Government action is not illegal or arbitrary. [Paras 46, 47] [675-F-H; 676-A, F]

*Ramana Dayaram Shetty v. International Airport Authority of India and Others* 1979 (3) SCC 489: 1979 (3) SCR 1014; *M/s Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir & Another* 1980 (4) SCC 1: 1980 (3) SCR 1338; *Akhil Bharatiya Upbhokta Congress v. State of Madhya Pradesh and others* JT 2011 (4) SC 311: 2011 (5) SCC 29 – referred to.

*T.M.A. Pai Foundation & Ors. v. State of Karnataka & Others* 2002 (8) SCC 481: 2002 (3) Suppl. SCR 587 – referred to.

“The New Property” (73 Yale Law Journal 733 – referred to.

3.1. It is very surprising that the High Court, in the impugned judgment, recorded a finding that the allottee was informed by ICSE that for obtaining affiliation for integrated educational institution, land should not be less than 60 kathas. This court fails to understand the basis on which the Division Bench came to such a conclusion. The letter of the allottee dated 19.1.2009 does not even whisper that he was informed of any objection by ICSE. The letter proceeds on a totally different basis. The letter states that after going through the norms of ICSE, it was the allottee’s own understanding that a plot of more than 60 kathas is necessary to take the school project forward. Therefore, the High Court’s recording of fact, that the allottee was ‘informed’ by the ICSE of any objection, is not substantiated by any material on record. This is a

A grave error on the part of the High Court. [Para 49] [677-B-D]

3.2. Apart from that, once the Government has initiated the process of advertisement, it cannot jettison the same and allot a new plot to the allottee without any advertisement. This action of the Government is certainly arbitrary and violates the principles of Article 14. [Para 50] [677-E-F]

*Sachidanand Pandey & another v. State of West Bengal & others* (1987) 2 SCC 295: 1987 (2) SCR 223 and *M/s Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir & Another* 1980 (4) SCC 1: 1980 (3) SCR 1338 – distinguished.

4. The allottee may be a well-known sportsman but does not claim any expertise as an educationist. Here within a month of the application made by the allottee, the allotment was made in a hot haste and without disclosure by the State of any detailed consideration. In the instant case, the impugned allotment of a different and bigger plot by the government in favour of the allottee without any advertisement, when initially advertisement was resorted to, and then it was given up and everything was rushed through in hot haste, is unreasonable and arbitrary, and the High Court was wrong in upholding the same. [Para 51, 53] [678-A-B; 678-E]

5. The order of allotment of plot no. CA-222, Sector-V, Salt Lake (Bidhannagar), Kolkata made in favour of Mr.Sourav Ganguly,the allottee,is quashed. In consequence thereof, the lease deed dated 1.4.09, pursuant to such allotment stands quashed. The allottee must, within two weeks from date, handover the peaceful and vacant possession of plot No. CA-222 measuring 63.04 Kathas in Sector-V, Salt Lake City (Bidhannagar), Kolkata to the concerned department of the State Government. Within two weeks thereafter the State

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**Government must refund to the allottee, by a Cheque, the entire money paid by him for such allotment. [Para 55] [678-H; 679-A-B]**

**Case Law Reference:**

1979 (3) SCR 1014	relied on	Para 25, 27, 31, 46	B
1980 (3) SCR 1338	relied on	Para 27, 31	
1980 (3) SCR 1338	distinguished	Para 46,48, 52	
2002 (3) Suppl. SCR 587	referred to	Para 28	C
2011 (5) SCC 29	relied on	Para 46	
1987 (2) SCR 223	distinguished	Para 48, 51	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4782 of 2011.

From the Judgment & Order dated 12.4.2010 of the High Court at Calcutta in W.P. No. 17090 of 2009.

WITH

C.A. Nos. 4783 & 4784 of 2011.

Deba Prasad Mukherjee, Arunangshu Chakraborty (Petitioner-In-Person), Anindya Lahiri, Partha Sil for the Appellants.

K.K. Venugopal, Ranjit Kumar, Jayanta Mitra, A. Subhashini, Sumit Talukdar, Manoj, P. Sinha, Aparna Sinha, Abhijat P. Medh for the Respondents.

The Judgment of the Court was delivered by

**GANGULY, J.** 1. Leave granted in all the special leave petitions.

2. Several writ petitions were filed in public interest before the Calcutta High Court challenging the allotment of land given in favour of Mr. Sourav Ganguly (hereinafter referred to as

A allottee), by the State of West Bengal. The High Court, by its judgment dated 12.4.2010, upheld the allotment of plot of land being plot no. CA-222 by allotment letter dated 17.2.2009. It disposed of all the petitions by a direction that in order to retain leasehold rights and possession of the said plot in Sector-V, Salt Lake City (Bidhannagar), Kolkata, the allottee has to pay the State Government a sum of Rs.43,25,500/-, failing which the lease deed dated 1.4.2009 shall be treated as invalid and possession of the land shall be handed back to the State Government.

C 3. Challenging the said judgment of the Division Bench, three SLP's (11783/2011, 22503/2010 and 22305/2010) were filed before this Court and as the judgment is one, and the facts and questions are identical, the cases were heard together and are being decided by this judgment.

D 4. The material facts of the case are that on 5.11.2006, an advertisement was issued by the Government of West Bengal, Urban Development Department, earmarking a plot of land measuring about 50 kathas in Plot No. BF-158 in Sector-I, Salt Lake (Bidhannagar), Kolkata- 700064, for the setting up of an integrated school from primary level to higher secondary level. It was stated in the advertisement that the school would basically be academic in nature, but with extra-curricular activities, which would form an integral part of the curriculum and it was stated that the intending Organization/Institution/ Body/Registered Society/ Trust which were capable of running and managing such a school by their own resources, may apply to the Principal Secretary, Urban Development Department, Government of West Bengal, Nagarayan, DF-8, Sector-1, Bidhannagar, Kolkata- 700064 on plain paper within 15 days from the publication of the advertisement giving details of the project. It was intimated that the aforesaid plot of land would be leased to the aforesaid applicants for 999 years on certain terms indicated in the advertisement.

H 5. One of the terms in the said advertisement, to which some reference shall be made later on, is as follows:

“The government, however, reserves the right to change the location of the land and revise the rate of salami at its full discretion. Such decision shall be final.”

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6. The allottee applied on 17.11.2006. In the said application, the allottee inter alia stated:

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“There is ever increasing demand for such institutions, especially in the northern and eastern part of the metropolitan city of Kolkata. The object of the proposed educational institution would be academic excellence with a balanced blend of co-curricular activities and sports for the all round growth of the younger generation...In this context, I propose to keep a few seats reserved for such needy cum meritorious pupils.”

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7. In the project report submitted by the allottee, it was stated that the school would be owned by a Registered Society/Trust. A Committee consisting of several Government officials considered about 20 applications, filed pursuant to the aforesaid advertisement. The Committee consisted of:

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- a. Chief Secretary, Government of West Bengal
- b. Principal Secretary/ Secretary to Chief Minister
- c. Principal Secretary/ Secretary, Urban Development Department
- d. Principal Secretary/ Secretary, Information and Cultural Affairs Department
- e. Principal Secretary/ Secretary, Cottage and Small-Scale Industries Department
- f. Principal Secretary/ Secretary, Commerce and Industries Department
- g. Managing Director, West Bengal Industries Development Corporation

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8. Surprisingly nobody from the Education Department was in the Committee.

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9. Thereafter, by resolution dated 10.1.2007, the aforesaid Committee selected the allottee and an allotment order dated 22.02.2007 in respect of plot no. BF-158 was issued by the Joint Secretary, Urban Department to the allottee. Thereupon, a lease deed was executed between the Government and the allottee on 29.10.2007 and possession of the said plot was given on 14.2.2008.

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10. It may be noted that the aforesaid selection of the allottee in respect of plot No.BF-158 was not challenged and is not the subject matter of dispute in these proceedings.

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11. Thereafter, on 19.1.2009, a letter was written to Sri Ashoka Bhattacharya, Minister for Urban Development and Municipal Affairs by the allottee by stating that after going through the norms of ‘ICSE’ he felt that allotment of a bigger plot was needed for getting affiliation and a prayer was made for allotment of another bigger plot.

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12. Since the prayer made in this letter and its consideration by the Government is vitally important for the decision in this case, the letter is set out below:

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“At present I am the owner of Plot No. 158, Block-BF in Salt Lake, Sector-I of 48 Kathas of land which was given to me for the purpose of building a school. But after going through the norms of ICSE to get an affiliation, we now need a plot of more than 60 kathas (1 acre). So I would like to *surrender this allotted land* to you and at the same time *apply for a plot of a bigger area* so that I can take the school project forward.”

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(Underlined by Court)

13. It may be noted that in this letter, the allottee stated that he ‘would like to surrender’ the plot already allotted to him and

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would at the same time 'apply for a plot of a bigger area'. This the allottee was seeking to do in order to comply with the norms of ICSE. A

14. Within a month thereafter, by a communication dated 17.2.2009, issued from the Urban Development Department, the allottee was informed about allotment of another plot- No. CA-222 in Sector-I measuring 62 kathas (it is actually 63.04 kathas). This allotment of a different plot, which is of much bigger size, in a different area, was challenged before the High Court and before this Court on various grounds. B C

15. The first ground of challenge was that there was no advertisement for allotment of the subsequent plot being plot No. CA-222, which is much bigger than the initial plot and allotment of this different and bigger plot, without any advertisement by the Government, only on the prayer of the allottee is arbitrary, discriminatory and violative of Article 14 of the Constitution. D

16. The second ground of challenge is that even though the impugned allotment was made on 17.2.2009 "subject to execution of registration of deed of surrender," the lease deed pursuant to such allotment was executed on 01.04.2009 and the same was presented for registration on 3.4.2009 and was registered on 6.4.2009. The possession of the plot was made over to the allottee on 30.4.2009. A draft deed of surrender was sent by the State Government to the allottee and was signed by the allottee on 5.3.2009 but the same was not presented for registration and the same was registered only after filing of the petition before the High Court. The complaint of the petitioner is that the plot was surrendered only after the writ petition was admitted by the High Court and direction for filing of affidavit was given. E F G

17. The third ground of challenge was that when the allottee initially applied and was allotted the previous plot, the norms of ICSE affiliation were already notified and the allottee H

A claiming to set up a school for ICSE affiliation must be aware of those norms.

18. The fourth ground was that the claim of the allottee for complying with the ICSE norm is just a specious plea, in fact the Trust which the allottee has set up for the school does not at all comply with the ICSE norms. B

19. The fifth ground was that in allotting the subsequent plot, to the allottee, the authorities have flouted the working plan which is available for Salt Lake City in the absence of a master plan. C

20. The learned counsel for the State, on the other hand, submitted before this Court that there was nothing illegal in the Government's accepting the subsequent offer of the allottee and in doing so the Government acted in terms of the original advertisement where it had reserved its right to alter the original location of the allotted plot. Learned counsel for the State submitted that the subsequent plot which has been allotted to the allottee cannot be called allotment of a new plot and no fresh advertisement for the same is necessary and relied on the impugned judgment in which High Court entered a similar finding. It was also submitted that the initial allotment made in favour of the allottee was examined by a high-powered Committee and after examining everything allotment was made and there is no illegality in the entire transaction. D E F

21. Learned counsel for the allottee submitted that the bona fide of the allottee must be looked into and considered by this court and the project is for a public purpose of setting up a good school in the area which is very much in need of the same. No challenge has been made to the allotment of the subsequent plot in favour of the allottee by any educational institution or by those who applied for the first allotment. The challenge by the public interest litigants should not be entertained by this court when the setting up of the school itself was in public interest. It is further urged that the subsequent allotment does not require G H

a fresh advertisement.

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22. The other grounds of challenge pointed out by the appellants, according to the counsel of the allottee, are inconsequential and may not be considered by this court in view of the overwhelming public interest in the setting up of a school.

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23. Considering the aforesaid rival submissions, this court is inclined to hold that the allotment of plot no. CA-222 in favour of the allottee cannot be sustained for the reasons discussed hereunder.

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24. When the Government decided to allot a substantial plot for setting up of a school by private organizations and when on the basis of an advertisement to that effect various organizations responded, the action of the Government was one of granting largesse in as much as land of which the Government is owner and which was allotted is a very scarce and valuable property.

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25. It has been repeatedly held by this court that in the matter of granting largesse, Government has to act fairly and without even any semblance of discrimination. Law on this subject has been very clearly laid down by this court in the case of *Ramana Dayaram Shetty v. International Airport Authority of India and Others* reported in 1979 (3) SCC 489. A three-Judge Bench in the said decision has recognized that the Government, in a welfare State, is in a position of distributing largesse in a large measure and in doing so the Government cannot act at its pleasure. This court perusing the new jurisprudential theory of Professor Reich in his article on the "The New Property" (73 Yale Law Journal 733) accepted the following dictum contained therein:

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"The government action be based on standards that are not arbitrary and unauthorized."

26. This court explained the purport of the aforesaid formulation by holding:

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"The government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licenses only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The government is still the government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual."

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(Para 11, page 505 of the report)

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27. The aforesaid dictum in *Ramana* (supra) is still followed by this court as the correct exposition of law and has been subsequently followed in many other decisions. In *M/s Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir & Another* reported in 1980 (4) SCC 1, another three-Judge Bench relied on the dictum in *Ramana* (supra) and held whenever any governmental action fails to satisfy the test of reasonableness and public interest, it is liable to be struck down as invalid. This court held that a necessary corollary of this proposition is that the Government cannot act in a manner which would benefit a private party. Such an action will be contrary to public interest. (See para 14, p. 13 of the report)

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28. The setting up of a private school may have some elements of public interest in it but Constitution Bench of this court has held in *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Others* reported in 2002 (8) SCC 481, that the right of a citizen, which is not claiming minority rights to set up a private educational institution is part of its fundamental right to carry on an occupation under Article 19(1)(g). Such enterprise may not be a totally business enterprise but profit motive cannot be ruled out.

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29. In view of the aforesaid legal principle, the question is whether the impugned order of the Government vide allotment letter dated 17.2.2009 allotting a plot of 63.04 kathas of land in a prime area in Salt Lake City is an allotment which is different

than the previous allotment of 50 kathas which was made to the allottee in Plot No. BF-158.

30. The answer is obvious from the admitted facts of the case. Even the allottee in his letter dated 19.1.2009 praying for such allotment, made it clear that he was applying for a plot of bigger area after surrendering the previous plot. The sequence suggested in the allottee's letter is that he would surrender the already allotted land and at the same time apply for a plot of bigger area. Therefore, the request of the allottee is to give another plot of land. Pursuant to such request of the allottee, another plot of land was allotted to him with exemplary speed by the Government, within a month, if we go by the normal pace in governmental transactions. The request was made by the allottee for a bigger plot of land on 19.1.2009 to Mr. Ashok Bhattacharya, Minister of Urban Development and Municipal Affairs and from the said department a communication was sent to the allottee on 17.2.2009, to the effect that after considering the request of the allottee, the Government was pleased to cancel its previous order of allotment and in lieu thereof was allotting a new plot of land being no. CA-222 measuring 62 kathas (which is actually 63.04 kathas).

31. Admittedly, no advertisement was issued and no offer was sought to be obtained from the members of the public in respect of the new allotment of a much bigger plot. In view of the principles laid down by this court, the impugned allotment is clearly in breach of the principles of Article 14 explained by this court in *Ramana (supra)*, *Kasturi Lal (supra)* and other subsequent cases.

32. This court cannot persuade itself to hold that this allotment is in exercise of the right of the Government in the first advertisement dated 5.11.2006, where the Government reserved its right to change the location of the land. The second allotment is not only about a change in the location of the land, but the subsequent allotment is also of a much larger plot of land, brought about in terms of the request of the allottee for a

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A bigger plot. The subsequent change was not brought about by the Government in its own discretion, assuming but not admitting that the Government could exercise its discretion in such a fashion but was in response to a written request of the allottee.

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33. The Government was so anxious to oblige the allottee by giving bigger plot that too with no loss of time, the said allotment was made by the Government admittedly without verifying whether the allottee had surrendered the previous plot allotted to him. From the facts which have been disclosed here, it is clear that such surrender took place much later on 17.12.2009, when the allottee sent a forwarding letter the registered deed of surrender in respect of the previous plot no. BF-158. The letter of the allottee dated 16.12.2009 would show the following:

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"Though I have executed the Deed of Surrender and made over the same to you but the formality of having the same registered could not be completed by me due to oversight which was mainly because of my busy schedule and constant travel. I understand that the said Deed cannot be registered now for lapse of time unless extended by the State.

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I shall be highly grateful if you could kindly arrange to have the said period extended or allow me to register a fresh deed of surrender at the earliest."

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34. It is, therefore, clear that the Government made allotment of the new plot to the allottee on terms which were even more generous than the ones suggested by the allottee in his letter dated 19.1.2009. Such action of the Government definitely smacks of arbitrariness and falls foul of Article 14.

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35. This factual aspect of the matter discussed in detail under the second ground of challenge was not disputed before us by either the learned counsel for the Government or the

learned counsel for the allottee.

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36. On the third ground of challenge about compliance with ICSE norms, we find that the ICSE norms were in place as early as 28.4.2006 and those norms have been disclosed by the counter-affidavit filed by the allottee before this court in the SLP filed by C.A. Block Citizens' Association. Therefore, much before the application was made by the allottee on 17.11.2006, those norms were available on record. Even then he applied for a plot of 50 kathas of land in terms of the advertisement dated 5.11.2006 issued by the State Government.

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37. On the fourth ground of challenge, we find that according to clause 2 of the ICSE norms, the school should be run by a Registered Society/Trust or a Company (under section 25(1)(a) of the Companies Act, 1986) for educational purposes. It must not be run for profit.

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38. The constitution of the Society/Trust/Company running the school should be such that it does not vest control in a single individual or members of the same family.

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39. But in the instant case, a Society which has been registered for running the proposed school under the name of 'Ganguly Education and Welfare Society' consists of the following members:

a. Sourav Ganguly

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b. Dona Ganguly

c. Snehasish Ganguly

d. Chandidas Ganguly

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e. Nirupa Ganguly

f. Arup Chatterjee

g. Deepak Kumar Mitra

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A 40. Of these names, the first 5 are all in the family and stay in the same address at 2-6, Biren Roy Road (E), Barisha, Kolkata. Mr. Arup Chatterjee is also a relation of the family staying in Brahma Samaj Road and only Mr. Deepak Kumar Mitra, the Chartered Accountant, is outside the family.

B Therefore, constitution of such a Trust to run the school is clearly against the ICSE norms.

C 41. It is thus clear that the allottee is selectively seeking compliance of the ICSE norms only in asking for a bigger plot. In so far as other norms are concerned, they are clearly flouted as seen in the constitution of the Trust set up to run the school. Hence, the argument on behalf of the appellant that the plea of the allottee to ask for a bigger plot in the name of complying with ICSE norms is not a bona fide plea is of some substance. The learned counsel for the allottee has not been able to meet the said argument as to how the ICSE norms are complied with if the school is to be run by such a Trust, which consists of members of the family and this court finds that there is a lot of substance in this argument of the appellants. This point was also urged before the High Court but unfortunately the High Court brushed aside this objection, if we may say so with respect, by a very strange logic by observing:

F "We are not required to consider this aspect of the matter because it will be for the governing body of the ICSE to examine the application which may be made for recognition/affiliation of the school which is yet to be established and construction yet to be made. As and when any application will be made for such recognition/affiliation, the concerned authority/body will consider the application and it is not for this court to speculate at this stage as to what would be the composition of the organization/body/society which will apply to Council for ICSE for recognition/affiliation of the integrated school."

G 42. This Court is of the view that a challenge to the legality of an order of allotment of land by the Government must be

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decided by the Court on the basis of material available when the High Court is examining the challenge. The High Court cannot refuse to examine the challenge on the basis of what may happen in future. By doing so, High Court refused to exercise a jurisdiction which is vested in it.

43. In connection with the fifth ground of challenge, a map was produced before us by the learned counsel for the appellant, which is a working map in the absence of a master plan for sector-I of Salt Lake area, dated 2.9.2004. In that map, the plot CA-222 is marked as one meant for a college yet the same has been given to the allottee for establishing an ICSE school. The learned counsel for the appellant submits that such allotment is clearly in violation of the aforesaid plan. The learned counsel for the State has not been able to refute the aforesaid contention of the appellant.

44. However, it has been repeatedly urged, both by the learned counsel for the State and also that of the allottee that both the State Government and the allottee had bona fide intentions of establishing a school. Therefore, the court in public interest should uphold allotment and allow the school to be set up and should refrain from interfering in public interest.

45. This court is unable to accept the aforesaid contention.

46. It is axiomatic that in order to achieve a bona fide end, the means must also justify the end. This court is of the opinion that bona fide ends cannot be achieved by questionable means, specially when the State is involved. This court has not been able to get any answer from the State why on a request by the allottee to the Hon'ble Minister for Urban Development, the Government granted the allotment with remarkable speed and without considering all aspects of the matter. This court does not find any legitimacy in the action of the Government, which has to act within the discipline of the constitutional law, explained by this Court in a catena of cases. We are sorry to hold that in making the impugned allotment in favour of the

A allottee, in the facts and circumstances of the case, the State has failed to discharge its constitutional role. Recently this Court relying on *Ramana* (supra), *Kasturi Lal* (supra) and various other judgments summed up the legal position in *Akhil Bharatiya Upbhokta Congress v. State of Madhya Pradesh and others* reported in JT 2011 (4) SC 311. The relevant extracts from paragraph 31 (page 336 of the report) are excerpted below:-

C “...Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.”

F 47. The Division Bench of the High Court, with respect, fell into an error by holding that by allotting plot no. CA-222 without open advertisement and public offer the Government action is not illegal or arbitrary.

G 48. In coming to the said conclusion, the Division Bench relied on two decisions of the Supreme Court rendered in the cases of *Sachidanand Pandey & another v. State of West Bengal & others* reported in (1987) 2 SCC 295 and *Kasturi Lal* (supra). This Court however finds that those two cases stand on completely different footing.

H 49. First of all, in the instant case, the Government initially

issued advertisement for allotment of land for setting up of a school and to which the allottee responded. Thereafter, a Committee considered all the applications and decided to allot the land in favour of the allottee. The matter rested there. Then came the letter of the allottee dated 19.1.2009, which has been set out above. It is very surprising that the Division Bench of Calcutta High Court, in paragraph 5 (page 6) and paragraph 21 (page 18) of the impugned judgment, recorded a finding that the allottee was informed by ICSE that for obtaining affiliation for integrated educational institution, land should not be less than 60 kathas. This court fails to understand the basis on which the Division Bench came to such a conclusion. The letter of the allottee dated 19.1.2009 does not even whisper that he was informed of any objection by ICSE. The letter proceeds on a totally different basis. The letter states that after going through the norms of ICSE, it was the allottee's own understanding that a plot of more than 60 kathas is necessary to take the school project forward. Therefore, the High Court's recording of fact, that the allottee was 'informed' by the ICSE of any objection, is not substantiated by any material on record. This is a grave error on the part of the High Court.

50. Apart from that, once the Government has initiated the process of advertisement, it cannot jettison the same and allot a new plot to the allottee without any advertisement. This action of the Government is certainly arbitrary and violates the principles of Article 14.

51. Neither in *Sachidanand Pandey* (supra) nor in *Kasturi Lal* (supra), any process of advertisement was ever initiated. In *Sachidanand Pandey* (supra), the main questions raised were issues of ecology and environment. In that case, the court dealt with the question of issuing public auction by explaining that there were direct negotiations with those who came forward to set up five star hotels, to promote the tourism industry in the State. Detailed considerations at different levels proceeded for a very long time before the Taj group of hotels,

A with sufficient experience in the hotel industry, was selected. In the instant case, the allottee may be a well-known sportsman but does not claim any expertise as an educationist. Here within a month of the application made by the allottee, the allotment was made in a hot haste and without disclosure by the State of any detailed consideration. Thus, the present case stands poles apart from the facts in *Sachidanand Pandey* (supra).

52. In *Kasturi Lal* (supra) also, the Government's policy was to set up industries in Jammu and Kashmir, which was not industrially developed and thus entrepreneurs, within the State, were offered encouraging terms for setting up industry. Therefore, in such a situation the State took a policy decision not to invite a tender or go in for advertisement for inviting industrialists from outside the State. It may be noted that at no stage, advertisement was thought of by the State in *Kasturi Lal* (supra).

53. In the instant case, the impugned allotment of a different and bigger plot by the government in favour of the allottee without any advertisement, when initially advertisement was resorted to, and then it was given up and everything was rushed through in hot haste, is unreasonable and arbitrary, and the High Court was wrong in upholding the same.

54. Before I conclude, I make it clear that I am aware that the allottee is a cricketer of great repute and has led this country to victory in many tournaments, both in India and abroad. I have watched him on the television on many occasions and was delighted to see his glorious cover drives and effortlessly lofted shots over the fence. But as a Judge, I have different duties to discharge. Here I must be objective and eschew my likes and dislikes and render justice to a cause which has come before the Court.

55. For the reasons aforesaid, the order of allotment of plot no. CA-222, Sector-V, Salt Lake (Bidhannagar), Kolkata made in favour of Mr. Sourav Ganguly, the allottee, is quashed. In

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consequence thereof, the lease deed dated 1.4.09, pursuant to such allotment stands quashed. The allottee must, within two weeks from date, handover the peaceful and vacant possession of plot No. CA-222 measuring 63.04 Kathas in Sector-V, Salt Lake City (Bidhannagar), Kolkata to the concerned department of the State Government. Within two weeks thereafter the State Government must refund to the allottee, by a Cheque, the entire money paid by him for such allotment.

56. The appeals are allowed. The order of the High Court is set aside.

57. No order as to costs.

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Appeals allowed.

A ACADEMY OF NUTRITION IMPROVEMENT AND ORS.  
v.  
UNION OF INDIA  
(Writ Petition (C) No. 80 of 2006)  
JULY 4, 2011  
B [R.V. RAVEENDRAN AND B. SUDERSHAN REDDY, JJ.]

***Prevention of Food Adulteration Rules, 1955:***

C *r.44-I – Constitutionality of – r.44-I providing for restriction on sale of non-iodised common salt for human consumption – Writ petitions challenging the compulsory iodisation of sale for human consumption – Held: Government of India has taken note of scientific and medical inputs, research results and survey data to conclude that compulsory iodisation is the most effective and accepted method for elimination of iodine deficiency disorders and that consumption of iodised salt by persons not suffering from iodine deficiency will not adversely affect them – r.44-I is stated to be in implementation of a policy decision regarding public health – The material on record is not sufficient to hold that the reason for the ban is erroneous and that r.44-I is unreasonable and arbitrary – Therefore, the provision placing a ban on sale of non-iodised salt for human consumption resulting in compulsory intake of iodised salt cannot be said to be arbitrary and violative of Article 14 or injurious to the health of general populace and violative of Article 21 – There was also no material to show that any monopoly is sought to be created in favour of a chosen few companies or MNCs – Therefore, contention that Article 19(1)(g) is violated is also liable to be rejected – Constitution of India, 1950 – Articles 14, 19(1)(g), 21.*

*r.44-I – Whether r.44-I is inconsistent with the Prevention of Food Adulteration Act – Held: The Act contemplates*

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A prohibition of manufacture, storing, sale or distribution of any adulterated and mis-branded food, measures to prevent adulteration, and also provides for laying down food standards and prohibiting import of certain objectionable articles of food items – If an item of food is adulterated, or is itself an adulterant (used for adulteration), or unwholesome or injurious to health, a rule to prevent or prohibit the manufacture for sale, storage, sale or distribution of such objectionable food item will be within the scope of the Act – If the object sought to be achieved is to persuade the people to use iodised salt or to ensure that people use iodised salt, recourse cannot be by making a rule banning sale of common salt for human consumption under the Act – The Act cannot be used to make a rule intended to achieve an object wholly unrelated to the Act – r. 44-I is wholly outside the scope of the Act and is ultra vires the Act and therefore, not valid – To do complete justice between the parties in the interest of public health, in exercise of jurisdiction u/Article 142, the ban contained in r.44-I for a period of six months is continued – Central Government given six months time to thoroughly review the compulsory iodisation policy (universal salt iodisation for human consumption) with reference to latest inputs and research data and if after such review, is of the view that universal iodisation scheme requires to be continued, bring appropriate legislation or other measures in accordance with law to continue the compulsory iodisation programme – Prevention of Food Adulteration Act, 1954.

Prevention of Food Adulteration Act, 1954:

Object and purpose of the Act – Discussed.

s.7 whether a source of power to make r.44-I – Held: s.7 relates to prohibition of manufacture for sale, storage, sale or distribution of ‘objectionable’ food, that is adulterated food, misbranded food, unlicensed food, food injurious to public health – s.7 does not relate to rule making and is not a source

A of power to make r.44-I – Prevention of Food Adulteration Rules, 1955 – r.44-I.

s.23(1A) – Whether r.44-I is beyond the rule making power of the Central Government – Held: The Act vests the power of prohibiting the manufacture for sale, storage or distribution of any article of food in the interests of public health, in the Food (Health) Authority – Central Government cannot under its power to make rules for carrying out the purposes of the Act, take upon itself the power to prohibit the manufacture for sale, storage, sale and distribution of any article of food – Clause (f) of s.23(1A) enables the central government to make rules prohibiting the sale or defining the conditions of sale of any substance “which may be injurious to health when used as food” or restricting in any manner its use as an ingredient in the manufacture of any article of food or regulating by the issue of licence the manufacture or sale of any article of food – If use of common salt is not injurious to health, the question of making a rule prohibiting the sale of such a substance would not arise under clause (f) of s.23(1A) of the Act.

s.23(1) – Whether s.23(1) provides the source of authority to make r.44-I – Held: No – s.23(1) provides that the central government may after consultation with the Central Committee for Food Standards and after previous publication by notification in the public gazette make rules to carry out the provisions of the Act – r.44-I is not a rule made or required to be made to carry out the provisions of the Act, having regard to its object and scheme – It has nothing to do with curbing of food adulteration or to suppress any social or economic mischief

**Administrative law:** Judicial review – Universal salt iodisation – Restriction imposed on the sale of non-iodised common salt for human consumption by introducing amendment in the Prevention of Food Adulteration Rules – Scope of interference by the court – Held: The question

*whether there should be universal salt iodisation is a much debated technical issue relating to medical science – An informed decision in such matters can only be taken by experts after carrying out exhaustive surveys, trials, tests, scientific investigations and research – Courts are neither equipped, nor can be expected to decide about the need or absence of need for such universal salt iodisation on the basis of some articles and reports placed before it – Nor should courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience.*

**Constitution of India, 1950:** Article 142 – Held: Vests unfettered independent jurisdiction to pass any order in public interest to do complete justice, if exercise of such jurisdiction is not contrary to any express provision of law – Prevention of Food Adulteration Rules, 1955 – r.44-I – Prevention of Food Adulteration Act, 1954.

Rule 44-I was inserted in the Prevention of Food Adulteration Rules, 1955 by way of amendment to the Rules. The said rule imposed restriction on the sale of non-iodised common salt for human consumption.

The instant writ petitions were filed by non-governmental organizations representing consumers, salt producers, medical experts, academics etc. opposing the compulsory iodisation of salt for human consumption. According to the petitioners, constant use of iodised salt on account of compulsory iodisation would lead to iodine induced hyper thyroidism with increased chances of death; that when the entire populace do not need iodised salt, it is unfair and unjust to deny them the right to choose between iodised salt and non-iodised salt and, therefore, Rule 44-I violates Articles 14 and 21 of the Constitution of India which entitles every person to have

A free choice in regard to consumption of food; that the cost of iodised salt being several times more than the cost of non-iodised salt, the majority of the populace are adversely affected by the rule requiring compulsory iodisation; that the compulsory use of iodised salt only helped a few multi-national companies which had the monopoly in the manufacture of iodised salt and that many small scale and local producers of salt were adversely affected by creation of such monopoly, therefore, Rule 44-I is violative of Article 19(1)(g) of the Constitution as it affected the fundamental rights of small and medium scale manufacturer to carry on their business in salt.

Partly allowing the writ petition and disposing of the transferred petitions, the Court

HELD: 1.1. There is some material to support the contention of the petitioners that around 90% of the populace do not need iodised salt and that consumption of excess iodine may have some adverse effects. On the other hand there is also considerable material for the view that compulsory iodisation is also necessary to prevent IDD's in about 10% (or more) of the populace and the consumption of iodised salt by the remaining 90% who do not require it, may not be injurious to their health as excess iodine is easily excreted. The question whether there should be universal salt iodisation is a much debated technical issue relating to medical science. An informed decision in such matters can only be taken by experts after carrying out exhaustive surveys, trials, tests, scientific investigations and research. Courts are neither equipped, nor can be expected to decide about the need or absence of need for such universal salt iodisation on the basis of some articles and reports placed before it. Courts should not rush in where even scientists and medical experts are careful to tread. The

rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. Nor will courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience. [Para 14] [706-E-H; 707-A-C]

*Medical Physiology* by Author C. Guyton & John E. Hall – 1996 Edition – referred to.

1.2. The petitioners’ challenge to constitutionality of the impugned amendment is bound to fail. Courts are not equipped to decide the medical issue relating to public health, as to whether compulsory iodisation should be replaced by voluntary iodisation as has been done in some developed countries, so that both common salt and iodised salt are available in the market and only those 10% who are deficient in iodine can opt for iodised salt. The Government of India has taken note of scientific and medical inputs, research results and survey data to conclude that compulsory iodisation is the most effective and accepted method for elimination of iodine deficiency disorders and that consumption of iodised salt by persons not suffering from iodine deficiency will not adversely affect them. Rule 44-I is stated to be in implementation of a policy decision regarding public health. The material placed by the petitioners is not sufficient to hold that the reason for the ban is erroneous and that Rule 44-I is unreasonable and arbitrary. Therefore, the contention that the provision placing a ban on sale of non-iodised salt for human consumption resulting in compulsory intake of iodised salt, is arbitrary and violative of Article 14 or injurious to the health of general populace and therefore violative of Article 21 is

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rejected. The use of common salt (non-iodised salt) for industrial and commercial use is not prohibited. The ban operates only in regard to use of common salt for human consumption. There was also no material to show that any monopoly is sought to be created in favour of a chosen few companies or MNCs. In the circumstances, the contention that Article 19(1)(g) is violated is liable to be rejected. [Para 16] [708-B-G]

*Report dated 6.2.2004 of the Core Advisory Group; Vitamin and Mineral Requirements in Human Nutrition” 2004 Edition, Report of a WHO Expert Consultation: “Salt as a Vehicle for Fortification” (2007) p. 7; Lewis E Braverman in his article “Adequate iodine intake – the good far outweighs the bad”, [European Journal of Endocrinology, 1998, Vol. 139 pages 14-15; Rajan Shankar and C.S.Pandav, in “Ban on Sale of Non-iodized Salt for Human Consumption: A step in the right direction” (The National Medical Journal of India, Vol. 18, No.4, 2005 p. 169 at p.170; Modern Nutrition in Health and Development” edited by M. Shike and others [Lippincott, Williams, & Wilknis Publishers, 2006, p.310 – referred to.*

2.1. The Prevention of Food Adulteration Act contemplates prohibition of manufacture, storing, sale or distribution of any adulterated and mis-branded food, measures to prevent adulteration, and also provides for laying down food standards and prohibiting import of certain objectionable articles of food items. The object and purpose of the Act is to eliminate the danger to human life from the sale of adulterated food and to ensure that what is sold is wholesome food. In other words, if an item of food is adulterated, or is itself an adulterant (used for adulteration), or unwholesome or injurious to health, a rule to prevent or prohibit the manufacture for sale, storage, sale or distribution of such objectionable food item will be within the scope of the Act. Such prohibition will be valid even in regard to incidental

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items such as misbranded food items and unlicensed food items (where licence is required). But where an item of food (used in the composition or preparation of human food and used as a flavouring) is in its natural form and is unadulterated and is not injurious to health, a rule cannot be made under the provisions of the Act to ban the manufacture for sale, storage or sale of such food item on the ground such ban will ensure that the populace will use a medicated form of such food, which will benefit a section of the populace. Making available medicines or medicinal preparations to improve public health is not the object of the Act. If the object sought to be achieved is to persuade the people to use iodised salt or to ensure that people use iodised salt, recourse cannot be by making a rule banning sale of common salt for human consumption under the Act. The Act cannot be used to make a rule intended to achieve an object wholly unrelated to the Act. The good intention of the rule making authority is not therefore sufficient to save the rule. Rule 44-I is wholly outside the scope of the Act. [Paras 18, 22] [709-D; 715-F-H; 716-A-D]

*Directorate of Film Festivals vs. Gaurav Ashwin Jain* 2007 (4) SCC 737; 2007 (5) SCR 7; *Municipal Corporation of Delhi. v. Kacheroo Mal* 1976(1) SCC 412; 1976 (2) SCR 1; *Dinesh Chandra Jamnadas Gandhi vs.State of Gujarat* 1989 (1) SCC 420; 1989 (1) SCR 138; *State of Karnataka vs. H. Ganesh Kamath* 1983(2) SCC 402; *Indian Express Newspapers (Bombay) Pvt. Ltd vs. Union of India* 1985 (1) SCC 641; 1985 (2) SCR 287; *General Officer Commanding-in-Chief vs. Dr.Subhash Chandra Yadav* 1988 (2) SCC 351; 1988 (3) SCR 62; *Supreme Court Employees' Welfare Association vs. Union of India* 1989 (4) SCC 187; 1989 (3) SCR 488; *Addl. District Magistrate (Rev.) Delhi Administration vs. Siri Ram* 2000 (5) SCC 451; 2000 (3) SCR 1019; *Dr.Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council & Ors.* 2004 (8) SCC 747; 2004 (5) Suppl.

A SCR 692; *J. K. Industries vs.Union of India* 2007 (13) SCC 673; 2007 (12) SCR 136 – relied on.

2.2. Section 7 does not relate to rule making. It relates to prohibition of manufacture for sale, storage, sale or distribution of ‘objectionable’ food, that is adulterated food, misbranded food, unlicensed food, food injurious to public health. Section 7(iv) provides that no person shall manufacture for sale, store, sell or distribute any article of food, the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health. Rule 44-I is not a prohibition by the Food (Health) Authority in the interest of public health. The Food (Health) Authority refers to the Director of Medical and Health Services or the Chief Officer in-charge of the Health Administration in a State as also any officer empowered by the Central Government or the State Government by notification in the official gazette to exercise the power and perform the duties of the Food (Health) Authority with respect to such local area as may be specified in such notification. Section 7(iv) is of no assistance to decide upon the validity of rule 44-I, nor can it be a source of power to make rule 44-I. [Para 23] [716-H; 717-A]

2.3. If the Act vests the power of prohibiting the manufacture for sale, storage or distribution of any article of food in the interests of public health, in the Food (Health) Authority, the Central Government cannot under its power to make rules for carrying out the purposes of the Act, take upon itself the power to prohibit the manufacture for sale, storage, sale and distribution of any article of food. Clause (f) of section 23(1A) enables the central government to make rules prohibiting the sale or defining the conditions of sale of any substance “which may be injurious to health when used as food” or restricting in any manner its use as an ingredient in the manufacture

of any article of food or regulating by the issue of licence the manufacture or sale of any article of food. It is the specific case of the respondent that the use of non-iodized salt is not injurious to health. Section 23(1A)(f) empowers making a rule to prohibit sale only if the substance is injurious to health when used as food. If use of common salt is not injurious to health, the question of making a rule prohibiting the sale of such a substance would not arise under clause (f) of section 23(1A) of the Act. [Paras 24, 25] [717-B-C; 717-H; 718-A-B, G-H]

*Godde Venkateswara Rao vs. Government of Andhra Pradesh 1966 (2)SCR 172 – relied on.*

2.4. Section 23(1) provides that the central government may after consultation with the Central Committee for Food Standards (constituted under section 3 of the Act) and after previous publication by notification in the public gazette make rules to carry out the provisions of the Act. Statutes delegating the power to make rules follow a standard pattern. The relevant section would first contain a provision granting the power to make rules to the delegate in general terms, by using the words ‘to carry out the provisions of this Act’ or ‘to carry out the purposes of this Act’. This is usually followed by another sub-section enumerating the matters/areas in regard to which specific power is delegated by using the words ‘in particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters.’ Interpreting such provisions, this Court in a number of decisions has held that where power is conferred to make subordinate legislation in general terms, the subsequent particularisation of the matters/topics has to be construed as merely illustrative and not limiting the scope of the general power. Consequently, even if the specific enumerated topics in section 23(1A) may not empower the Central Government

A to make the impugned rule (Rule 44-I), making of the Rule can be justified with reference to the general power conferred on the central government under section 23(1), provided the rule does not travel beyond the scope of the Act. But even a general power to make rules or regulations for carrying out or giving effect to the Act, is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the Act. Therefore, such a power “will not support attempts to widen the purposes of the Act, to add new and different means to carrying them out, to depart from or vary its terms. Rule 44-I is not a rule made or required to be made to carry out the provisions of the Act, having regard to its object and scheme. It has nothing to do with curbing of food adulteration or to suppress any social or economic mischief. [Para 26] [719-A-H; 720-A]

*Principles of Statutory Interpretation* by Justice G. P. Singh 12th Edition page 1009 – referred to.

*Shanahan v. Scott 1957 (96) CLR 245; Utah Construction v. Pataky 1965 (3) All ER 650 – referred to.*

2.5. There is no material to show that universal salt iodisation will be injurious to public health (that is to the majority of populace who do not suffer from iodine deficiency). But Rule 44-I is ultra vires the Act and therefore, not valid. The result would be that the ban on sale of non-iodised salt for human consumption will be raised, which may not be in the interest of public health. Therefore, the Central Government should have at least six months time to thoroughly review the compulsory iodisation policy (universal salt iodisation for human consumption) with reference to latest inputs and research data and if after such review, is of the view that universal iodisation scheme requires to be continued, bring appropriate legislation or other measures in

accordance with law to continue the compulsory iodisation programme. [Para 27] [720-B-E]

3. Article 142 of the Constitution vests unfettered independent jurisdiction to pass any order in public interest to do complete justice, if exercise of such jurisdiction is not be contrary to any express provision of law. To do complete justice between the parties in the interest of public health, in exercise of jurisdiction under Article 142 of the Constitution, the ban contained in Rule 44-I for a period of six months is continued. The central government may within that period review the compulsory iodisation programme and if it decides to continue, may introduce appropriate legislative or other measures. However, if it fails to take any action within the expiry of six months from today, Rule 44-I shall cease to operate. Thus, Rule 44-I of the Prevention of Food Adulteration Rules, 1955 (inserted by Prevention of Food Adulteration (Eighth Amendment) Rules 2005) is beyond the rule-making power of the Central Government and ultra vires the Act subject to the continuation of the ban contained in Rule 44-I for a period of six months in terms of the previous paragraph. [Paras 28-30] [720-F; 722-B-E]

*Supreme Court Bar Association vs. Union of India* 1998 (4) SCC 409:1998 (2) SCR 795; *Kalyan Chandra Sarkar vs. Rajesh Ranjan* 2005 (3)SCC 284 – relied on.

**Case Law Reference:**

2007 (5) SCR 7	relied on	Para 14	
1976 (2) SCR 1	relied on	Para 19	G
1989 (1) SCR 138	relied on	Para 19	
1985 (2) SCR 287	relied on	Para 20	
1988 (3) SCR 62	relied on	Para 20	H

A	1989 (3) SCR 488	relied on	Para 20
	2000 (3) SCR 1019	relied on	Para 20
	2004 (5 ) Suppl. SCR 692	relied on	Para 20
B	2007 (12 ) SCR 136	relied on	Para 20
	1966 (2) SCR 172	relied on	Para 24
	1957 (96) CLR 245	relied on	Para 26
C	1965 (3) All ER 650	relied on	Para 26
	1998 (2) SCR 795	relied on	Para 28
	2005 (3) SCC 284	relied on	Para 29
D	CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 80 of 2006.		
	Under Article 32 of the Constitution of India.		
	WITH		
E	TC (C) No. 54, 55, 56, 57, 58 of 2011 And		
	TC (C) No. 11 of 2002 & WP (C) No. 175 of 2006.		
	Dr. Aurobindo Ghose, Balraj Dewan, Vishwajit Singh, Himanshu Munshi for the Appellants.		
F	Naresh Kaushik, Sadhana Sandhu, D.S. Mahra, Sushma Suri, B.B. Singh for the Respondent.		
	The Judgment of the Court was delivered by		
G	<b>R.V.RAVEENDRAN, J.</b> 1. The petitioners have sought a declaration that the Prevention of Food Adulteration (Eighth Amendment) Rules, 2005 [vide Notification No.GSR 670(E) dated 17.11.2005 of the Ministry of Health and Family Welfare, Government of India] is unconstitutional and invalid. The grievance is primarily in regard to Rule 44-I inserted in the		
H	Prevention of Food Adulteration Rules 1955 by the said		

Amendment Rules. The said Rule reads as follows :

**“44 I. Restriction on sale of common salt** – No person shall sell or offer to expose for sale or have in his premises for the purpose of sale, the common salt, for direct human consumption unless the same is iodized :

Provided that common salt may be sold or exposed for sale or stores for sale for iodization, iron fortification, animal use, preservation, manufacturing medicines, and industrial use, under proper label declarations, as specified under clause (22) of sub-rule (zzz) of rule 42.”

The incidental challenge is to consequential amendments to the Rules by insertion of Rule 43(zzz)(22) which reads as under :

“Rule 43(zzz)(22). Every container or package of common sale shall bear the following label, namely :

Common Salt for Iodisation/Iron fortification/Animal Use/  
 Preservation/Medicine/Industrial Use\*

\*Strike out whichever is not applicable

2. The Government of India has been promoting the use of iodised salt in place of common salt, for human consumption, since 1962 by launching a centrally assisted programme for supplying iodised salt in place of common salt with the object of controlling and reducing various Iodine Deficiency Disorders including Goitre (for short ‘IDDs’). In April, 1992, the Central Committee for Food Standards (CCFS), a statutory body providing technical advice to the Government on food-related matters, approved the proposal for mandatory iodisation of salt, provided such mandatory iodisation was done only in respect of edible salt for direct human consumption and not in regard to salt meant for commercial use by the food industry. In pursuance of it, Government of India took a decision to iodise the entire edible salt for direct human consumption in the

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A country. As a consequence, the state governments were advised to implement the compulsory iodization of salt within their own territories by placing suitable restrictions on the marketing and sale of non-iodised salt for direct human consumption by invoking the provisions of section 7(iv) of the Prevention of Food Adulteration Act, 1954 (‘Act’ for short). Based on such advice, various States took action by issuing notifications prohibiting/restricting the sale of non-iodised salt. Subsequently, with the object of uniformly applying the ban throughout the country, the Central Government inserted Rule 44-H in the Prevention of Food Adulteration Rules, 1955 (‘Rules’ for short), by the Prevention of Food Adulteration (Tenth Amendment) Rules 1997 (vide notification dated 27.11.1997), banning the sale of non-iodised common salt for direct human consumption. The said Rule 44-H came into effect on 27.5.1998. It is stated that by then, almost all the States (except Kerala, Maharashtra and parts of Andhra Pradesh) had imposed ban or restrictions on sale of non-iodised salt for human consumption.

3. The said amendment inserting Rule 44-H prohibiting the sale of non-iodised salt for direct human consumption was reviewed by the Central Government. On such review, it came to the conclusion that such a restriction could be more effectively exercised by the State Governments in regard to the respective areas within their jurisdiction, keeping in view the nutritional profiles of the populace in different parts of the respective state, whereas such a flexibility was not available as a result of the Central Government making the rule (Rule 44H) mandating the use of iodised salt in the entire country, without any option or choice. In view of it, the Central Government omitted Rule 44H from the Rules with effect from 30.9.2000, by the Prevention of Food Adulteration (Fifth Amendment) Rules 2000 (vide notification dated 13.9.2000), so that more informed decisions could be taken by the respective State Governments on the question whether a provision should be made for sale of only iodised salt for

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A direction human consumption. It was felt that by providing such  
 option to the state governments, there would be no unnecessary  
 compulsion to use iodised salt in areas where iodine deficiency  
 disorders were not prevalent. The Central Government also  
 proposed to play a greater role in enhancing the awareness  
 about the benefits of iodised salt and monitor the impact of the  
 salt iodisation programme in the country. B

4. The said omission of Rule 44-H was challenged by  
 'Common Cause', an NGO, in Writ Petition (C) No.525 of 2000  
 in this Court. During the pendency of W.P. (C) No.525 of 2000,  
 a Core Advisory Group on Public Health & Human Rights,  
 National Human Rights Commission, was required to critically  
 apprise the evidence available on the public health  
 consequences arising from consumption of non-iodized salt by  
 the populace. The said Core Advisory Group submitted a  
 report dated 6.2.2004 advising that universal iodisation of salt  
 is a public health need which should be implemented throughout  
 the country without any relaxation in the ban on sale of non-  
 iodised salt. On a survey of 324 districts in 28 States and 7  
 Union Territories, 263 districts were found to be endemic for  
 IDD's, (that is, where prevalence of IDD's was found in more than  
 10% of the population) and no state or Union Territory was free  
 from IDD's. It was also found that iodine deficiency caused a  
 wide spectrum of disorders, ranging from Goitre to Cretinism,  
 apart from causing disorders like still-birth, abortion, dwarfism,  
 eye-squint, mental retardation, lower IQ, deaf-mutism and  
 neuromotor defects. It was found that the simplest and most  
 effective and inexpensive method of preventing and controlling  
 IDD's was to make up the iodine deficiency by iodising the  
 common salt to ensure that through consumption of iodised salt,  
 not less than 150 micro grams of iodine is made available to  
 each person per day. In view of the said report, the Central  
 Government again introduced a ban on sale of non-iodised  
 common salt for human consumption by inserting Rule 44-I, by  
 way of amendment to the Rules, vide notification dated  
 17.11.2005. On such re-introduction of the ban, WP [C] No.525  
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A of 2000 challenging the omission of Rule 44H was disposed  
 of, as having become infructuous.

5. The petitioners in these writ petitions are non-  
 governmental organisations representing consumers, salt  
 producers, medical experts, academics, etc. They oppose  
 compulsory iodisation of salt for human consumption. According  
 to them, goitre and other IDD's occur not only in areas deficient  
 in iodine but also in areas where (i) water supply is  
 contaminated, (ii) water is hard, (iii) poor hygiene prevails on  
 account of poverty, (iv) foods contain iodine inhibitory  
 (goitrogenic) substances; (v) functioning of thyroid gland is  
 improper; and (vi) consumption of processed and preserved  
 food is excessive. According to them, even after two decades  
 of use of iodised salt in several areas, incidence of goitre had  
 increased sharply. It is submitted that the international  
 experience, particularly in western countries, is to move from  
 compulsory iodisation regime to voluntary need-based  
 iodisation regime, so that only those having iodine deficiency  
 could use iodised salt. It is submitted that when people who do  
 not suffer from iodine deficiency are forced to take iodised salt  
 regularly, there is risk of many of them developing  
 complications induced by higher intake of iodine and increase  
 in iodine levels. According to the petitioners, constant use of  
 iodised salt on account of compulsory iodisation, would lead  
 to iodine-induced hyper-thyroidism with increased chances of  
 death. It is contended that while iodised salt would help to  
 make up the iodine deficiency in about 10% of the populace,  
 it would adversely affect the health of remaining 90% of the  
 populace who have no deficiency in iodine levels.

5.1) The petitioners submit that when the entire populace  
 do not need iodised salt, it is unfair and unjust to deny them  
 the right to choose between iodised salt and non-iodised salt.  
 It is submitted that Rule 44-I violates Articles 14 and 21 of the  
 Constitution, which entitle every person to have free choice in  
 regard to consumption of food.

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5.2) The petitioners submit that the cost of iodised salt being several times more than the cost of non-iodised salt, the majority of the populace were adversely affected by the rule requiring compulsory iodisation. It is contended that the compulsory use of iodised salt only helped a few multi-national companies (MNCs) which had the monopoly in the manufacture of iodised salt. It is submitted that many small scale and local producers of salt were adversely affected by creation of such monopoly. The petitioners therefore contend that Rule 44-I is violative of Article 19(1)(g) of the Constitution, as it affects the fundamental right of small and medium scale manufacturers to carry on their business in salt.

5.3) It was lastly contended by the petitioners that non-iodised salt was not injurious to public health and consequently, the provisions of the Act do not enable the Central Government to make a rule banning the sale of common salt (non-iodised salt) for human consumption. The petitioners submit that common salt is an unadulterated article used as an ingredient in food and Rule 44-I imposing a ban on its sale for human consumption does not conform to, and is inconsistent with the object of the statute under which it is made.

6. Respondent has resisted the petitions by referring to the circumstances (mentioned in para 4 above) which necessitated the insertion of Rule 44-I by way of amendment to the Rules. It was contended that the ban on sale of common salt for human consumption was imposed in the interest of public health, and does not violate either Article 14 or 21 of the Constitution. It is submitted that IDD's are caused by lack of iodine in diet; that majority of iodine deficiency disorders are permanent and incurable, but each one of them is completely preventable by ensuring a iodine supplementation of 100-150 ug (micrograms) of iodine per day and the simplest and most effective way of ensuring such iodine intake is through iodising the common salt used for human consumption; and that iodine, when taken in excess of what is required is easily excreted through urine and

A therefore consumption of iodated salt is safe for everyone. It is submitted that if the resistance to the ban was on account of small scale manufacturers of salt not being able to produce iodised salt in an economically viable manner or compete with large scale manufacturers (multinational companies), appropriate steps would be taken by the central and state governments to enable them to produce iodised salt by using simple production techniques. It is stated that by 2006 itself more than 800 private units were licensed and more than 500 units have started production of iodised salt. Respondent contends that Rule 44-I is neither inconsistent with the provisions of the Act nor beyond its rule making power. The power to make such a rule is traced to section 7(iv), and section 23(1) and 23(1A)(f) of the Act.

7. Therefore, the following two questions arise for our consideration:

- (i) Whether Rule 44-I is unconstitutional?
- (ii) Whether Rule 44-I is inconsistent with the Act and beyond the rule making power of the Central Government?

**Re : Question (i)**

8. The question whether iodised salt is beneficial to the public or whether it causes harm to the majority of the populace, is a highly disputed and debated issue, on which there is strong divergence of opinion in the scientific community and among the experts on medicine, nutrition and public health. The petitioners have produced some medical and scientific literature which according to them demonstrates that Universal Salt Iodisation (for short 'USI') is not completely effective in attaining its object of elimination of Iodine Deficiency Disorders and at the same time injurious to the majority of populace who do not suffer from iodine deficiency. Respondent has countered the said claim by relying upon some material to show that

compulsory salt iodisation has shown marked results and is required in the interest of public health. A

*Material against ban on non iodised salt for human consumption :*

9. Reliance was placed upon the resolution dated 29.12.1989 passed at a meeting of group of distinguished scientists and experts including Dr. B.D.Agarwal, President, Indian Medical Association (NB) DBA, Dr. Ajai Lanjewar, President, Academy of Medical Sciences; Dr. (Mrs.) Memuha Haque, President, Nutrition Society of India, Dr. P.K.Sengupta, Past President IMA, and several others. The relevant portions of the said resolution are extracted below: B C

“The available data about availability of iodine to the people from daily diet clearly indicates that it is more than adequate (Annual Report 1986-87, National Institute of Nutrition, I.C.M.R. Hyderabad, Page 4). Also common salt (Not iodised) provides iodine upto 5 micrograms per grams of salt which it self is adequate to meet daily requirement of iodine of poor people involved in hard work (Salt Commissioner of India, Letter No. 11(4)/Goiter/89/6373 dated 18.10.89 and Analytical Report of the Iodine Content of Common Salt, Biochemistry Department, Nagpur University of PGTD/BC dated 9th February, 1989 and Dr. M.S.Swaminathan). D E

As such it is concluded and resolved that there is no need of promoting of compulsion of iodised salt all over the country. However, the medical profession can prescribe iodised salt or alike preparations for those who really need iodine for their good health. F G

Available reports indicates regular excess intake of iodine or iodised salt is injurious to the health of the people and more so for pregnant, neonatal conditions and over the age of 40 years. On the basis of these informations, use H

A of radiographic dyes, antiseptic lotions and medication with high iodine content are prohibited for clinical use in pregnant mothers even in western countries.

B It is also known that people are sensitive to iodine and as such it is routine practice to carry out iodine sensitivity test before iodine is used for diagnostic or therapeutic purpose. It is noted that people suffering from asthma are very sensitive to iodine and as such may prove health hazard upto sudden death when universal use of iodised salt is made (Preventive and control of Iodine Deficiency Disorders by Basil & Hetzel, United Nations Publication, March 1988 Page 76-77 and N. Kouchupillai & M.M.Godbole, N.F.I. bulletin October 1986 page 343).” C

D 10. In an open letter dated 9.9.2005 addressed to the Minister for Health & Family Welfare, Government of India, 235 eminent doctors and medical experts pointed out that adverse side-affects to a large number would outweigh benefits to a few and raised the following issues for the consideration of the Ministry :

E “The studies available in the public domain provide only weak evidence in support of the universal ban.

- The prevalence and seriousness of the problem both appear to have been overestimated, especially given that some qualified analysts have pointed out methodological flaws. For instance, goiter is known to be difficult to assess, and it can exist as a physiological (normal) condition as well as a disease condition, but the studies do not account for this. F G

- The studies assessing impact of salt iodisation programmes appear to have assumed effectiveness of the programme approach, even though findings of several studies demonstrate H

varying impact. Some studies show little impact despite high use of iodised salt in such areas, thus pointing to the multifactorial origin of IDD. In other areas goiter has declined despite little use of iodised salt.

- The potential negative consequence of compulsory use of iodised salt have been demonstrated by other studies, gaining importance when applied on a mass scale.”

In some locations and sub-populations, iodine deficiency disorders (IDD) do constitute a public health problem. Local measures to deal with the problem are known, for instance, subsidizing the iodised salt so that it becomes available at lower prices than non-iodised salt, promoting small-scale production in the endemic pockets and encouraging its use there. Therefore, there is no rationale for instituting a universal ban on non-iodised salt.”

11. Reliance was placed on the following passage from Text Book of Medical Physiology (By Author C. Guyton & John E. Hall – 1996 Edition) :

“Because iodides in high concentrations decrease all phases of thyroid activity, they slightly decrease the size of the thyroid gland and especially decrease its blood supply, in contradistinction to the oppose effects caused by most of the other anti-thyroid agents.”

The following observations from the Article “Common Salt vs. Iodised Salt” (by Dr. PVR Bhaskar Rao, Chairman, People for Economical and Effective Medicare) are also relied on :

“The advice for consumption of iodised salt without correction of total nutritional deficiency is unscientific and results in waste of money. If iodine is consumed in the form of iodised salt the aim is to see that the iodine gets converted into thyroid hormone, there should be sufficient

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amounts of the essential amino acid tyrosine (protein) and the enzyme peroxidase for the manufacture of which sufficient quantities of iron in the body are necessary. It means that if there is protein deficiency or iron deficiency or both, whatever iodine is given to an individual in any form it would be completely excreted in the urine. Therefore, it is utterly futile to advice consumption of iodised salt without correcting total nutrition deficiency including anaemia. It is worth while to note that even in urban population 60% are anaemia and in rural population it would be around 80% with this degree of anaemia iodine deficiency cannot be corrected by any means if anaemia is not corrected.

Conclusion :

- (c) By addition of potassium iodate which may be harmful to some, iodised salt is the adulterated salt.
- (d) Iodised salt is known to cause hyperthyroidism and also severe allergic reactions to some and its universal consumption leads to health hazards.
- (e) Without correcting iron and protein deficiencies, advising people to consume iodised salt amounts to putting cart before the horse.
- (f) People who are deficient in iodine, are deficient in all nutrients. For them total nutrition correction and not iodised salt is the answer.”

*Material in support of the compulsory use of iodised salt*

12. On the other hand the respondent submitted that the decision to ban non-iodised salt for human consumption was taken on detailed studies and on the advice of the Core Advisory Group on Public Health and Human Rights (NHRC). Reliance is placed on the following passages from the report dated 6.2.2004 of the Core Advisory Group :

“The Core Advisory Group reviewed the documents which were sent to it by the NHRC and the members also drew upon their expertise and several scientific publications, to critically appraise the evidence available on the public health consequences arising from consumption of non-iodised salt by sections of our population.

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Iodine deficiency disorders have been recognized as a public health problem in India since the 1920s. Unlike other micronutrient deficiencies, iodine deficiency disorders are due to deficiency of iodine in water, soil and foodstuffs and affect all socio-economic groups living in defined geographic areas. Initially, Iodine deficiency disorders were thought to be a problem in sub-Himalayan region. However, surveys carried out subsequently showed that iodine deficiency disorders exist even in riverine and coastal areas. No State in India is completely free from iodine deficiency disorders. Universal use of iodised salt is a simple, inexpensive method of preventing iodine deficiency disorders.

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The Tenth Five Year Plan has recommended that it is essential to ensure that only iodised salt is made available for human consumption in order to enable the children of the 21st century to attain their full intellectual potential and take their rightful place in a knowledge based-society.

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The plea that there should not be any ban on the sale of non iodised salt and that the people should be allowed to make an informed choice between use of iodised salt and non iodised salt is not tenable. An apparently normal mother in a family with no over signs of iodine deficiency disorders (IDD) can deliver a child with cretinism. In view of this there is a need to ensure universal access only to

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A good quality powdered iodised salt.....

The Core Advisory Group was of the opinion that universal iodisation of salt is a public health need which should be met, without any relaxation in the ban on sale of non-iodised salt. If part of the opposition to a ban on the sale of non-iodised salt arises from the apprehensions of small-scale manufacturers of salt that they would be unable to produce iodised salt in an economically viable manner and compete with large commercial manufacturers of iodised salt, appropriate steps may be taken by relevant government agencies to enable them to produce iodised salt close to the sites of salt extraction, using simple production techniques.”

13. Support for compulsory iodisation of salt for human consumption is also found in the opinion of several experts. We may refer to some of them. The World Health Organisation, in its publication on *“Vitamin and Mineral Requirements in Human Nutrition”* [2004 Edition, p.314] states:

“Excess iodine intake in healthy adults in iodine replete areas is difficult to define. Many people are regularly exposed to huge amounts of iodine- in the range of 10-200 mg/daily – without apparent adverse effects... This tolerance to huge doses of iodine in healthy iodine-replete adults is the reason why WHO stated in 1994 that, “Daily iodine intake of upto 1 mg i.e. 1000 ug appears to be entirely safe.... In conclusion, it appears clearly that the *benefits of correcting iodine deficiency far outweigh the risks of iodine supplementation.*”

G Report of a WHO Expert Consultation: *“Salt as a Vehicle for Fortification”*, (2007), at p. 7 states:

H Salt is the most widely used food vehicle for iodine fortification. USI, that is iodization of all salt for human (food industry and household) and livestock consumption, is the

strategy recommended by WHO for the control of iodine deficiency (WHO, 1999). Salt iodization programmes are currently implemented in over 70 countries around the world where IDD is a public health problem (Delange F, et al, 1999).

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*direction of doing nothing.”*

Lewis E Braverman in his article *“Adequate iodine intake – the good far outweighs the bad”*, [European Journal of Endocrinology, 1998, Vol. 139 pages 14-15] says:

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“Iodine is a necessary component of the thyroid hormones, which are required for life and health. Iodine is distributed unequally over the earth, and half of the world’s population lives in countries with significant deficiency. The worst consequence of the deficiency occur during pregnancy and included fetal and infant deaths, irreversible brain damage, and maternal complications. Additional problems of the rest of the community are hypothyroidism, goiter, and socio-economic stagnation. *Iodisation of salt is the best and most effective way of correcting iodine deficiency. Excess iodine intake occasionally occurs but can be avoided : its consequences are minor compared with those of deficiency.*”

“Over the past few years, small outbreaks of thyrotoxicosis in adults have been reported following iodine prophylaxis with iodized oil or iodized salt in severely iodine-deficient regions, probably due to excess iodination of these severely iodine-deficient populations (3-6). However, *it must be emphasized that the eradication of iodine deficiency far outweighs this minor risk, which is almost always self-limited and disappears over many years as the iodine-deficient population achieves iodine repletion.* Prevention of iodine-deficiency goiter, mental and growth retardation, poor productivity, and cretinism must be achieved through joint efforts of international, national, and local agencies.”

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(emphasis supplied)

Rajan Shankar and C.S.Pandav, in *“Ban on Sale of Non-iodized Salt for Human Consumption: A step in the right direction”* (The National Medical Journal of India, Vol. 18, No.4, 2005 p. 169 at p.170) state :

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14. There is thus some material to support the contention of the petitioners that around 90% of the populace do not need iodised salt and that consumption of excess iodine may have some adverse effects. On the other hand there is also considerable material for the view that compulsory iodisation is also necessary to prevent IDDs in about 10% (or more) of the populace and the consumption of iodised salt by the remaining 90% who do not require it, may not be injurious to their health as excess iodine is easily excreted. The question whether there should be universal salt iodisation is a much debated technical issue relating to medical science. An informed decision in such matters can only be taken by experts after carrying out exhaustive surveys, trials, tests, scientific investigations and research. Courts are neither equipped, nor can be expected to decide about the need or absence of need for such universal salt iodisation on the basis of some articles

“Why is there a need for legislation and compulsory salt iodisation? Can people have a choice? There are situations in which, in the absence of proper education, ‘the freedom to choose’ may not offer the right choice and salt iodization is one of them. Individuals often need to be convinced to make good choices when the benefits are preventive in nature.... *Public health experts who see iodine deficiency as a critical problem should lead the fight against the ideological arguments tilted in the*

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A and reports placed before it. This Court in a series of decisions  
 has reiterated that courts should not rush in where even  
 scientists and medical experts are careful to tread. The rule of  
 prudence is that courts will be reluctant to interfere with policy  
 decisions taken by the Government, in matters of public health,  
 after collecting and analysing inputs from surveys and research. B  
 Nor will courts attempt to substitute their own views as to what  
 is wise, safe, prudent or proper, in relation to technical issues  
 relating to public health in preference to those formulated by  
 persons said to possess technical expertise and rich  
 experience. This Court in *Directorate of Film Festivals vs.* C  
*Gaurav Ashwin Jain - 2007 (4) SCC 737*, pointed out :

“The scope of judicial review of governmental policy is now  
 well defined. Courts do not and cannot act as Appellate  
 Authorities examining the correctness, suitability and  
 appropriateness of a policy. Nor are courts Advisors to the  
 executive on matters of policy which the executive is  
 entitled to formulate. The scope of judicial review when  
 examining a policy of the government is to check whether  
 it violates the fundamental rights of the citizens or is  
 opposed to the provisions of the Constitution, or opposed  
 to any statutory provision or manifestly arbitrary. Courts  
 cannot interfere with policy either on the ground that it is  
 erroneous or on the ground that a better, fairer or wiser  
 alternative is available. Legality of the policy, and not the  
 wisdom or soundness of the policy, is the subject of judicial  
 review.”

15. The limited question that can therefore be examined  
 by this Court is whether the policy underlying Rule 44-I based  
 on opinion of experts and national survey can be said to be  
 wholly arbitrary and unreasonable so as to be violative of Article  
 14. The further question is whether forcing the majority of  
 populace who are not having iodine deficiency to use iodised  
 salt to ensure that those with iodine deficiency get their needed  
 dosage of iodine would affect their right to life under Article 21.  
 The last question is whether the rule violates the fundamental  
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A right of small scale and medium scale manufacturers of salt and  
 traders to carry on trade or business and thereby violates Article  
 19(1)(g).

16. In our considered opinion the petitioners’ challenge to  
 constitutionality of the impugned amendment is bound to fail.  
 Courts are not equipped to decide the medical issue relating  
 to public health, as to whether compulsory iodisation should be  
 replaced by voluntary iodisation as has been done in some  
 developed countries, so that both common salt and iodised salt  
 are available in the market and only those 10% who are  
 deficient in iodine can opt for iodised salt. The Government of  
 India has taken note of scientific and medical inputs, research  
 results and survey data to conclude that compulsory iodisation  
 is the most effective and accepted method for elimination of  
 iodine deficiency disorders and that consumption of iodised  
 salt by persons not suffering from iodine deficiency will not  
 adversely affect them. Rule 44-I is stated to be in  
 implementation of a policy decision regarding public health.  
 The material placed by the petitioners is not sufficient to hold  
 that the reason for the ban is erroneous and that Rule 44-I is  
 unreasonable and arbitrary. We therefore reject the contention  
 that the provision placing a ban on sale of non-iodised salt for  
 human consumption resulting in compulsory intake of iodised  
 salt, is arbitrary and violative of Article 14 or injurious to the  
 health of general populace and therefore violative of Article 21.  
 F The use of common salt (non-iodised salt) for industrial and  
 commercial use has not prohibited. The ban operates only in  
 regard to use of common salt for human consumption. There  
 is also no material to show that any monopoly is sought to be  
 created in favour of a chosen few companies or MNCs. In the  
 circumstances, the contention that Article 19(1)(g) is violated  
 is liable to be rejected.

**Re : Question (ii)**

H 17. The petitioners next contend that Rule 44-I apart from  
 being contrary to the objects and provisions of the Act, travels

beyond the scope of the Act. It is also contended that the Act does not empower the central government to make a rule banning the manufacture, sale or distribution of an article unless it is adulterated or injurious to health. The respondent on the other hand contends that section 7(iv) and sub-sections (1) and (1A) (f) of section 23 of the Act empower and enable the central government to make Rule 44-I and the rule does not travel beyond the scope of the Act. To consider this question, it is necessary to refer to the relevant provisions of the Act which was enacted to make provision for prevention of food adulteration.

18. The Act contemplates prohibition of manufacture, storing, sale or distribution of any adulterated and mis-branded food, measures to prevent adulteration, and also provides for laying down food standards and prohibiting import of certain objectionable articles of food items. Section 7 of the Act relates to prohibition of manufacture, sale etc. of certain articles of food. It is extracted below :

**“7. Prohibition of manufacture, sale, etc., of certain articles of food.—**No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute—

- (i) any adulterated food;
- (ii) any misbranded food;
- (iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;
- (iv) *any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health;*
- (v) any article of food in contravention of any other provision of this Act or of any rule made thereunder;

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or  
 (vi) any adulterant.”  
 The term ‘food’ is defined in section 2(v) as under :  
 “(v) “food” means any article used as food or drink for human consumption other than drugs and water and includes—  
 (a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,  
 (b) any flavouring matter or condiments, and  
 (c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act;”  
 ‘Food (Health) Authority’ is defined in section 2(vi) as under :  
 “Food (Health) Authority” means the Director of Medical and Health Services or the Chief Officer in-charge of Health administration in a State, by whatever designation he is known, and includes any officer empowered by the Central Government or the State Government, by notification in the Official Gazette, to exercise the powers and perform the duties of the Food (Health) Authority under this Act with respect to such local area as may be specified in the notification;”  
 Section 23 of the Act relates to the power of the central government to make rules, relevant portions of which are extracted below :

“23. *Power of the Central Government to make rules.*— A  
 (1) The Central Government may, after consultation with the  
 Committee and after previous publication by notification  
 in the Official Gazette, make rules to carry out the  
 provisions of this Act: x x x

(1A) In particular and without prejudice to the generality of  
 the foregoing power, such rules may provide for all or any  
 of the following matters, namely:— B

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(f) prohibiting the sale of defining the conditions of sale of  
 any substance which may be injurious to health when used  
 as food or restricting in any manner its use as an  
 ingredient in the manufacture of any article of food or  
 regulating by the issue of licences the manufacture or sale  
 of any article of food; C D

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19. The object of the Act is to prevent supply of adulterated  
 food-stuff as a part of business activity, in the interests of health  
 of the community. In *Municipal Corporation of Delhi. v.*  
*Kacheroo Mal* [1976 (1) SCC 412], this court described the  
 object of the Act thus: E

“*The Act has been enacted to curb and remedy the*  
*widespread evil of food-adulteration, and to ensure the*  
*sale of wholesome food to the people.* It is well settled that  
 wherever possible, without unreasonable stretching or  
 straining the language of such a statute, should be  
 construed in a manner which would suppress the mischief,  
 advance the remedy, promote its object, prevent its subtle  
 evasion and foil its artful circumvention... F G

In *Dinesh Chandra Jamnadas Gandhi vs. State of Gujarat* –  
 1989 (1) SCC 420, this Court described the object of the Act  
 thus : H

A “The object and the purpose of the Act are to eliminate the  
 danger to human life from the sale of unwholesome articles  
 of food The legislation is on the Topic ‘Adulteration of Food  
 Stuffs and other Goods’ (Entry 18 list III Seventh Schedule).  
 It is enacted to curb the wide spread evil of food  
 adulteration and is a legislative measure for social-  
 defence. It is intended to suppress a social and economic  
 mischief—an evil which attempts to poison, for monetary  
 pains the very sources of sustenance of life and the well-  
 being of the community. The evil of adulteration of food and  
 its effects on the health of the community are assuming  
 alarming proportions. The offence of adulteration is a  
 socio-economic offence.....The construction appropriate  
 to a social defence legislation is, therefore, one which  
 would suppress the mischief aimed at by the legislation  
 and advance the remedy.” B C D

(emphasis supplied)

20. The grounds on which a sub-ordinate legislation can  
 be challenged are well settled. In *State of Karnataka vs. H.*  
*Ganesh Kamath* – 1983 (2) SCC 402, this Court held : E

“.....It is a well-settled principle of interpretation of statutes  
 that the conferment of rule-making power by an Act *does*  
*not enable the rule making authority to make a rule which*  
*travels beyond the scope of the enabling Act* or which is  
 inconsistent therewith or repugnant thereto.” F

(emphasis supplied)

In *Indian Express Newspapers (Bombay) Pvt. Ltd vs.*  
*Union of India* – 1985 (1) SCC 641, this Court held : G

“A piece of subordinate legislation does not carry the same  
 degree of immunity which is enjoyed by a statute passed  
 by a competent legislature. *Subordinate legislation* may  
 be questioned on any of the grounds on which plenary  
 legislation is questioned. *In addition, it may also be* H

*questioned on the ground that it does not conform to the statute under which it is made. It may further be question on the ground that it is contrary to some other statute. That is because sub-ordinate legislation must yield to plenary legislation.”*

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(emphasis supplied) B

In *General Officer Commanding-in-Chief vs. Dr. Subhash Chandra Yadav* – 1988 (2) SCC 351, this Court held :

“Rules have statutory force. But before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) *it must also come within the scope and purview of the rule making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.”*

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(emphasis supplied)

In *Supreme Court Employees’ Welfare Association vs. Union of India* – 1989 (4) SCC 187, this Court held :

*“Thus as delegated legislation, a subordinate legislation must conform exactly to the power granted.*

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Rules whether made under the Constitution or a Statute, must be intra vires the parent law under which power has been delegated. They must also be in harmony with the provisions of the Constitution and other laws. *If they do not tend in some degree to the accomplishment of the objects for which power has been delegated to the authority, courts will declare them to be unreasonable and therefore void.”*

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(emphasis supplied)

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A In *Addl. District Magistrate (Rev.) Delhi Administration vs. Siri Ram* – 2000 (5) SCC 451, this Court reiterated :

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“It is a well-recognised principle of interpretation of a statute that conferment of rule making power by an Act does not enable the rule making authority *to make a rule which travels beyond the scope of the enabling Act* or which is inconsistent therewith or repugnant thereto.”

(emphasis supplied)

C In *Dr. Mahachandra Prasad Singh vs. Chairman, Bihar Legislative Council & Ors.* [2004 (8) SCC 747], this court explained the concept of delegated legislation thus :

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“Underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is to lay down the outline. *This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.* The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate’s function is to serve and promote that object, while at all times remaining true to it. That is the rule of primary intention. *Power delegated by an enactment does not enable the authority by regulations to extent the scope or general operation of the enactment but is strictly ancillary.* It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. *But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.* (See

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Section 59 in chapter "Delegated Legislation" in Francis A  
Bennion's *Statutory Interpretation*, 3rd Edn.)"

(emphasis supplied)

In *J. K. Industries vs. Union of India* – 2007 (13) SCC 673, B  
this Court reiterated the grounds on which a sub-ordinate  
legislation can be challenged as follows :

"That, any inquiry into its vires must be confined to the  
grounds on which plenary legislation may be questioned,  
to the grounds that it is contrary to the statute under which C  
it is made, to the grounds that it is contrary to other  
statutory provisions or on the ground that it is so patently  
arbitrary that it cannot be said to be in conformity with the  
statute. It can also be challenged on the ground that it  
violates Article 14 of the Constitution." D

21. We will now examine whether the rule is valid in the  
light of the aforesaid principles, that is (a) whether the rule  
making authority in making the rule has travelled beyond the  
scope of the Act; (b) whether the rule does not conform to the  
provisions of the Act; and (c) whether the rule falls within the E  
scope and purview of the rule making power of the Central  
Government under section 23 of the Act.

22. As noticed above, the object and purpose of the Act  
is to eliminate the danger to human life from the sale of F  
adulterated food and to ensure that what is sold is wholesome  
food. In other words, if an item of food is adulterated, or is itself  
an adulterant (used for adulteration), or unwholesome or  
injurious to health, a rule to prevent or prohibit the manufacture  
for sale, storage, sale or distribution of such objectionable food G  
item will be within the scope of the Act. Such prohibition will  
be valid even in regard to incidental items such as misbranded  
food items and unlicensed food items (where licence is  
required). But where an item of food (used in the composition  
or preparation of human food and used as a flavouring) is in H

A its natural form and is unadulterated and is not injurious to health,  
a rule cannot be made under the provisions of the Act to ban  
the manufacture for sale, storage or sale of such food item on  
the ground such ban will ensure that the populace will use a  
medicated form of such food, which will benefit a section of the  
populace. Making available medicines or medicinal B  
preparations to improve public health is not the object of the  
Act. If the object sought to be achieved is to persuade the  
people to use iodised salt or to ensure that people use iodised  
salt, recourse cannot be by making a rule banning sale of  
common salt for human consumption under the Act. The Act C  
cannot be used to make a rule intended to achieve an object  
wholly unrelated to the Act. The good intention of the rule  
making authority is not therefore sufficient to save the rule. We  
are of the view that the Rule 44-I is wholly outside the scope of  
the Act. D

23. We may next consider whether section 7(iv) of the Act  
enables or empowers the Central Government to make Rule  
44-I. Section 7 does not relate to rule making. It relates to  
prohibition of manufacture for sale, storage, sale or distribution  
of 'objectionable' food, that is adulterated food, misbranded  
food, unlicensed food, food injurious to public health. Section  
7(iv) provides that no person shall manufacture for sale, store,  
sell or distribute any article of food, the sale of which is for the  
time being prohibited by the Food (Health) Authority in the  
interest of public health. Rule 44-I is not a prohibition by the  
Food (Health) Authority in the interest of public health. The Food  
(Health) Authority refers to the Director of Medical and Health  
Services or the Chief Officer in-charge of the health  
administration in a state as also any officer empowered by the  
central government or the state government by notification in  
the official gazette to exercise the power and perform the duties  
of the Food (Health) Authority with respect to such local area  
as may be specified in such notification. We are not concerned  
with either any notification by the central government constituting  
the Food (Health) Authority nor the exercise of power by any H

Food (Health) Authority in the interest of public health. A  
 Therefore, section 7(iv) is of no assistance to decide upon the  
 validity of rule 44-I, nor can it be a source of power to make  
 rule 44-I, nor can it be a source of power to make rule 44-I.

24. If the Act vests the power of prohibiting the manufacture B  
 for sale, storage or distribution of any article of food in the  
 interests of public health, in the Food (Health) Authority, the  
 Central Government cannot under its power to make rules for  
 carrying out the purposes of the Act, take upon itself the power  
 to prohibit the manufacture for sale, storage, sale and C  
 distribution of any article of food. In *Godde Venkateswara Rao*  
*vs. Government of Andhra Pradesh* [1966 (2) SCR 172] this  
 court considered a similar question. Under section 18 of the  
 Andhra Pradesh Panchayat Samitis and Zilla Parishads Act,  
 1959, the power of establishing primary health centres was  
 vested in the Panchayat Samitis. The question was whether the D  
 State Government in purported exercise of its power under  
 section 69 of the said Act to make rules for carrying out the  
 purposes of the Act, take upon itself the power to establish a  
 primary health centre at a particular centre. This court held that  
 that was impermissible, observing as follows : E

“It is manifest that under the Act the statutory power to  
 establish and maintain Primary Health Centres is vested  
 in the Panchayat Samithi. There is no provision vesting the  
 said power in the Government. Under s. 69 of the Act, the  
 Government can only make rules for carrying out the F  
 purposes of the Act; it cannot, under the guise of the said  
 rules, convert an authority with power to establish a  
 Primary Health Centre into only a recommendatory body.  
 It cannot, by any rule, vest in itself a power which under the  
 Act vests in another body. The rules, therefore, in so far G  
 as they transfer the power of the Panchayat Samithi to the  
 Government, being inconsistent with the provisions of the  
 Act, must yield to s. 18 of the Act.”

25. We may next consider whether clause (f) of section H

A 23(1A) empowers the Central Government to make Rule 44-I.  
 The said clause enables the central government to make rules  
 prohibiting the sale or defining the conditions of sale of any  
 substance “*which may be injurious to health when used as*  
*food*” or restricting in any manner its use as an ingredient in  
 the manufacture of any article of food or regulating by the issue B  
 of licence the manufacture or sale of any article of food. It is  
 the specific case of the respondent that the use of non-iodized  
 salt is not injurious to health. The Government of India has filed  
 two counter affidavits in WP(C) No.80/2006. In para 3 of the  
 first affidavit filed on 3.4.2006, the respondent specifically C  
 admits as follows :

“...*the respondent has never stated that the use of any*  
*non-iodised salt is injurious to health. .... the restriction*  
*on sale of non-iodised salt have been issued in view of*  
*the fact that regular consumption of iodised salt ensures*  
*prevention and control of Iodine Deficiency Disorder.”*

(emphasis supplied)

In the additional counter affidavit filed by the respondent on  
 E 30.3.2009, the respondent has again reiterated as follows :

“*That the respondent has never stated that the use of*  
*non-iodised salt is injurious to health..... That there is*  
*no blanket ban on sale of common salt. The ban on sale*  
*of common salt has been imposed (by Rule 44-I)only for*  
*direct human consumption. Thus the ban on sale of direct*  
*salt for human consumption has been imposed in the*  
*interest of public health.”*

(emphasis supplied)

G Section 23(1A)(f) empowers making a rule to prohibit sale only  
 if the substance is injurious to health when used as food. If use  
 of common salt is not injurious to health, the question of making  
 a rule prohibiting the sale of such a substance would not arise  
 under clause (f) of section 23(1A) of the Act.  
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26. We will next consider whether section 23(1) of the Act provides the source of authority to make rule 44-I. Sub-section (1) of section 23 provides that the central government may after consultation with the Central Committee for Food Standards (constituted under section 3 of the Act) and after previous publication by notification in the public gazette make rules to carry out *the provisions of the Act*. Statutes delegating the power to make rules follow a standard pattern. The relevant section would first contain a provision granting the power to make rules to the delegate in general terms, by using the words ‘to carry out the provisions of this Act’ or ‘to carry out the purposes of this Act’. This is usually followed by another sub-section enumerating the matters/areas in regard to which specific power is delegated by using the words ‘in particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters.’ Interpreting such provisions, this Court in a number of decisions has held that where power is conferred to make subordinate legislation in general terms, the subsequent particularisation of the matters/topics has to be construed as merely illustrative and not limiting the scope of the general power. Consequently, even if the specific enumerated topics in section 23(1A) may not empower the Central Government to make the impugned rule (Rule 44-I), making of the Rule can be justified with reference to the general power conferred on the central government under section 23(1), provided the rule does not travel beyond the scope of the Act. But even a general power to make rules or regulations for carrying out or giving effect to the Act, is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the Act. Therefore, such a power “will not support attempts to widen the purposes of the Act, to add new and different means to carrying them out, to depart from or vary its terms. (See: *Principles of Statutory Interpretation* by Justice G. P. Singh – 12th Edition page 1009) referring to *Shanahan v. Scott* - 1957 (96) CLR 245 and *Utah Construction v. Pataky* – [1965 (3) All ER 650]. Rule 44-I is not a rule made or required

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A to be made to carry out the provisions of the Act, having regard to its object and scheme. It has nothing to do with curbing of food adulteration or to suppress any social or economic mischief.

B **What Relief?**

27. We have already noticed that as at present there is no material to show that universal salt iodisation will be injurious to public health (that is to the majority of populace who do not suffer from iodine deficiency). But we are constrained to hold that rule 44-I is ultra vires the Act and therefore, not valid. The result would be that the ban on sale of non-iodised salt for human consumption will be raised, which may not be in the interest of public health. We are therefore, of the view that the central government should have at least six months time to thoroughly review the compulsory iodisation policy (universal salt iodisation for human consumption) with reference to latest inputs and research data and if after such review, is of the view that universal iodisation scheme requires to be continued, bring appropriate legislation or other measures in accordance with law to continue the compulsory iodisation programme.

28. The question is having held that Rule 44-I to be invalid, whether we can permit the continuation of the ban on sale of non-iodised salt for human consumption for any period. Article 142 of the Constitution vests unfettered independent jurisdiction to pass any order in public interest to do complete justice, if exercise of such jurisdiction is not be contrary to any express provision of law. In *Supreme Court Bar Association vs. Union of India* – 1998 (4) SCC 409, this Court observed:

G “The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* “between the parties in any cause or matter pending before it”. The very nature of the power must lead the court to set limits for itself within which to exercise those powers and ordinarily it

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A cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by “ironing out the creases” *in a cause or matter before it*. Indeed this Court is not a court of restricted jurisdiction of only dispute settling. It is well recognised and established that this court has always been a law maker and its role travels beyond merely dispute settling. It is a “problem solver in the nebulous areas”. (See. *K. Veeraswami v. Union of India* – 1991 (3) SCC 655, but the substantive statutory provisions dealing with the subject matter of a given case, cannot be altogether ignored by this court, while making an order under Article 142. Indeed, these constitutional powers can not, in any way, *be controlled by* any statutory provisions but at the same time these powers are not meant to be exercised when their exercise *may come directly in conflict* with what has been expressly provided for in statute dealing expressly with the subject.”

In *Kalyan Chandra Sarkar vs. Rajesh Ranjan* – 2005 (3) SCC 284, this Court after reiterating that this Court in exercise of its jurisdiction under Article 142 of the Constitution would not pass any order which would amount to supplanting substantive law applicable to the case or ignoring express statutory provisions dealing with the subject, observed as follows:

F “It may therefore be understood that the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are *complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties...and are in the nature of *supplementary powers*...[and] may be put on a different and perhaps even wider footing than ordinary inherent powers of a court to *prevent injustice*. The advantage that is derived from a constitutional provision

A couched in such a wide compass is that it prevents ‘clogging or obstruction of the stream of justice. [See : *Supreme Court Bar Association (supra)*]”

B 29. In view of the above and to do complete justice between the parties in the interest of public health, in exercise of our jurisdiction under Article 142 of the Constitution, we direct the continuation of the ban contained in Rule 44-I for a period of six months. The central government may within that period review the compulsory iodisation programme and if it decides to continue, may introduce appropriate legislative or other measures. It is needless to say that if it fails to take any action within the expiry of six months from today, Rule 44-I shall cease to operate.

D 30. We therefore allow this writ petition in part and declare that Rule 44-I of the Prevention of Food Adulteration Rules, 1955 (inserted by Prevention of Food Adulteration (Eighth Amendment) Rules 2005) is beyond the rule-making power of the Central Government and ultra vires the Act subject to the continuation of the ban contained in Rule 44-I for a period of six months in terms of the previous paragraph. The Transferred Cases are also disposed of in terms of the decision in the writ petition.

D.G. Matters disposed of.

SWADESI JAGARAN MANCH

v.

STATE OF ORISSA &amp; ANR.

(Transferred case no(s) 11 of 2002)

JULY 4, 2011

**[R.V. RAVEENDRAN AND B. SUDERSHAN REDDY, JJ.]**

*Prevention of Food Adulteration Rules, 1955: r.44I – Prohibition on sale and manufacture of common salt – Writ petition no.80 of 2006 wherein constitutionality of r.44 was under challenge was disposed of and six months time was granted to Central Government to review position regarding universal iodisation – Transferred petitions 92/2009, 152/2009, 168/2009, 185/2009 and 218/2009 allowed in terms of judgment in Writ petition no.80 of 2006 – Writ petition no.175/2006 and Transfer case 11/2002 delinked from writ petition no.80 of 2006 since dispute therein did not relate to challenge to r.44I – In view of that, pending matters to be listed for further orders after six months.*

CIVIL ORIGINAL JURISDICTION : Transferred Case No. 11 of 2002 etc.

Under Article 139A of the Constitution of India.

WITH

TC (C) No. 54, 55, 56, 57, 58 of 2011 And

WP (C) No. 80, 175 of 2006.

Dr. Aurobindo Ghose, Balraj Dewan, Vishwajit Singh, Himanshu Munshi for the Appellants.

Naresh Kaushik, Sadhana Sandhu, D.S. Mahra, Sushma Suri, B.B. Singh for the Respondents.

The following order of the Court was delivered

O R D E R

Transfer Petition (C) Nos.92/2009, 152/2009, 168/2009,

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A 185/2009 and 218/2009 are allowed and the following writ petitions are transferred from the respective High Court to this Court :

(1) WP(C) No.4204/2006 on the file of the Madras High Court

B (2) WP(C) No.341/2006 on the file of the Bombay High Court

(3) WP(C) No.13082/2006 on the file of the Andhra Pradesh High Court

C (4) WP(C) No.13354/2006 on the file of the Karnataka High Court

(5) PIL No. 61/2006 on the file of the Bombay High Court

D 2. Judgment is pronounced in WP(C) No.80 of 2006 and the aforesaid five transferred cases, allowing them in terms of the Judgement.

E 3. Writ Petition (Civil) No.175/2006 and Transfer Case (Civil) No.11/2002 are delinked from the aforesaid cases which are disposed of, as they do not relate to challenge to Rule 44-I of Prevention of Food Adulteration Rules 1955. Transfer Case (Civil) No.11/2002 seeks quashing of a notification dated 15.10.2001 issued by the Director of Health Services, Orissa prohibiting sale and manufacture of common salt other than iodised salt for human consumption, issued in exercise of power under the relevant state Rules. Writ Petition (Civil) No.175/2006 is filed seeking a direction to the central government to frame a uniform policy for the control of goitre and a direction regarding imposing ban on the manufacture of non-iodised salt all over the country.

G 4. While disposing of Writ Petition (Civil) No.80/2006, we have granted six months time to review the position regarding universal iodisation. In view of the above, list these two matters for further orders, after six months.

D.G. Writ Petition (c) No. 175 of 2006 and

Transfer case (c) No. 11 of 2002 are pending.

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RAM JETHMALANI AND ORS.

v.

UNION OF INDIA AND ORS.

(Writ Petition (Civil) No. 176 of 2009.)

JULY 04, 2011

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

**Administrative law:**

*Writ petition filed by former Union law minister – Allegation regarding transfers and accumulation of unaccounted monies by many individuals and other legal entities in foreign banks – Petition specifically named Hassan Ali and Tapurias as party to such illegal activities – Supreme Court expressed its concern not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country and also expressed worries also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation – Union of India did not give satisfactory explanation for slowness of the pace of investigation – It was only upon the insistence and intervention of Supreme Court that the Enforcement Directorate initiated and secured custodial interrogation over Hassan Ali Khan – Union of India explicitly acknowledged that there was much desired with the manner in which the investigation had proceeded prior to the intervention of the Court – Union of India, on account of its more recent efforts to conduct the investigation with seriousness led to the securing of additional information, and leads, which could aid in further investigation – During the continuing interrogation*

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A *of Hassan Ali Khan and the Tapurias, undertaken at the behest of the Supreme Court, many names of important persons, including leaders of some corporate giants, politically powerful people, and international arms dealers cropped up – Supreme Court proposed to the Union of India that the High Level Committee constituted by it be converted into a Special Investigation Team, headed by two retired judges of the Supreme Court of India – Union of India to issue appropriate notification and publish the same forthwith.*

C *Concept of a “soft state” – Held: Is a broad based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance – The more soft the State is, greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker – The issue of unaccounted monies held by nationals, and other legal entities, in foreign banks, is of primordial importance to the welfare of the citizens – The quantum of such monies may be rough indicators of the weakness of the State, in terms of both crime prevention, and also of tax collection – Depending on the volume of such monies, and the number of incidents through which such monies are generated and secreted away, it may very well reveal the degree of “softness of the State.”*

*Public function – Responsibilities of State – Discussed.*

*Fragmentation of administration – Effect of – Discussed.*

**Double Taxation Avoidance Agreement:**

G *Writ petition – Allegation regarding transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks – Disclosure sought by the petitioners of certain documents relied upon by the Government – Supreme Court strongly disapproved the stand taken by the Government that the names of the tax evaders was a “secret” and could not be*

revealed under the Indo German Double Taxation Avoidance Agreement – The said agreement, by itself, did not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account holders in Liechtenstein – The agreement between Germany and India is with regard to various issues that crop up with respect to German and Indian citizens’ liability to pay taxes to Germany and/or India – It does not even remotely touch upon information regarding Indian citizens’ bank accounts in Liechtenstein that Germany secures and shares that have no bearing upon the matters that are covered by the double taxation agreement between the two countries – In fact, the “information” that is referred to in Article 26 is that which is “necessary for carrying out the purposes of the Indo-German DTAA – Instead the agreement specifically provides that the information may be disclosed in public court proceedings, which the instant proceedings are – The proceedings in the instant matter relate both to the issue of tax collection with respect to unaccounted monies deposited into foreign bank accounts, as well as with issues relating to the manner in which such monies were generated, which may include activities that are criminal in nature also – Therefore, the information sought does not fall within the ambit of this provision – It is disingenuous for the Union of India, under these circumstances, to repeatedly claim that it is unable to reveal the documents and names as sought by the petitioners on the ground that the same is proscribed by the said agreement.

**Vienna Convention of the Law of Treaties, 1969:**  
Article 31 – Interpretation of treaties – General Rule of Interpretation – Held: It provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose – While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of

interpretation, of Article 31 provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.

**Constitution of India, 1950:**

Article 32 – Writ petition – In the writ proceeding, petitioner seeking certain documents referenced by the Union of India – Held: Constitution guarantees the right, pursuant to Clause (1) of Article 32, to petition Supreme Court on the ground that the rights guaranteed under Part III of the Constitution have been violated – This provision is a part of the basic structure of the Constitution – Clause (2) of Article 32 empowers the Supreme Court to issue “directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by” Part III – This is also a part of the basic structure of the Constitution – In order that the right guaranteed by Clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State – To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by Clause (1) of Article 32 – Burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim, however, the burden of protection of fundamental rights is primarily the duty of the State – Consequently, unless constitutional grounds exist, the State may not act in a manner that hinders the Supreme Court from rendering complete justice in such proceedings – The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide

A the same to the petitioners – This is so, because the  
petitioners would also then be enabled to bring to light facts  
and the law that may be relevant for the Court in rendering  
its decision – However, revelation of details of bank accounts  
of individuals, without establishment of prima facie grounds  
to accuse them of wrong doing, would be a violation of their  
rights to privacy – Details of bank accounts can be used by  
those who want to harass, or otherwise cause damage, to  
individuals – No conclusion can be drawn as to whether those  
who have not been investigated, or only partially investigated  
and proceedings not initiated have committed any wrong  
doing – There is no presumption that every account holder  
in banks of Liechtenstein has acted unlawfully – In these  
circumstances, it would be inappropriate to order disclosure  
of such names, even in the context of proceedings under  
Clause (1) of Article 32.

D Article 21 – Right to privacy is an integral part of right to  
life – The rights of citizens, to effectively seek the protection  
of fundamental rights, under Clause (1) of Article 32 have to  
be balanced against the rights of citizens and persons under  
Article 21 – The notion of fundamental rights, such as a right  
to privacy as part of right to life, is not merely that the State is  
enjoined from derogating from them – It also includes the  
responsibility of the State to uphold them against the actions  
of others in the society, even in the context of exercise of  
fundamental rights by those others – The revelation of details  
of bank accounts of individuals, without establishment of  
prima facie grounds to accuse them of wrong doing, would be  
a violation of their rights to privacy – Details of bank accounts  
can be used by those who want to harass, or otherwise cause  
damage, to individuals – No conclusion can be drawn as to  
whether those who have not been investigated, or only partially  
investigated and proceedings not initiated have committed  
any wrong doing.

H **Treaties:** Governments entering into treaties – Held:

A Such act of governments can only be lawful when exercised  
within the four corners of constitutional permissibility – No  
treaty can be entered into, or interpreted, such that  
constitutional fealty is derogated from.

B Vineet Narain v Union of India (1996) 2 SCC 199:  
1996(1) SCR 1053; NHRC v. State of Gujarat (2004) 8 SCC  
610; Sanjiv Kumar v State of Haryana (2005) 5 SCC 517;  
Centre for PIL v Union of India (2011) 1 SCC 560; Union of  
India v. Azadi Bachao Andolan (2004) 10 SCC 1 – referred  
to.

C **Case Law Reference:**

1996(1) SCR 1053	referred to	Para 48
(2004) 8 SCC 610	referred to	Para 48
(2005) 5 SCC 517	referred to	Para 48
(2004) 10 SCC 1	referred to	Para 48

D CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No.  
E 176 of 2009 etc.

With

SLP (C) No. 11032 of 2009.

W.P. (C) Nos. 37 of 2010 & 136 of 2011.

F Gopal Subramaniam, S.G., H.P. Raval, P.P. Malhotra,  
ASG. Anil Divan, Rajinder Sachchar, Krishnan Venugopal,  
Mukul Rohtagi, Rajiv Mohiti, I.P. Bagadia, J.S. Attri, Lata,  
Krishnamurthi, R.N. Karanjawala, Manik Karanjawala, Sandeep  
Kapur, Ranvir Singh, Ravi Sharma, Pranav Diesh, Karan Kalia,  
Arjun Mahajan (for Karanjawala & Co.), Gaurav Jain, Abha  
Jain, Anuradha Mutatkar, Anagha S. Desai, Shyamohan,  
Meenakshi Arora, Devansh Mohta, T.A. Khan, Arijit Prasad,  
Kunal Bahri, B.V. Balaram Das, B. Krishna Prasad, Rajiv  
Nanda, Pratap Venugopal, Surekha Raman, Dileep Poolakkit,

Namrta Sood, Anuj Sarma (for K.J. John & Co.) Kuldeep S. A  
Parihar, H.S. Parihar, Sanjay Kharde, Asha Gopalan Nair,  
Sadhana Sandhu, Anil Katiyar, Samir Ali Khan, Santosh Paul,  
B.V. Reddy, Arvind Gupta, Arti Singh, Mohita Bagati, Ashok  
Kumar Gupta-I for the appearing parties.

The following Order of the Court was delivered

O R D E R

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1. "Follow the money" was the short and simple advice C  
given by the secret informant, within the American Government,  
to Bob Woodward, the journalist from Washington Post, in aid  
of his investigations of the Watergate Hotel break in. Money  
has often been claimed, by economists, to only be a veil that D  
covers the real value and the economy. As a medium of  
exchange, money is vital for the smooth functioning of exchange  
in the market place. However, increasing monetization of most  
social transactions has been viewed as potentially problematic  
for the social order, in as much as it signifies a move to E  
evaluating value, and ethical desirability, of most areas of  
social interaction only in terms of price obtained in the market  
place.

2. Price based notions of value and values, as F  
propounded by some extreme neo-liberal doctrines, implies  
that the values that ought to be promoted, in societies, are the  
ones for which people are willing to pay a price for. Values,  
and social actions, for which an effective demand is not  
expressed in the market, are neglected, even if lip service is G  
paid to their essentiality. However, it cannot be denied that  
not everything that can be, and is transacted, in the market for  
a price is necessarily good, and enhances social welfare.  
Moreover, some activities, even if costly and without being  
directly measurable in terms of exchange value, are to be  
rightly viewed as essential. It is a well established proposition, H

A of political economy, and of statecraft, that the State has a  
necessary interest in determining, and influencing, the kinds of  
transactions, and social actions, that occur within a legal order.  
From prevention of certain kinds of harmful activities, that may  
range from outright crimes, to regulating or controlling, and  
consequently mitigating, socially harmful modes of social and B  
economic production, to promotion of activities that are deemed  
to be of higher priority, than other activities which may have a  
lower priority, howsoever evaluated in terms of social utility,  
are all the responsibilities of the State. Whether such activities  
by the State result in directly measurable benefits or not is C  
often not the most important factor in determining their  
desirability; their absence, or their substantial evisceration,  
are to be viewed as socially destructive.

3. The scrutiny, and control, of activities, whether in the D  
economic, social or political contexts, by the State, in the public  
interest as posited by modern constitutionalism, is substantially  
effectuated by the State "following the money." In modern  
societies very little gets accomplished without transfer of  
money. The incidence of crime, petty and grand, like any other E  
social phenomena is often linked to transfers of monies, small  
or large. Money, in that sense, can both power, and also  
reward, crime. As noted by many scholars, with increasing  
globalization, an ideological and social construct, in which  
transactions across borders are accomplished with little or no  
control over the quantum, and mode of transfers of money in F  
exchange for various services and value rendered, both legal  
and illegal, nation-states also have begun to confront complex  
problems of cross-border crimes of all kinds. Whether this  
complex web of flows of funds, instantaneously, and in large G  
sums is good or bad, from the perspective of lawful and desired  
transactions is not at issue in the context of the matters before  
this Court.

4. The worries of this Court that arise, in the context of the H  
matters placed before us, are with respect to transfers of

monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against the State. The worries of this Court also relate to whether the activities of engendering such unaccounted monies, transferring them abroad, and the routing them back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as desirable modes of individual and group action. The worries of this court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity. Finally, the worries of this Court are also with respect to the extent of incapacities, system wide, in terms of institutional resources, skills, and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance. Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives.

5. Large amounts of unaccounted monies, stashed away in banks located in jurisdictions that thrive on strong privacy

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A laws protecting bearers of those accounts to avoid scrutiny, raise each and every worry delineated above. First and foremost, such large monies stashed abroad, and unaccounted for by individuals and entities of a country, would suggest the necessity of suspecting that they have been generated in activities that have been deemed to be unlawful. In addition, such large amounts of unaccounted monies would also lead to a natural suspicion that they have been transferred out of the country in order to evade payment of taxes, thereby depleting the capacity of the nation to undertake many tasks that are in public interest.

6. Many schools of thought exist with regard to the primary functions of the State, and the normative expectations of what the role of the State ought to be. The questions regarding which of those schools provide the absolutely correct view cannot be the criteria to choose or reject any specific school of thought as an aid in constitutional adjudication. Charged with the responsibility of having to make decisions in the present, within the constraints of epistemic frailties of human knowledge, constitutional adjudicators willy-nilly are compelled to choose those that seem to provide a reasoned basis for framing of questions relevant, both with respect to law, and to facts. Institutional economics gives one such perspective which may be a useful guide for us here. Viewed from a functional perspective, the State, and governments, may be seen as coming into existence in order to solve, what institutional economists have come to refer to as, the coordination problems in providing public goods, and prevent the disutility that emerges from the moral hazard of a short run utility maximizer, who may desire the benefits of goods and services that are to be provided in common to the public, and yet have the interest of not paying for their production.

7. Security of the nation, infrastructure of governance, including those that relate to law making and law keeping functions, crime prevention, detection and punishment,

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coordination of the economy, and ensuring minimal levels of material, and cultural goods for those who may not be in a position to fend for themselves or who have been left by the wayside by the operation of the economy and society, may all be cited as some examples of the kinds of public goods that the State is expected to provide for, or enable the provision of. In as much as the market is primarily expected to cater to purely self centered activities of individuals and groups, markets and the domain of purely private social action significantly fail to provide such goods. Consequently, the State, and government, emerges to rectify the coordination problem, and provide the public goods.

8. Unaccounted monies, especially large sums held by nationals and entities with a legal presence in the nation, in banks abroad, especially in tax havens or in jurisdictions with a known history of silence about sources of monies, clearly indicate a compromise of the ability of the State to manage its affairs in consonance with what is required from a constitutional perspective. This is so in two respects. The quantum of such monies by itself, along with the numbers of individuals or other legal entities who hold such monies, may indicate in the first instance that a large volume of activities, in the social and the economic spheres within the country are unlawful and causing great social damage, both at the individual and the collective levels. Secondly, large quanta of monies stashed abroad, would also indicate a substantial weakness in the capacity of the State in collection of taxes on incomes generated by individuals and other legal entities within the country. The generation of such revenues is essential for the State to undertake the various public goods and services that it is constitutionally mandated, and normatively expected by its citizenry, to provide. A substantial degree of incapacity, in the above respect, would be an indicia of the degree of failure of the State; and beyond a particular point, the State may spin into a vicious cycle of declining moral authority, thereby causing the incidence of unlawful activities in which wealth is sought to be generated,

A as well as instances of tax evasion, to increase in volume and in intensity.

B 9. Consequently, the issue of unaccounted monies held by nationals, and other legal entities, in foreign banks, is of primordial importance to the welfare of the citizens. The quantum of such monies may be rough indicators of the weakness of the State, in terms of both crime prevention, and also of tax collection. Depending on the volume of such monies, and the number of incidents through which such monies are generated and secreted away, it may very well reveal the degree of “softness of the State.”

D 10. The concept of a “soft state” was famously articulated by the Nobel Laureate, Gunnar Myrdal. It is a broad based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance. The more soft the State is, greater the likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker.

E 11. When a catchall word like “crimes” is used, it is common for people, and the popular culture to assume that it is “petty crime,” or crimes of passion committed by individuals. That would be a gross mischaracterization of the seriousness of the issues involved. Far more dangerous are the crimes that threaten national security, and national interest. For instance, with globalization, nation states are also confronted by the dark worlds of international arms dealers, drug peddlers, and various kinds of criminal networks, including networks of terror. International criminal networks that extend support to home-grown terror or extremist groups, or those that have been nurtured and sustained in hostile countries, depend on networks of formal and informal, lawful and unlawful mechanisms of transfer of monies across boundaries of nation-states. They work in the interstices of the micro-structures of financial transfers across the globe, and thrive in the lacunae, the gaps in law and of effort. The loosening of control over those

mechanisms of transfers, guided by an extreme neo-liberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-states, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe.

12. Increasingly, on account of “greed is good” culture that has been promoted by neo-liberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature. From mining mafias to political operators who, all too willingly, bend policies of the State to suit particular individuals or groups in the social and economic sphere, the *raison d’être* for weakening the capacities and intent to enforce the laws is the lure of the lucre. Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly it’s poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price.

13. The paradigm of governance that has emerged, over the past three decades, prioritizes the market, and its natural course, over any degree of control of it by the State. The role for the State is visualized by votaries of the neo-liberal paradigm as that of a night watchman; and moreover it is also expected to take its hands out of the till of the wealth generating machinery. Based on the theories of Arthur Laffer, and pushed by the Washington Consensus, the prevailing wisdom of the elite, and of the policy makers, is that reduction of tax rates, thereby making tax regimes regressive, would incentivise the supposed genius of entrepreneurial souls of individuals, actuated by pursuit of self-interest and desire to accumulate great economic power. It was expected that this would enable the generation of more wealth, at a more rapid pace, thereby enabling the State to generate appropriate tax revenues even

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A with lowered tax rates. Further, benefits were also expected in moral terms – that the lowering of tax rates would reduce the incentives of wealth generators to hide their monies, thereby saving them from the guilt of tax evasion. Whether that is an appropriate model of social organization or not, and from the perspective of constitutional adjudication, whether it meets the requirements of constitutionalism as embedded in the texts of various constitutions, is not a question that we want to enter in this matter.

C 14. Nevertheless, it would be necessary to note that there is a fly in the ointment of the above story of friction free markets that would always clear, and always work to the benefit of the society. The strength of tax collection machinery can, and ought to be, expected to have a direct bearing on the revenues collected by the State. If the machinery is weak, understaffed, ideologically motivated to look the other way, or the agents motivated by not so salubrious motives, the amount of revenue collected by the State would decline, stagnate, or may not generate the revenue for the State that is consonant with its responsibilities. From within the neo-liberal paradigm, also emerged the under-girding current of thought that revenues for the State implies a big government, and hence a strong tax collecting machinery itself would be undesirable. Where the elite lose out in democratic politics of achieving ever decreasing tax rates, it would appear that state machineries in the hands of the executive, all too willing to promote the extreme versions of the neo-liberal paradigm and co-opt itself in the enterprises of the elite, may also become all too willing to not develop substantial capacities to monitor and follow the money, collect the lawfully mandated taxes, and even look the other way. The results, as may be expected, have been disastrous across many nations.

H 15. In addition, it would also appear that in this miasmatic cultural environment in which greed is extolled, conspicuous consumption viewed as both necessary and socially valuable,

A and the wealthy viewed as demi-gods, the agents of the State  
 may have also succumbed to the notions of the neo-liberal  
 paradigm that the role of the State ought to only be an enabling  
 one, and not exercise significant control. This attitude would  
 have a significant impact on exercise of discretion, especially  
 in the context of regulating economic activities, including  
 keeping an account of the monies generated in various  
 activities, both legal and illegal. Carried away by the ideology  
 of neo-liberalism, it is entirely possible that the agents of the  
 State entrusted with the task of supervising the economic and  
 social activities may err more on the side of extreme caution,  
 whereby signals of wrong doing may be ignored even when  
 they are strong. Instances of the powers that be ignoring publicly  
 visible stock market scams, or turning a blind eye to large  
 scale illegal mining have become all too familiar, and may be  
 readily cited. That such activities are allowed to continue to  
 occur, with weak, or non-existent, responses from the State  
 may, at best, be charitably ascribed to this broader culture of  
 permissibility of all manner of private activities in search of  
 ever more lucre. Ethical compromises, by the elite – those  
 who wield the powers of the state, and those who fatten  
 themselves in an ever more exploitative economic sphere-  
 can be expected to thrive in an environment marked by such  
 a permissive attitude, of weakened laws, and of weakened  
 law enforcement machineries and attitudes.

F 16. To the above, we must also add the fragmentation of  
 administration. Even as the range of economic, and social  
 activities have expanded, and their sophistication increased  
 by leaps and bounds, the response in terms of administration  
 by the State has been to create ever more specialized  
 agencies, and departments. To some degree this has been  
 unavoidable. Nevertheless, it would also appear that there is  
 a need to build internal capacities to share information across  
 such departments, lessen the informational asymmetries  
 between, and friction to flow of information across the  
 boundaries of departments and agencies, and reduce the levels

A of consequent problems in achieving coordination. Life, and  
 social action within which human life becomes possible, do  
 not proceed on the basis of specialized fiefdoms of expertise.  
 They cut across the boundaries erected as a consequence of  
 an inherent tendency of experts to specialize. The result, often,  
 is a system wide blindness, while yet being lured by the dazzle  
 of ever greater specialization. Many dots of information, now  
 collected in ever increasing volume by development of  
 sophisticated information technologies, get ignored on account  
 of lack of coordination across agencies, and departments,  
 and tendency within bureaucracy to jealously guard their own  
 turfs. In some instances, the failure to properly investigate, or  
 to prevent, unlawful activities could be the result of such over-  
 specialization, frictions in sharing of information, and  
 coordination across departmental and specialized agency  
 boundaries.

D 17. If the State is soft to a large extent, especially in terms  
 of the unholy nexus between the law makers, the law keepers,  
 and the law breakers, the moral authority, and also the moral  
 incentives, to exercise suitable control over the economy and  
 the society would vanish. Large unaccounted monies are  
 generally an indication of that. In a recent book, Prof. Rotberg  
 states, after evaluating many failed and collapsed states over  
 the past few decades:

F *“Failed states offer unparalleled economic opportunity –  
 but only for a privileged few. Those around the ruler or  
 ruling oligarchy grow richer while their less fortunate  
 brethren starve. Immense profits are available from an  
 awareness of regulatory advantages and currency  
 speculation and arbitrage. But the privilege of making  
 real money when everything else is deteriorating is  
 confined to clients of the ruling elite.... The nation-state’s  
 responsibility to maximize the well-being and prosperity  
 of all its citizens is conspicuously absent, if it ever  
 existed.... Corruption flourishes in many states, but in*

*failed states it often does so on an unusually destructive scale. There is widespread petty or lubricating corruption as a matter of course, but escalating levels of venal corruption mark failed states.”*<sup>1</sup>

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18. India finds itself in a peculiar situation. Often celebrated, in popular culture, as an emerging economy that is rapidly growing, and expected to be a future economic and political giant on the global stage, it is also popularly perceived, and apparently even in some responsible and scholarly circles, and official quarters, that some of its nationals and other legal entities have stashed the largest quantum of unaccounted monies in foreign banks, especially in tax havens, and in other jurisdictions with strong laws of secrecy. There are also apparently reports, and analyses, generated by Government of India itself, which place the amounts of such unaccounted monies at astronomical levels.

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19. We do not wish to engage in any speculation as to what such analyses, reports, and factuality imply with respect to the state of the nation. The citizens of our country can make, and ought to be making, rational assessments of the situation. We fervently hope that it leads to responsible, reasoned and reasonable debate, thereby exerting the appropriate democratic pressure on the State, and its agents, within the constitutional framework, to bring about the necessary changes without sacrificing cherished, and inherently invaluable social goals and values enshrined in the Constitution. The failures are discernible when viewed against the vision of the constitutional project, and as forewarned by Dr. Ambedkar, have been on account of the fact that man has been vile, and not the defects of a Constitution forged in the fires of wisdom gathered over eons of human experience. If the politico-bureaucratic, power wielding, and business classes bear a large part of the blame, at least some part of blame ought to

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1. “The Failure and collapse of nation-States- Breakdown, prevention and Repair” in “WHEN STATES FAIL: CAUSES AND CONSEQUENCES”, Rotberg, Robert I., Ed. Preinceton University Press (2004).

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A be apportioned to those portions of the citizenry that is well informed, or is expected to be informed. Much of that citizenry has disengaged itself with the political process, and with the masses. Informed by contempt for the poor and the downtrodden, the elite classes that have benefited the most, or expects to benefit substantially from the neo-liberal policies that would wish away the hordes, has also chosen to forget that constitutional mandate is as much the responsibility of the citizenry, and through their constant vigilance, of all the organs of the state, and national institutions including political parties. B To not be engaged in the process, is to ensure the evisceration of constitutional content. Knee jerk reactions, and ill advised tinkering with the constitutional framework are not the solutions. C The road is always long, and needs the constant march of the citizenry on it. There is no other way. To expect instant solutions, because this law or that body is formed, without striving to solve system wide, and systemic, problems that have emerged is to not understand the demands of a responsible citizenry in modern constitutional republican democracies. D

20. These matters before us relate to issues of large sums of unaccounted monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted monies, as alleged by the Government of India itself is massive. The show cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.

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21. It is in light of the above, that we heard some significant

elements of the instant writ petitions filed in this Court, and at this stage it is necessary that appropriate orders be issued. There are two issues we deal with below: (i) the appointment of a Special Investigation Team; and (ii) disclosure, to the Petitioners, of certain documents relied upon by the Union of India in its response.

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22. The instant writ petition was filed, in 2009, by Shri. Ram Jethmalani, Shri. Gopal Sharman, Smt. Jalbala Vaidya, Shri. K.P.S. Gill, Prof. B.B. Dutta, and Shri. Subhash Kashyap, all well known professionals, social activists, former bureaucrats or those who have held responsible positions in the society. They have also formed an organization called Citizen India, the stated objective of which is said to be to bring about changes and betterment in the quality of governance, and functioning of all public institutions.

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23. The Petitioners state that there have been a slew of reports, in the media, and also in scholarly publications that various individuals, mostly citizens, but may also include non-citizens, and other entities with presence in India, have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals holding such accounts. The Petitioners allege that most of such monies are unaccounted, and in all probability have been generated through unlawful activities, whether in India or outside India, but relating to India. Further, the Petitioners also allege that a large part of such monies may have been generated within India, and have been taken away from India, breaking various laws, including but not limited to evasion of taxes.

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24. The Petitioners contend: (i) that the sheer volume of such monies points to grave weaknesses in the governance

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A of the nation, because they indicate a significant lack of control over unlawful activities through which such monies are generated, evasion of taxes, and use of unlawful means of transfer of funds; (ii) that these funds are then laundered and brought back into India, to be used in both legal and illegal activities; (iii) that the use of various unlawful modes of transfer of funds across borders, gives support to such unlawful networks of international finance; and (iv) that in as much as such unlawful networks are widely acknowledged to also effectuate transfer of funds across borders in aid of various crimes committed against persons and the State, including but not limited to activities that may be classifiable as terrorist, extremist, or unlawful narcotic trade, the prevailing situation also has very serious connotations for the security and integrity of India.

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D 25. The Petitioners also further contend that a significant part of such large unaccounted monies include the monies of powerful persons in India, including leaders of many political parties. It was also contended that the Government of India, and its agencies, have been very lax in terms of keeping an eye on the various unlawful activities generating unaccounted monies, the consequent tax evasion; and that such laxity extends to efforts to curtail the flow of such funds out, and into, India. Further, the Petitioners also contend that the efforts to prosecute the individuals, and other entities, who have secreted such monies in foreign banks, have been weak or non-existent. It was strongly argued that the efforts at identification of such monies in various bank accounts in many jurisdictions across the globe, attempts to bring back such monies, and efforts to strengthen the governance framework to prevent further outflows of such funds, have been sorely lacking.

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26. The Petitioners also made allegations about certain specific incidents and patterns of dereliction of duty, wherein the Government of India, and its various agencies, even though in possession of specific knowledge about the monies in

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certain bank accounts, and having estimated that such monies run into many scores of thousands of crores, and upon issuance of show cause notices to the said individual, surprisingly have not proceeded to initiate, and carry out suitable investigations, and prosecute the individuals. The individual specifically named is one Hassan Ali Khan. The Petitioners also contended that Kashinath Tapuria, and his wife Chandrika Tapuria, are also party to the illegal activities of Hassan Ali Khan.

27. Specifically, it was alleged that Hassan Ali Khan was served with an income tax demand for Rs. 40,000.00 Crores (Rupees Forty Thousand Crores), and that the Tapurias were served an income tax demand notice of Rs. 20,580.00 Crores (Rupees Twenty Thousand and Five Hundred and Eighty Crores). The Enforcement Directorate, in 2007, disclosed that Hassan Ali Khan had “dealings amounting to 1.6 billion US dollars” in the period 2001-2005. In January 2007, upon raiding Hassan Ali’s residence in Pune, certain documents and evidence had been discovered regarding deposits of 8.04 billion dollars with UBS bank in Zurich. It is the contention of the Petitioners that, even though such evidence was secured nearly four and half years ago, (i) a proper investigation had not been launched to obtain the right facts from abroad; (ii) the individuals concerned, though present in India, and subject to its jurisdiction, and easily available for its exercise, had not even been interrogated appropriately; (iii) that the Union of India, and its various departments, had even been refusing to divulge the details and information that would reveal the actual status of the investigation, whether in fact it was being conducted at all, or with any degree of seriousness; (iv) given the magnitude of amounts in question, especially of the demand notice of income tax, the laxity of investigation indicates multiple problems of serious non-governance, and weaknesses in the system, including pressure from political quarters to hinder, or scuttle, the investigation, prosecution, and ultimately securing the return of such monies; and (v) given the broadly accepted fact that within the political class corruption is rampant, ill-

A begotten wealth has begun to be amassed in massive quantities by many members in that class, it may be reasonable to suspect, or even conclude, that investigation was being deliberately hindered because Hassan Ali Khan, and the Tapurias, had or were continuing to handle the monies of such a class. The fact that both Income Tax department, and the Enforcement Directorate routinely, and with alacrity, seek the powers for long stretches of custodial interrogation of even those suspected of having engaged in money laundering, or evaded taxes, with respect to very small amounts, ought to raise the reasonable suspicion that inaction in the matters concerning Hassan Ali Khan, and Tapurias, was deliberately engineered, for nefarious reasons.

28. In addition, the Petitioners also state that in as much as the bank in which the monies had been stashed by Hassan Ali Khan was UBS Zurich, the needle of suspicion has to inexorably turn to high level political interference and hindrance to the investigations. The said bank, it was submitted, is the biggest or one of the biggest wealth management companies in the world. The Petitioners also narrated the mode, and the manner, in which the United States had dealt with UBS, with respect to monies of American citizens secreted away with the said bank. It was also alleged that UBS had not cooperated with the U.S. authorities. Contrasting the relative alacrity, and vigour, with which the United States government had pursued the matters, the Petitioners contend the inaction of Union of India is shocking.

29. The Petitioners further allege that in 2007, the Reserve Bank of India had obtained some “knowledge of the dubious character” of UBS Security India Private Limited, a branch of UBS, and consequently stopped this bank from extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India. It was also claimed by the Petitioners that the SEBI had alleged that UBS played a role in the stock market crash of 2004. The

said UBS Bank has apparently applied for a retail banking license in India, which was approved in principle by RBI initially. In 2008, this license was withheld on the ground that “investigation of its unsavoury role in the Hassan Ali Khan case was pending investigation in the Enforcement Directorate.” However, it seems that the RBI reversed its decision in 2009, and no good reasons seem to be forthcoming for the reversal of the decision of 2008.

30. The Petitioners contend that such a reversal of decision could only have been accomplished through high level intervention, and that it is further evidence of linkages between members of the political class, and possibly even members of the bureaucracy, and such banking operations, and the illegal activities of Hassan Ali Khan and the Tapurias. Hence, the Petitioners argued, in the circumstances it would have to be necessarily concluded that the investigations into the affairs of Hassan Ali Khan, and the Tapurias, would be severely compromised if the Court does not intervene, and monitor the investigative processes by appointing a special investigation team reporting directly to the Court.

31. The learned senior counsel for the Petitioners sought that this Court intervene, order proper investigations, and monitor continuously, the actions of the Union of India, and any and all governmental departments and agencies, in these matters. It was submitted that their filing of this Writ Petition under Article 32 is proper, as the inaction of the Union of India, as described above, violates the fundamental rights – to proper governance, in as much as Article 14 provides for equality before the law and equal protection of the law, and Article 21 promises dignity of life to all citizens.

32. We have heard the learned senior counsel for the Petitioners, Shri. Anil B. Divan, the learned senior counsel for interveners, Shri. K.K. Venugopal, and the learned senior counsel for the petitioners in the connected Writ Petition, Shri. Shanti Bhushan. We have also heard the learned Solicitor

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A General, Shri. Gopal Subramaniam, on behalf of the respondents.

33. Shri. Divan, specifically argued that, having regard to the nature of the investigation, its slow pace so far, and the non-seriousness on the part of the respondents, there is a need to constitute a Special Investigation Team (“SIT”) headed by a former judge or two of this court. However, this particular plea has been vociferously resisted by the Solicitor General. Relying on the status reports submitted from time to time, the learned Solicitor General stated that all possible steps were being taken to bring back the monies stashed in foreign banks, and that the investigations in cases registered were proceeding in an appropriate manner. He expressed his willingness for a Court monitored investigation. He also further submitted that the Respondents, in principle, have no objections whatsoever against the main submissions of the Petitioners.

34. The real point of controversy is, given above, as to whether there is a need to constitute a SIT to be headed by a judge or two, of this court, to supervise the investigation.

35. We must express our serious reservations about the responses of the Union of India. In the first instance, during the earlier phases of hearing before us, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by us did the Union of India begin to admit that indeed the investigation was proceeding very slowly. It also became clear to us that in fact the investigation had completely stalled, in as much as custodial interrogation of Hassan Ali Khan had not even been sought for, even though he was very much resident in India. Further, it also now appears that even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician.

36. During the course of the hearings the Union of India

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repeatedly insisted that the matter involves many jurisdictions, across the globe, and a proper investigation could be accomplished only through the concerted efforts by different law enforcement agencies, both within the Central Government, and also various State governments. However, the absence of any satisfactory explanation of the slowness of the pace of investigation, and lack of any credible answers as to why the respondents did not act with respect to those actions that were feasible, and within the ambit of powers of the Enforcement Directorate itself, such as custodial investigation, leads us to conclude that the lack of seriousness in the efforts of the respondents are contrary to the requirements of laws and constitutional obligations of the Union of India. It was only upon the insistence and intervention of this Court has the Enforcement Directorate initiated and secured custodial interrogation over Hassan Ali Khan. The Union of India has explicitly acknowledged that there was much to be desired with the manner in which the investigation had proceeded prior to the intervention of this court. From the more recent reports, it would appear that the Union of India, on account of its more recent efforts to conduct the investigation with seriousness, on account of the gravitas brought by this Court, has led to the securing of additional information, and leads, which could aid in further investigation. For instance, during the continuing interrogation of Hassan Ali Khan and the Tapurias, undertaken for the first time at the behest of this Court, many names of important persons, including leaders of some corporate giants, politically powerful people, and international arms dealers have cropped up. So far, no significant attempt has been made to investigate and verify the same. This is a further cause for the grave concerns of this Court, and points to the need for continued, effective and day to day monitoring by a SIT constituted by this Court, and acting on behalf, behest and direction of this Court.

37. In light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the

A necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences.

B The composition of the High Level Committee (“HLC”) is said to be as follows: (i) Secretary, Department of Revenue, as the Chairman; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (viii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT. It was also submitted that the HLC may co-opt, as necessary, representation not below the rank of Joint Secretary from the Home Secretary, Foreign Secretary, Defense Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.

F 38. While it would appear, from the Status Reports submitted to this Court, that the Enforcement Directorate has moved in some small measure, the actual facts are not comforting to an appropriate extent. In fact we are not convinced that the situation has changed to the extent that it ought to so as to accept that the investigation would now be conducted with the degree of seriousness that is warranted. According to the Union of India the HLC was formed in order to take charge of and direct the entire investigation, and subsequently, the prosecution. In the meanwhile a charge sheet has been filed against Hassan Ali Khan. Upon inquiry by us as to whether the

charge-sheet had been vetted by the HLC, and its inputs secured, the counsel for Union of India were flummoxed. The fact was that the charge-sheet had not been given even for the perusal of the HLC, let alone securing its inputs, guidance and direction. We are not satisfied by the explanation offered by the Directorate of Enforcement by way of affidavit after the orders were reserved. Be it noted that a nodal agency was set up, pursuant to directions of this Court in Vineet Narain case given many years ago. Yet the same was not involved and these matters were never placed before it. Why?

39. From the status reports, it is clear that the problem is extremely complex, and many agencies and departments spread across the country have not responded with the alacrity, and urgency, that one would desire. Moreover, the Union of India has been unable to answer any of the questions regarding its past actions, and their implications, such as the slowness of the investigation, or about grant of license to conduct retail banking by UBS, by reversing the decision taken earlier to withhold such a license on the grounds that the said bank's credentials were suspect. To this latter query, the stance of the Union of India has been that entry of UBS would facilitate flow of foreign investments into India. The question that arises is whether the task of bringing foreign funds into India override all other constitutional concerns and obligations?

40. The predominant theme in the responses of Union of India before this court has been that it is doing all that it can to bring back the unaccounted monies stashed in various banks abroad. To this is added the qualifier that it is an extremely complex problem, requiring the cooperation of many different jurisdictions, and an internationally coordinated effort. Indeed they are complex. We do not wish to go into the details of arguments about whether the Union of India is, or is not, doing necessary things to achieve such goals. That is not necessary for the matters at hand.

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A obtained knowledge, documents and information that indicated possible connections between Hassan Ali Khan, and his alleged co-conspirators and known international arms dealers. Further, the Union of India was also in possession of information that suggested that because the international arms dealing network, and a very prominent dealer in it, could not open a bank account even in a jurisdiction that is generally acknowledged to lay great emphasis on not asking sources of money being deposited into its banks, Hassan Ali Khan may have played a crucial role in opening an account with the branch of the same bank in another jurisdiction. The volume of alleged income taxes owed to the country, as demanded by the Union of India itself, and the volume of monies, by some accounts US \$8.04 billion, and some other accounts in excess of Rs. 70,000 crores, that are said to have been routed through various bank accounts of Hassan Ali Khan, and Tapurias. Further, from all accounts it has been acknowledged that none of the named individuals have any known and lawful sources for such huge quantities of monies. All of these factors, either individually or combined, ought to have immediately raised questions regarding the sources being unlawful activities, national security, and transfer of funds into India for other illegal activities, including acts against the State. It was only at the repeated insistence by us that such matters have equal, if not even greater importance than issues of tax collection, has the Union of India belatedly concluded that such aspects also ought to be investigated with thoroughness. However, there is still no evidence of a really serious investigation into these other matters from the national security perspective.

42. The fact remains that the Union of India has struggled in conducting a proper investigation into the affairs of Hassan Ali Khan and the Tapurias. While some individuals, whose names have come to the adverse knowledge of the Union of India, through the more recent investigations, have been interrogated, many more are yet to be investigated. This highly complex investigation has in fact just begun. It is still too early

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to conclude that the Union of India has indeed placed all the necessary machinery to conduct a proper investigation. The formation of the HLC was a necessary step, and may even be characterized as a welcome step. Nevertheless, it is an insufficient step.

43. In light of the above, we had proposed to the Union of India that the same HLC constituted by it be converted into a Special Investigation Team, headed by two retired judges of the Supreme Court of India. The Union of India opposes the same, but provides no principle as to why that would be undesirable, especially in light of the many lapses and lacunae in its actions in these matters spread over the past four years.

44. We are of the firm opinion that in these matters fragmentation of government, and expertise and knowledge, across many departments, agencies and across various jurisdictions, both within the country, and across the globe, is a serious impediment to the conduct of a proper investigation. We hold that it is in fact necessary to create a body that coordinates, directs, and where necessary orders timely and urgent action by various institutions of the State. We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values. However, it would be impossible for this Court to be involved in day to day investigations, or to constantly monitor each and every aspect of the investigation.

45. The resources of this court are scarce, and it is overburdened with the task of rendering justice in well over a lakh of cases every year. Nevertheless, this Court is bound to uphold the Constitution, and its own burdens, excessive as they already are, cannot become an excuse for it to not perform that task. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by this Court would be unconscionable.

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46. The issue is not merely whether the Union of India is making the necessary effort to bring back all or some significant part of the alleged monies. The fact that there is some information and knowledge that such vast amounts may have been stashed away in foreign banks, implies that the State has the primordial responsibility, under the Constitution, to make every effort to trace the sources of such monies, punish the guilty where such monies have been generated and/or taken abroad through unlawful activities, and bring back the monies owed to the Country. We do recognize that the degree of success, measured in terms of the amounts of monies brought back, is dependent on a number of factors, including aspects that relate to international political economy and relations, which may or may not be under our control. The fact remains that with respect to those factors that were within the powers of the Union of India, such as investigation of possible criminal nexus, threats to national security etc., were not even attempted. Fealty to the Constitution is not a matter of mere material success; but, and probably more importantly from the perspective of the moral authority of the State, a matter of integrity of effort on all the dimensions that inform a problem that threatens the constitutional projects. Further, the degree of seriousness with which efforts are made with respect to those various dimensions can also be expected to bear fruit in terms of building capacities, and the development of necessary attitudes to take the law enforcement part of accounting or following the money seriously in the future.

47. The merits of vigour of investigations, and attempts at law enforcement, cannot be measured merely on the scale of what we accomplish with respect to what has happened in the past. It would necessarily also have to be appreciated from the benefits that are likely to accrue to the country in preventing such activities in the future. Our people may be poor, and may be suffering from all manner of deprivation. However, the same poor and suffering masses are rich, morally and from a humanistic point of view. Their forbearance of the many foibles

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and failures of those who wield power, no less in their name and behalf than of the rich and the empowered, is itself indicative of their great qualities, of humanity, trust and tolerance. That greatness can only be matched by exercise of every sinew, and every resource, in the broad goal of our constitutional project of bringing to their lives dignity. The efforts that this Court makes in this regard, and will make in this respect and these matters, can only be conceived as a small and minor, though nevertheless necessary, part. Ultimately the protection of the Constitution and striving to promote its vision and values is an elemental mode of service to our people.

48. We note that in many instances, in the past, when issues referred to the Court have been very complex in nature, and yet required the intervention of the Court, Special Investigation Teams have been ordered and constituted in order to enable the Court, and the Union of India and/or other organs of the State, to fulfill their constitutional obligations. The following instances may be noted: *Vineet Narain v Union of India*<sup>2</sup>, *NHRC v State of Gujarat*<sup>3</sup>, *Sanjiv Kumar v State of Haryana*<sup>4</sup>, and *Centre for PIL v Union of India*<sup>5</sup>.

49. In light of the above we herewith order:

- (i) That the High Level Committee constituted by the Union of India, comprising of (i) Secretary, Department of Revenue; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (viii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBDT be forthwith appointed with immediate

2. (1996) 2 SCC 199.  
 3. (2004) 8 SCC 610.  
 4. (2005) 5 SCC 517.  
 5. (2011) 1 SCC 560.

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- effect as a Special Investigation Team;
- (ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;
- (iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent judges of this Court: (a) Hon'ble Mr. Justice B.P. Jeevan Reddy as Chairman; and (b) Hon'ble Mr. Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;
- (iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal or civil proceedings of: (a) all issues relating to the matters concerning and arising from unaccounted monies of Hassan Ali Khan and the Tapurias; (b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances of the stashing of unaccounted monies in foreign bank accounts by Indians or other entities operating in India; and (c) all other matters with respect to unaccounted monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. It is clarified here that within the ambit of responsibilities described above, also lie the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted monies out of and/or bring such

- monies back into the country, and use of such monies in India or abroad. The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted monies, and their stashing away in foreign banks or in various forms domestically.
- (v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time;
- (vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning;
- (vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad.
- (viii) That the Special Investigation Team also be empowered to further investigate even where charge-sheets have been previously filed; and that

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the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted monies unlawfully kept in bank accounts abroad.

50. We accordingly direct the Union of India to issue appropriate notification and publish the same forthwith. It is needless to clarify that the former judges of this Court so appointed to supervise the Special Investigation Team are entitled to their remuneration, allowances, perks, facilities as that of the judges of the Supreme Court. The Ministry of Finance, Union of India, shall be responsible for creating the appropriate infrastructure and other facilities for proper and effective functioning of the Special Investigation Team at once.

**III**

51. We now turn our attention to the matter of disclosure of various documents referenced by the Union of India, as sought by the Petitioners. These documents, including names and bank particulars, relate to various bank accounts, of Indian citizens, in the Principality of Liechtenstein ("Liechtenstein"), a small landlocked sovereign nation-state in Europe. It is generally acknowledged that Liechtenstein is a tax haven.

52. Apparently, as alleged by the Petitioners, a former employee of a bank or banks in Liechtenstein secured the names of some 1400 bank account holders, along with the particulars of such accounts, and offered the information to various entities. The same was secured by the Federal Republic of Germany ("Germany"), which in turn, apart from initiating tax proceedings against some 600 individuals, also offered the information regarding nationals and citizens of other countries to such countries. It is the contention of the Petitioners that even though the Union of India was informed about the presence of the names of a large number of Indian citizens in the list of names revealed by the former bank employee, the

Union of India never made a serious attempt to secure such information and proceed to investigate such individuals. It is the contention of the Petitioners that such names include the identities of prominent and powerful Indians, or the identities of individuals, who may or may not be Indian citizens, but who could lead to information about various powerful Indians holding unaccounted monies in bank accounts abroad. It is also the contention of the Petitioners that, even though they had sought the information under the Right to Information Act (2005), the Respondents had not revealed the names nor divulged the relevant documents. The Petitioners argue that such a reluctance is only on account of the Union of India not having initiated suitable steps to recover such monies, and punish the named individuals, and also because revelation of names of individuals on the list would lead to discovery of powerful persons engaged in various unlawful activities, both in generation of unlawful and unaccounted monies, and their stashing away in banks abroad.

53. It was also alleged by the Petitioners that in fact Germany had offered such information, freely and generally to any country that requests the same, and did not specify that the names and other information pertaining to such names ought to be requested only pursuant to any double taxation agreements it has with other countries. The Petitioners also alleged that Union of India has chosen to proceed under the assumption that it could have requested such information only pursuant to the double taxation agreement it has with Germany. The Petitioners contend that the Government of India took such a step primarily to conceal the information from public gaze.

54. The response of the Union of India may be summed up briefly: (i) that they secured the names of individuals with bank accounts in banks in Liechtenstein, and other details with respect to such bank accounts, pursuant to an agreement of India with Germany for avoidance of double taxation and prevention of fiscal evasion; (ii) that the said agreement proscribes the Union of India from disclosing such names,

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A and other documents and information with respect to such bank accounts, to the Petitioners, even in the context of these ongoing proceedings before this court; (iii) that the disclosure of such names, and other documents and information, secured from Germany, would jeopardize the relations of India with a foreign state; (iv) that the disclosure of such names, and other documents and information, would violate the right to privacy of those individuals who may have only deposited monies in a lawful manner; (v) that disclosure of names, and other documents and information can be made with respect to those individuals with regard to whom investigations are completed, and proceedings initiated; and (vi) that contrary to assertions by the Petitioners, it was Germany which had asked the Union of India to seek the information under double taxation agreement, and that this was in response to an earlier request by Union of India for the said information.

55. For the purposes of the instant order, the issue of whether the Union of India could have sought and secured the names, and other documents and information, without having to take recourse to the double taxation agreement is not relevant. For the purposes of determining whether Union of India is obligated to disclose the information that it obtained, from Germany, with respect to accounts of Indian citizens in a bank in the Principality of Liechtenstein, we need only examine the claims of the Union of India as to whether it is proscribed by the double taxation agreement with Germany from disclosing such information. Further, and most importantly, we would also have to examine whether in the context of Article 32 proceedings before this court, wherein this court has exercised jurisdiction, the Union of India can claim exemption from providing such information to the Petitioners, and also with respect to issues of right to privacy of individuals who hold such accounts, and with respect of whom no investigations have yet been commenced, or only partially conducted, so that the State has not yet issued a show cause and initiated proceedings.

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56. We have perused the said agreement with Germany. We are convinced that the said agreement, by itself, does not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account holders in Liechtenstein. In the first instance, we note that the names of the individuals are with respect to bank accounts in the Liechtenstein, which though populated by largely German speaking people, is an independent and sovereign nation-state. The agreement between Germany and India is with regard to various issues that crop up with respect to German and Indian citizens' liability to pay taxes to Germany and/or India. It does not even remotely touch upon information regarding Indian citizens' bank accounts in Liechtenstein that Germany secures and shares that have no bearing upon the matters that are covered by the double taxation agreement between the two countries. In fact, the "information" that is referred to in Article 26 is that which is "necessary for carrying out the purposes of this agreement", i.e. the Indo-German DTAA. Therefore, the information sought does not fall within the ambit of this provision. It is disingenuous for the Union of India, under these circumstances, to repeatedly claim that it is unable to reveal the documents and names as sought by the Petitioners on the ground that the same is proscribed by the said agreement. It does not matter that Germany itself may have asked India to treat the information shared as being subject to the confidentiality and secrecy clause of the double taxation agreement. It is for the Union of India, and the courts, in appropriate proceedings, to determine whether such information concerns matters that are covered by the double taxation agreement or not. In any event, we also proceed to examine the provisions of the double taxation agreement below, to also examine whether they proscribe the disclosure of such names, and other documents and information, even in the context of these instant proceedings.

57. Relevant portions of Article 26 of the double taxation agreement with Germany, a copy of which was submitted by Union of India, reads as follows:

A "1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the purposes of this Agreement. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. They may disclose the information in public court proceedings or in judicial proceedings.

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D 2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (order public)"

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G 58. The above clause in the relevant agreement with Germany would indicate that, contrary to the assertions of Union of India, there is no absolute bar of secrecy. Instead the agreement specifically provides that the information may be disclosed in public court proceedings, which the instant proceedings are. The proceedings in this matter before this court, relate both to the issue of tax collection with respect to

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unaccounted monies deposited into foreign bank accounts, as well as with issues relating to the manner in which such monies were generated, which may include activities that are criminal in nature also. Comity of nations cannot be predicated upon clauses of secrecy that could hinder constitutional proceedings such as these, or criminal proceedings.

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59. The claim of Union of India is that the phrase “public court proceedings”, in the last sentence in Article 26(1) of the double taxation agreement only relates to proceedings relating to tax matters. The Union of India claims that such an understanding comports with how it is understood internationally. In this regard Union of India cites a few treatises. However, the Union of India did not provide any evidence that Germany specifically requested it to not reveal the details with respect to accounts in the Liechtenstein even in the context of proceedings before this court.

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60. Article 31, “General Rule of Interpretation”, of the Vienna Convention of the Law of Treaties, 1969 provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.

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61. This Court in *Union of India v. Azadi Bachao Andolan*<sup>6</sup>, approvingly noted Frank Bennion’s observations that a treaty is really an indirect enactment, instead of a substantive legislation, and that drafting of treaties is notoriously sloppy, whereby inconveniences obtain. In this regard this Court further noted the dictum of Lord Widgery, C.J. that the words “are to be given their general meaning, general to lawyer and layman alike.... The meaning of the diplomat rather than the lawyer.” The broad principle of interpretation, with respect to treaties,

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A and provisions therein, would be that ordinary meanings of words be given effect to, unless the context requires or otherwise. However, the fact that such treaties are drafted by diplomats, and not lawyers, leading to sloppiness in drafting also implies that care has to be taken to not render any word, phrase, or sentence redundant, especially where rendering of such word, phrase or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional perspective. The government cannot bind India in a manner that derogates from Constitutional provisions, values and imperatives.

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62. The last sentence of Article 26(1) of the double taxation agreement with Germany, “[T]hey may disclose this information in public court proceedings or in judicial decisions,” is revelatory in this regard. It stands out as an additional aspect or provision, and an exception, to the preceding portion of the said article. It is located after the specification that information shared between contracting parties may be revealed only to “persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by this Agreement.” Consequently, it has to be understood that the phrase “public court proceedings” specified in the last sentence in Article 26(1) of the double taxation agreement with Germany refers to court proceedings other than those in connection with tax assessment, enforcement, prosecution etc., with respect to tax matters. If it were otherwise, as argued by Union of India, then there would have been no need to have that last sentence in Article 26(1) of the double taxation agreement at all. The last sentence would become redundant if the interpretation pressed by Union of India is accepted. Thus, notwithstanding the alleged convention of interpreting the last sentence only as referring to proceedings in tax matters, the rubric of common law jurisprudence, and fealty to its principles, leads us inexorably to the conclusion that the language in this specific

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treaty, and under these circumstances cannot be interpreted in the manner sought by Union of India. A

63. While we agree that the language could have been tighter, and may be deemed to be sloppy, to use Frank Bennion’s characterization, negotiation of such treaties are conducted and secured at very high levels of government, with awareness of general principles of interpretation used in various jurisdictions. It is fairly well known, at least in Common Law jurisdictions, that legal instruments and statutes are interpreted in a manner whereby redundancy of expressions and phrases is sought to be avoided. Germany would have been well aware of it. B C

64. The redundancy that would have to be ascribed to the said last sentence of Article 26(1) of the double taxation agreement with Germany, if the position of Union of India were to be accepted, also leads to a manifest absurdity, in the context of the Indian Constitution. Such a redundancy would mean that constitutional imperatives themselves are to be set aside. Modern constitutionalism, to which Germany is a major contributor too, especially in terms of the basic structure doctrine, specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a constitution cannot change the identity of the constitution itself. D E

65. The basic structure of the Constitution cannot be amended even by the amending power of the legislature. Our Constitution guarantees the right, pursuant to Clause (1) of Article 32, to petition this Court on the ground that the rights guaranteed under Part III of the Constitution have been violated. This provision is a part of the basic structure of the Constitution. Clause (2) of Article 32 empowers this Court to issue “directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by” Part III. This is also a part of the basic F G H

A structure of the Constitution.

66. In order that the right guaranteed by Clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by Clause (1) of Article 32. B C

67. Further, in as much as, by history and tradition of common law, judicial proceedings are substantively, though not necessarily fully, adversarial, both parties bear the responsibility of placing all the relevant information, analyses, and facts before this court as completely as possible. In most situations, it is the State which may have more comprehensive information that is relevant to the matters at hand in such proceedings. However, some agents of the State may perceive that because these proceedings are adversarial in nature, the duty and burden to furnish all the necessary information rests upon the Petitioners, and hence the State has no obligation to fully furnish such information. Some agents of the State may also seek to cast the events and facts in a light that is favourable to the government in the immediate context of the proceedings, even though such actions do not lead to rendering of complete justice in the task of protection of fundamental rights. To that extent, both the petitioners and this Court would be handicapped in proceedings under Clause (1) of Article 32. D E F G

68. It is necessary for us to note that the burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, the burden of protection of fundamental rights is primarily the duty of the State. Consequently, unless H

A constitutional grounds exist, the State may not act in a manner that hinders this Court from rendering complete justice in such proceedings. Withholding of information from the petitioners, or seeking to cast the relevant events and facts in a light favourable to the State in the context of the proceedings, even though ultimately detrimental to the essential task of protecting fundamental rights, would be destructive to the guarantee in Clause (1) of Article 32, and substantially eviscerate the capacity of this Court in exercising its powers contained in clause (2) of Article 32, and those traceable to other provisions of the Constitution and broader jurisprudence of constitutionalism, in upholding fundamental rights enshrined in Part III. In the task of upholding of fundamental rights, the State cannot be an adversary. The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights.

69. Furthermore, we hold that there is a special relationship between Clause (1) of Article 32 and Sub-Clause (a) of Clause (1) of Article 19, which guarantees citizens the freedom of speech and expression. The very genesis, and the normative desirability of such a freedom, lies in historical experiences of the entire humanity: unless accountable, the State would turn tyrannical. A proceeding under Clause (1) of Article 32, and invocation of the powers granted by Clause (2) of Article 32, is a primordial constitutional feature of ensuring such accountability. The very promise, and existence, of a constitutional democracy rests substantially on such proceedings.

A 70. Withholding of information from the petitioners by the State, thereby constraining their freedom of speech and expression before this Court, may be premised only on the exceptions carved out, in Clause (2) of Article 19, "in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence" or by law that demarcate exceptions, provided that such a law comports with the enumerated grounds in Clause (2) of Article 19, or that may be provided for elsewhere in the Constitution.

C 71. It is now a well recognized proposition that we are increasingly being entwined in a global network of events and social action. Considerable care has to be exercised in this process, particularly where governments which come into being on account of a constitutive document, enter into treaties. The actions of governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from. The redundancy, that the Union of India presses, with respect to the last sentence of Article 26(1) of the double taxation agreement with Germany, necessarily transgresses upon the boundaries erected by our Constitution. It cannot be permitted.

F 72. We have perused the documents in question, and heard the arguments of Union of India with respect to the double taxation agreement with Germany as an obstacle to disclosure. We do not find merit in its arguments flowing from the provisions of double taxation agreement with Germany. However, one major constitutional issue, and concern remains. This is with regard to whether the names of individuals, and details of their bank accounts, with respect to whom there has been no completed investigations that reveal wrong doing and proceedings initiated, and there is no other credible information and evidence currently available with the Petitioners that there

has been any wrong doing, may be disclosed to the Petitioners. A

73. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values. The rights of citizens, to effectively seek the protection of fundamental rights, under Clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter-alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others.

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74. An argument can be made that this Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted with the requisite speed and vigour in the case of large volumes of suspected unaccounted monies of certain individuals. There is an inherent danger in making exceptions to fundamental principles and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself. Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court. However, a decision by this Court that an exception could be carved out remains permanently as a part of judicial canon, and becomes a part of the constitutional interpretation itself. It can be used in the future in a manner and form that may far exceed what this Court intended or what the Constitutional text and values can bear. We are not proposing that Constitutions cannot be interpreted in a manner that allows the nation-state to tackle the problems it faces. The principle is that exceptions cannot be carved out willy-nilly, and without forethought as to the damage they may cause.

75. One of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions, would become entrenched as a part of the constitutional order. Such logic would then lead to seeking exceptions, from protective walls of all fundamental rights, on grounds of expediency and claims that there are no solutions to problems that the society is confronting without the evisceration of fundamental rights. That same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale.

76. It is indeed true that the information shared by Germany, with regard to certain bank accounts in Liechtenstein, also contains names of individuals who appear to be Indians.

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The Petitioners have also claimed that names of all the individuals have been made public by certain segments of the media. However, while some of the accounts, and the individuals holding those accounts, are claimed to have been investigated, others have not been. No conclusion can be drawn as to whether those who have not been investigated, or only partially investigated and proceedings not initiated have committed any wrong doing. There is no presumption that every account holder in banks of Liechtenstein has acted unlawfully. In these circumstances, it would be inappropriate for this Court to order the disclosure of such names, even in the context of proceedings under Clause (1) of Article 32.

77. The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrong doing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals. We cannot remain blind to such possibilities, and indeed experience reveals that public dissemination of banking details, or availability to unauthorized persons, has led to abuse. The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of details of his or her account that the State has acquired. Innocent citizens, including those actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society. Whether the State itself can access details of citizens bank accounts is a separate matter. However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrong doing. It is only after the State

A has been able to arrive at a prima facie conclusion of wrong doing, based on material evidence, would the rights of others in the nation to be informed, enter the picture. In the event citizens, other persons and entities have credible information that a wrong doing could be associated with a bank account, it is needless to state that they have the right, and in fact the moral duty, to inform the State, and consequently the State would have the obligation to investigate the same, within the boundaries of constitutional permissibility. If the State fails to do so, the appropriate courts can always intervene.

C 78. The major problem, in the matters before us, has been the inaction of the State. This is so, both with regard to the specific instances of Hassan Ali Khan and the Tapurias, and also with respect to the issues regarding parallel economy, generation of black money etc. The failure is not of the Constitutional values or of the powers available to the State; the failure has been of human agency. The response cannot be the promotion of vigilantism, and thereby violate other constitutional values. The response has to necessarily be a more emphatic assertion of those values, both in terms of protection of an individual's right to privacy and also the protection of individual's right to petition this Court, under Clause (1) of Article 32, to protect fundamental rights from evisceration of content because of failures of the State. The balancing leads only to one conclusion: strengthening of the machinery of investigations, and vigil by broader citizenry in ensuring that the agents of State do not weaken such machinery.

79. In light of the above we order that:

- G (i) The Union of India shall forthwith disclose to the Petitioners all those documents and information which they have secured from Germany, in connection with the matters discussed above, subject to the conditions specified in (ii) below;
- H (ii) That the Union of India is exempted from revealing

the names of those individuals who have accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of who investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available;

(iii) That the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations have been concluded, either partially or wholly, and show cause notices issued and proceedings initiated may be disclosed; and

(iv) That the Special Investigation Team, constituted pursuant to the orders of today by this Court, shall take over the matter of investigation of the individuals whose names have been disclosed by Germany as having accounts in banks in Liechtenstein, and expeditiously conduct the same. The Special Investigation Team shall review the concluded matters also in this regard to assess whether investigations have been thoroughly and properly conducted or not, and on coming to the conclusion that there is a need for further investigation shall proceed further in the matter. After conclusion of such investigations by the Special Investigation Team, the Respondents may disclose the names with regard to whom show cause notices have been issued and proceedings initiated.

80. Compliance reports shall be filed by Respondents, with respect of all the orders issued by this Court today. List for further directions in the week following the Independence Day, August 15, of 2011.

Ordered accordingly.

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Matters adjourned.

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KRISHAN KUMAR MALIK

v.

STATE OF HARYANA

(Criminal Appeal No. 1252 of 2011)

JULY 04, 2011

**[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]**

*Penal Code, 1860:*

*ss.376(2)(g) and 366 – Abduction of PW-9 (prosecutrix) from her aunt’s house and subsequent gang-rape – Eight accused – Solitary evidence of the prosecutrix – Six accused convicted under s.366 while accused-appellant and another accused convicted under both s.366 and s.376(2)(g) – Conviction of appellant – Justification – Held: Not justified – The evidence of the prosecutrix did not inspire confidence – She did not mention the name of appellant in the FIR, instead she described him as Gitta (Short statured) with beard, even though she was aware of his name – No explanation was offered by her in this regard – Initially the prosecutrix reported that there were in all 10 persons but later on she deposed that there were only eight persons and at some place she narrated that only 7 persons were there –During investigation, the prosecutrix was taken to the area, to point out the Kothi, where she was said to have been subjected to rape, but she failed to identify the said kothi, which fully belies her case – All through, the prosecutrix described appellant as gitta (short statured) man with beard, whereas he was in fact 5’ 6” tall and thus by no stretch of imagination, he could be called a gitta (short statured) man – Also, no spot maps were prepared either by the Naib Tehsildar or by the Investigating Officer – This was a lacuna on the part of the investigating agency and prosecution, the benefit of which must accrue to the Appellant – According to the prosecutrix, she was abducted from the house of her aunt where her husband and sons were also*

present, but the prosecution did not examine the aunt or her husband, their sons or any of their neighbours – No plausible and valid reasons were given for their non-examination – There were several significant variations in material facts in the s.164 statement of the prosecutrix, her s.161 statement (Cr.P.C.), FIR and deposition in Court – The mother and sister of the prosecutrix were not examined, even though their evidence would have been vital as contemplated under s.6 of the Evidence Act as they would have been Res Gestae witnesses – High Court, on the same set of evidence acquitted two accused, without assigning any cogent, valid or specific reasons for it whereas on the same very set of evidence, the Appellant was found guilty – Why the same benefit could not have been bestowed to the Appellant has not been dealt with specifically in the impugned judgment of the High Court – In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the Appellant – This lacuna on the part of the prosecution proves to be fatal and goes in favour of the Appellant – Appellant is a physically handicapped person to the extent of 55% as per Doctor's Report – This handicap would have been much better identification of the Appellant, which the prosecutrix did not mention at all – There were thus various shortcomings, irregularities and lacuna on the part of the prosecution – Appellant accordingly acquitted.

*Evidence Act, 1872 – s.6 – Res gestae witness – Held: The statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter.*

*Code of Criminal Procedure, 1973 – s.53A – Allegation of rape – Effect of incorporation of s.53A CrPC – Held: After incorporation of s.53A in CrPC w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test*

in such type of cases, facilitating the prosecution to prove its case against the accused – Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the accused – In the instant case, in the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the accused-appellant – This lacuna on the part of the prosecution goes in favour of the accused-appellant – Medical Jurisprudence.

**According to the prosecution, the prosecutrix PW-9 along with her younger sister 'R' had gone to meet their aunt 'B', and while they were talking to each other at the house of 'B', the accused persons came there and forcibly lifted prosecutrix and put her in a Maruti Van and then took her to a separate room in a vacant Kothi where accused 'KKM' and another accused 'K' subjected her to forcible sexual intercourse while the other accused fondled with her body parts. It was alleged that subsequently the prosecutrix managed to escape from the her aunt's house whereafter she narrated the entire incident to her mother and sister 'S' after which they went to the Police Station to lodge an FIR.**

**The trial court convicted all the eight accused under Section 366 and in addition to it, convicted accused 'KKM' and three other accused 'V', 'KT' and 'K', under Section 376(2)(g) of the IPC as well. On appeal, the High Court acquitted 'V' and 'KT'. The conviction of the other accused was maintained by the High Court. Thus out of the initial eight accused, six were held guilty under Section 366 IPC while 'KKM' and 'K' were held guilty under both Section 366 and Section 376(2)(g) IPC. The instant appeal was filed by only 'KKM'.**

The question which arose for consideration was whether there existed sufficient, cogent, valid, reliable and trustworthy evidence to hold the appellant 'KKM' guilty of committing the offences of abduction and rape on the prosecutrix or whether he had been falsely implicated.

Allowing the appeal, the Court

HELD:1.The prosecutrix P.W.9 had not mentioned the name of the Appellant in the FIR, instead she described him as Gitta (Short statured) with beard, even though she was aware of his name. No explanation has been offered by her in this regard. The number of people who were with the prosecutrix during the abduction and subsequent rape, has not been conclusively ascertained. The Prosecutrix admitted in her cross examination that she had come to know the names of all the accused during the course of occurrence, as they were taking each other's names. If that be so, then why she did not name the Appellant in the FIR is a million dollar question? These omissions speak volumes against her and her credibility stands shaken. It is also to be noted that initially she reported that there were in all 10 persons but later on she deposed that there were only eight persons and at some place she narrated that only 7 persons were there. When she had ample time to count the number of persons then why this wavering in the number of persons. These acts or omissions of Prosecutrix cannot be said to be minor contradictions as these are very relevant pieces of evidence. Because of such contradictions, an agile and active court can differentiate between genuine cases from the frivolous and concocted ones. The role of courts in such cases is to see, whether the evidence available before the court is enough and cogent to prove the accused guilty. [Paras 15, 16 and 17] [788-E-F; 789-A-D]

2. From the record it is established that PW-9 was

A member of a Musical Concert Party, which used to perform at various functions. Her photographs and video recording fully reflects it, yet she had the audacity to deny this fact. It is also pertinent to mention, if she had really met her mother and sister 'S' at the Bus Stop in Kurukshetra then, why her mother or her sister 'S' was not examined by the Prosecution. Thus story of meeting them at Kurukshetra Bus Stop is wholly unreliable and it appears to be concocted. [Para 18] [789-E-F]

3. The medical evidence shows that the Labia Majora and Labia Minora of PW-9 were healthy and had no marks of injury. Hymen had old healed tear and the same was not red hot or tender and did not bleed on touching. Vagina admitted two fingers easily. P.W.6(Dr.) further opined in her cross-examination that PW-9 might be habitual to sexual intercourse prior to the alleged incident. Her Medico Legal Report and medical evidence further reveal that she had not received any significant injuries on other parts of her body and injuries on her private parts were much less as mentioned by her in the FIR, except for the cheek bite. [Para 19] [789-G-H; 790-A]

4. PW-9 had travelled certain distance in the Maruti Van after her alleged abduction but she did not raise any alarm for help. This shows her conduct and behaviour during the whole process and render her evidence shaky and untrustworthy. The statement of the prosecutrix that in all 11 persons were there in the Maruti Van renders it further doubtful as it would be extremely difficult for 11 persons to be accommodated in the Maruti Van, the seating capacity of which is only 5. [Paras 20, 21] [790-B-C]

5. During the course of investigation, the prosecutrix was taken to the area, to point out the Kothi, where she was said to have been subjected to rape, but she failed to identify the said kothi. PW-9 was alleged to have been

abducted during broad day light, thus her failure to identify the kothi, fully belies her case. [Para 22] [790-D]

6. On the account of various serious contradictions in the statement of prosecutrix and her actions, it can be safely concluded that she was certainly not telling a gospel truth. The solitary evidence of the prosecutrix to bring home the charge of abduction and commission of rape by the appellant does not inspire confidence and is not of sterling quality. It is neither prudent nor safe to hold the appellant guilty of commission of the said offence. [Paras 23,24] [790-E-G]

7. No identification parade was conducted to identify the Appellant as the description given by prosecutrix about the details did not match with his appearance. All through, she has been describing the Appellant as gitta (short statured) man with beard, whereas a statement before the Bench has been made by the counsel for Appellant, after verification from the Appellant's wife, that he is 5' 6" tall. This fact has been independently corroborated by the jailor's report on this specific query. Even though a man having height of 5' 6" cannot be said to be tall but by no stretch of imagination, he could be called a gitta (short statured) man. PW-9 was already shown the Appellant and other accused at the Police Station, after they were arrested. Thus, her dock identification in Court had become meaningless. [Paras 25, 26] [790-H; 791-A-C]

8. No spot maps were prepared either by the Naib Tehsildar or by the Investigating Officer to show the size of the room where the incident allegedly happened. If the size of the room was so small then it could not have been possible to accommodate 7 persons and also allowing the Appellant to commit the offence of rape. This was a lacuna on the part of the investigating agency and prosecution, the benefit of which must accrue to the

A Appellant. PW-11, Inspector/ SHO had not gone to see the spot at all, which he admitted in his cross-examination. This certainly reflects and shows the casual manner in which the investigation was conducted. The statement of PW-13, Sub Inspector, further goes to show that not only the prosecutrix but even the I.Os failed to locate the site where offence of rape was said to have been committed. [Paras 27, 28, 29] [791-D-F, H; 792-A-C]

C 9. Though according to the prosecutrix, she was abducted from the house of her aunt 'B' where, apart from the above two ladies, the husband and sons of 'B' were also present, the prosecution did not examine either 'B' or her husband, their sons or any of their neighbours. No plausible and valid reasons have been given for their non-examination. [Para 30] [792-D-E]

D 10. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant variations in material facts in her S.164 statement, S.161 statement (Cr.P.C.), FIR and deposition in Court. Thus, it was necessary to get the evidence of the prosecutrix corroborated independently, which they could have done either by examination of her sister or 'B', who were present in the house at the time of her alleged abduction. Record shows that 'B' though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant. [Paras 31, 32] [792-F-H; 793-A-B]

H 11. As per the FIR lodged by the prosecutrix, she first

met her mother and sister at the bus stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Indian Evidence Act, 1872 as they would have been Res Gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. In the narrative of PW-9, it is amply clear that 'B' and 'R' were stated to be at the scene of alleged abduction. Even though 'B' may have later turned hostile, 'R' could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best person to lend support to the prosecution story invoking Section 6 of the Act. Section 6 of the Act has an exception to the general rule where-under, hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter. In the case on hand, PW-9 had met her mother and sister soon after the occurrence, thus, they could have been the best *res gestae* witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which prosecution had conducted the investigation then the trial. This lacuna has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond shadow of doubt, that it was Appellant who had committed the said offences. [Paras 33, 35, 36] [793-D-E; 794-C-F]

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A Black's Law Dictionary – referred to.

B 12. The High Court, on the same set of evidence acquitted two accused, without assigning any cogent, valid or specific reasons for it whereas on the same very set of evidence, the Appellant has been found guilty. Why the same benefit could not have been bestowed to the Appellant has not been dealt with specifically in the impugned judgment. The prosecution also adopted a peculiar mode in the case as only after the first statement of prosecutrix was recorded under Section 164 of the Cr.P.C. before Judicial Magistrate, First Class, Kurukshetra, her further statement under Section 161 of the Cr.P.C. was recorded. In fact, the procedure should have been otherwise. This further shows that right from the beginning the prosecution was doubtful on the trustworthiness of the prosecutrix herself. Precisely that was the reason that she was first bound down by her statement under Section 164 of the Cr.P.C. [Paras 37, 38, 39] [794-G-H; 795-A-B]

E 13. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the Appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the Appellant. Appellant is a physically handicapped person to the extent of 55% as per Doctor's Report, and this fact is not controverted by the prosecution. This much of handicap of any person would be easily noticeable. In fact, this would have been much better identification of the Appellant, which the prosecutrix did not mention at all. On account of the aforesaid shortcomings, irregularities and lacuna on the part of the prosecution, it will not be safe to convict the Appellant. [Paras 40, 41, 42] [795-C-F]

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14. Now, after the incorporation of Section 53(A) in the Criminal Procedure Code, w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006 (as in the instant case where the incident occurred in 1994), even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences. Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the Appellant. [Paras 44, 46] [796-C-F]

*Taylor's 2<sup>nd</sup> Edn. (1965) Principles and Practice of Medical Jurisprudence – referred to.*

15. Looking to the matter from all angles, this Court is of the considered opinion that the conviction of the Appellant cannot be upheld. The Appellant is acquitted of all the charges. [Para 47] [796-H; 797-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1252 of 2011.

From the Judgment & Order dated 27.03.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 338-SB of 1996.

Jaspal Singh, Sanjeev Anand, Yakesh Anand, Nimit Mathur, Vikram Anand for the Appellant.

Roopansh Purohit, Ramesh Kumar (for Kamal Mohan Gupta) for the Respondent.

The Judgment of the Court was delivered by

A DEEPAK VERMA, J. 1. Leave granted.

2. In all, eight accused were charged and prosecuted for commission of alleged offences under Section 366 and 376 (2) (g) of the Indian Penal Code (hereinafter shall be referred as 'I.P.C.') for abducting prosecutrix and then committing rape on her. Trial Court after appreciation of evidence on record found all the eight accused guilty for commission of offence punishable under Section 366 and in addition to it, found present Appellant (accused) Krishan Kumar Malik, Vijay Dua, Krishan Takkar and Krishan @ Kaka, guilty for commission of offences under Section 376 (2) (g) of the IPC. The said four accused were awarded a sentence of ten years R.I. and a fine of Rs. 2000/- each and in default of payment of such fine to undergo further R.I. for a period of one year. These four convicts were sentenced further to undergo R.I. for a period of five years for the offence punishable under Section 366 of the I.P.C and to pay a fine of Rs. 1,000/- each and in default of payment of fine to further undergo R.I. for six months. Two other accused were convicted solely under Section 366 of the IPC, and being ladies, leniency was shown and they were awarded a sentence of three years R.I. and a fine of Rs. 1000/- each, in default whereof, to undergo R.I. for six months each. The remaining two accused, Sandeep and Dheeraj were convicted under Section 366 of the IPC as well and the Trial Court sentenced them each to 5 years R.I., and a fine of Rs. 1000/- in default of payment of which a further period of 6 months R.I. would come into effect.

3. Feeling aggrieved by the judgment and order of conviction recorded by Additional Sessions Judge, Kurukshetra in Sessions Case No.52 of 1994 decided on 24.04.1996, Criminal Appeal No. 324-SB of 1996 (filed by two female accused) and Criminal Appeal No. 338-SB of 1996 was filed by remaining six convicted accused in the High Court of Punjab and Haryana at Chandigarh. Since both the appeals arose out of the same judgment, they were heard analogously and were disposed off by a common impugned judgment on 27.03.2009.

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4. Learned Single Judge after going through the records and appreciating the evidence available, partly allowed Criminal Appeal 338-SB of 1996, qua Vijay Dua and Krishan Kumar Takkar, and acquitted them of all the charges levelled against them. They were accordingly directed to be set at liberty. Thus out of the initial eight, only the remaining six accused were found to have committed offences under Section 366 and, in addition, the Appellant and Krishan @ Kaka were also found to have committed offences under Section 376 (2) (g) of the IPC, by the High Court.

5. The present appeal has been filed by Krishan Kumar Malik only, one of the accused. We were given to understand that on account of paucity of funds and various other reasons, other convicted accused have not preferred any appeal. However on enquiries being made from the office, it came to our notice that both the Special Leave Petition as well as the Review Petition filed by one of the two female accused Hardevi were dismissed by this Court. Thus, in the present appeal, we are only required to consider whether there existed sufficient, cogent, valid, reliable and trustworthy evidence to hold the Appellant guilty of the aforesaid offences. To come to the said conclusion, it is necessary to deal with the bare facts of the prosecution.

6. Thumbnail sketch of instant case is as follows: Prosecutrix, PW-9, was a resident of Saraswati Road, Pehowa and was said to be aged about 17 years at the time of the commission of the said offence by the accused. She had passed her 10<sup>th</sup> class. Her father had expired few years prior to the date of the incident. Prosecutrix has two younger sisters by the names, Sangeeta and Ritu. Ritu was said to be aged 8 years at the time of the incident. She alongwith her mother, Narayani Devi, and sister, Sangeeta, was running a small book stall from their house. As she was having vacation in her school, she alongwith her mother and sisters, after closing the book shop, came to Darra Khera in Thanesar to meet her maternal

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A aunt (mausi), about 15 days before the incident. On the date of incident, they were staying with their mausi.

7. On 23.06.1994, at about 1.00 p.m., prosecutrix went with Ritu, her Sister to Sector 13, Kurukshetra to meet her aunt Bimla, wife of Des Raj. While they were talking to each other at about 2.00 p.m., accused Hardevi (Bua), her daughter Heena, Heena's husband Sonu and Heena's brother Dheeraj accompanied by six boys, whose names were not known to the prosecutrix, came to the house of her aunt, Bimla. Thereafter, they forcibly lifted prosecutrix and put her in a blue Maruti Van. Even though, lot of hue and cry was raised by her as well as by her aunt, her aunt's husband, neighbours and others but no one came forward to help her. She was then taken to a vacant Kothi near a bridge. After reaching the said Kothi, she was taken to a separate room, and was subjected to alleged forcible sexual intercourse by a hefty man who was being called as Kaka and by another man, who was gitta (short statured), having a beard. They committed the alleged crime after removing her clothes. There were Six more persons sitting in the said room, while two of them committed rape on her one after the other as stated above. Remaining six were also allegedly fondling with her body parts. Some of them inserted finger in her anus and some of them gave tooth bite on her cheek. The family of her so called Bua and others were sitting in the adjoining room where the incident had taken place.

8. Thereafter, all of them took her forcibly in the same Maruti Van to Radaur to the in law's house of her Bua, Hardevi. All the six boys left her there. Thereafter, her Bua after cutting prosecutrix's hair gave her a beating with sandals. As soon as she got an opportunity, she escaped from the said house and boarded the bus by which she reached Kurukshetra. At Kurukshetra she met her mother Narayani and sister Sangeeta. She then narrated the whole incident to them after which they went to the Police Station to lodge an FIR. FIR was recorded at Police Station, Manesar on 24.06.1994 at 12.30 a.m. In the

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said FIR, the same story was mentioned by the prosecutrix stating that ten persons had participated in the commission of the said offence. But the name of the Appellant was not mentioned and instead he was described as Gitta (short statured) with a beard.

9. On the strength of the said FIR, investigation machinery was set into motion and prosecutrix was sent for medical examination. On 24.06.1994, at 3.30 a.m. Prosecutrix was examined by P.W-6, Dr. Sushma Saini, Medical Officer, LNJP Hospital at Kurukshetra. Her medical report and evidence would be discussed at a later stage. Statement of prosecutrix under Section 164 of the Criminal Procedure Code, (hereinafter shall be referred to as 'Cr.PC') was recorded by Shri Jagdeep Jain, RCS, Judicial Magistrate, 1<sup>st</sup> Class, Kurukshetra on 27.06.1994. Thereafter on 28.06.1994 her further statement was recorded under Section 161 of Cr.PC. A perusal of both the aforesaid statements clearly indicates that she has given the name of the present Appellant Krishan Kumar Malik as the perpetrator, describing him as short statured person.

10. The FIR lodged by prosecutrix was also sent to local Magistrate on 24.06.1994 at 2.20 a.m. During the course of investigation, all the accused were arrested. After completion of investigation, the accused were put on trial for commission of the said offence before Additional Sessions Judge, Kurukshetra. They pleaded not guilty and requested for a judicial trial.

11. In order to bring home the charges levelled against the accused, the prosecution had examined 14 witnesses on its behalf. Defence also examined 5 witnesses on their behalf. On appreciation of evidence available on record, the trial court convicted the Appellant and the remaining 7 accused mentioned hereinabove and awarded sentences to all of them.

12. Subsequently, as has been previously stated, in appeals preferred by all the 8 accused, before the High Court

A two of them namely Vijay Kumar and Krishan Kumar Takkar were acquitted and conviction of remaining accused was upheld. However, this appeal has been preferred by only Krishan Kumar Malik.

B 13. We have accordingly heard Mr. Jaspal Singh, learned Senior Advocate, ably assisted by Mr. Sanjeev Anand, learned counsel for the Appellant and Mr. Roopansh Purohit with Mr. Ramesh Kumar learned counsel for the Respondent State and have perused the record.

C 14. The basic and foremost question that arises for consideration in this appeal is whether the present Appellant had committed the offence of abduction and rape on the prosecutrix on 23.06.1994 or whether he has been falsely implicated.

D 15. With intention to proceed further and complete the journey to reach the destination, we would first like to consider the evidence of prosecutrix threadbare. She was examined as P.W.9. Admittedly she had not mentioned the name of the Appellant in the FIR lodged by her promptly, instead she described him as Gitta (Short statured) with beard, even though she was aware of his name. No explanation has been offered by her in this regard.

F 16. According to the prosecutrix, only two accused had sexual intercourse with her and other four were sitting in the room fondling with her body parts. It may be pertinent to point out that the number of people who were with the prosecutrix during the abduction and subsequent rape, has not been conclusively ascertained. This point has been explored in detail in the next paragraph. This appears to be quite improbable as there were admittedly other rooms, where they could have sat so as to allow the Appellant to do the act in privacy. It is not her case that due to shortage of time or accomodation this method was adopted.

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17. The Prosecutrix admitted in her cross examination that she had come to know the names of all the accused during the course of occurrence, as they were taking each other's names. If that be so, then why she did not name the Appellant in the FIR is a million dollar question? These omissions speak volumes against her and her credibility stands shaken. It is also to be noted that initially she reported that there were in all 10 persons but later on she deposed that there were only eight persons and at some place she narrated that only 7 persons were there. When she had ample time to count the number of persons then why this wavering in the number of persons. These acts or omissions of Prosecutrix cannot be said to be minor contradictions as these are very relevant pieces of evidence. Because of such contradictions, an agile and active court can differentiate between genuine cases from the frivolous and concocted ones. The role of courts in such cases is to see, whether the evidence available before the court is enough and cogent to prove the accused guilty.

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18. From the record it is established that she was member of a Musical Concert Party, which used to perform at various functions. Her photographs and video recording fully reflects it, yet she had the audacity to deny this fact. It is also pertinent to mention, if she had really met her mother Narayani and sister at the Bus Stop in Kurukshetra then, why Narayani or her sister Sangeeta was not examined by the Prosecution. Thus story of meeting them at Kurukshetra Bus Stop is wholly unreliable and it appears to be concocted.

19. Medical evidence shows that her Labia Majora and Labia Minora were healthy and had no marks of injury. Hymen had old healed tear and the same was not red hot or tender and did not bleed on touching. Vagina admitted two fingers easily. P.W.6 Dr. Sushma Saini further opined in her cross-examination that she might be habitual to sexual intercourse prior to 23.06.1994. Her Medico Legal Report and medical evidence further reveal that she had not received any significant

A injuries on other parts of her body and injuries on her private parts were much less as mentioned by her in the FIR, except for the cheek bite.

B 20. Admittedly, she had travelled certain distance in the Maruti Van after her alleged abduction but she did not raise any alarm for help. This shows her conduct and behaviour during the whole process and render her evidence shaky and untrustworthy.

C 21. The statement of the prosecutrix that in all 11 persons were there in the Maruti Van renders it further doubtful as it would be extremely difficult for 11 persons to be accommodated in the Maruti Van, the seating capacity of which is only 5.

D 22. During the course of investigation, the prosecutrix was taken to the area, to point out the Kothi, where she was said to have been subjected to rape, but she failed to identify the said kothi. It may be recalled that she was alleged to have been abducted during broad day light, thus her failure to identify the kothi, fully belies her case.

E 23. These are some of the salient features of the lop sided story of the prosecutrix, more so, when it has not been corroborated by any other evidence. On the account of various serious contradictions in the statement of prosecutrix and her actions, it could be safely concluded that she was certainly not telling a gospel truth.

F 24. Needless to say the solitary evidence of the prosecutrix to bring home the charge of abduction and commission of rape by the Appellant does not inspire confidence and is not of sterling quality. In our opinion, it is neither prudent nor safe to hold the Appellant guilty of commission of the said offence. We hold so, on account of many other circumstances, which are against the prosecution, narrated hereinbelow:

H 25. Admittedly, no identification parade was conducted to identify the Appellant as the description given by prosecutrix about the details did not match with his appearance. All

through, she has been describing the Appellant as gitta (short A  
statured) man with beard, whereas a statement before the  
Bench has been made by learned counsel for Appellant, after B  
verification from the Appellant's wife, that he is 5' 6" tall. This  
fact has been independently corroborated by the jailor's report  
on this specific query. Even though a man having height of 5'  
6" cannot be said be tall but by no stretch of imagination, he  
could be called a gitta (short statured) man.

26. Admittedly she was already shown the Appellant and C  
other accused at the Police Station, after they were arrested.  
Thus, her dock identification in Court had become  
meaningless.

27. No spot maps were prepared either by the Naib D  
Tehsildar or by the Investigating Officer to show the size of the  
room. If the size of the room was so small then it could not have  
been possible to accommodate 7 persons and also allowing  
the Appellant to commit the offence of rape. If the size of the  
room could have been verified, then the very genesis of  
commission of the offence by the Appellant would fall flat. This  
could have been possible to ascertain only if spot map had E  
been prepared. This was a lacuna on the part of the  
investigating agency and prosecution, the benefit of which must  
accrue to the Appellant.

28. PW-11, Sohan Singh, Inspector/ SHO had not gone F  
to see the spot at all. He has admitted this in the following  
manner in his cross-examination:-

"Since I have never visited house No. 919/13, no site G  
plan of that house was prepared. Because the prosecutrix  
herself has not stated the number of house. She was even  
unable to identify this house. I did not take the prosecutrix  
in house No. 919/13 inspite of the fact disclosed by  
accused on 27.6.1994."

This certainly reflects and shows the casual manner in H

A which the investigation was conducted.

29. PW-13, Sub Inspector Ramji Lal, has also admitted this  
fact by making the following statements:

B *"However, Sneh Lata was not in a position to locate the  
place of the incident. Thereafter, I took her to Radaur.  
Even in Radaur she was not able to locate the place  
where she was criminally assaulted."*

C This further goes to show that not only the prosecutrix but  
even the I.Os failed to locate the site where offence of rape was  
said to have been committed.

30. According to the prosecutrix, she was abducted from  
the house of Bimla Devi where, apart from the above two ladies,  
husband of Bimla Devi, Des Raj and sons of Des Raj and  
D Bimla Devi were present. They had raised hue and cry for help  
at the time of abduction. Many neighbours had come out of their  
houses but surprisingly enough prosecution has not examined  
either Bimla Devi or her husband, their sons or any of their  
neighbours. No plausible and valid reasons have been given  
E for their non-examination.

31. No doubt, it is true that to hold an accused guilty for  
commission of an offence of rape, the solitary evidence of  
prosecutrix is sufficient provided the same inspires confidence  
and appears to be absolutely trustworthy, unblemished and  
F should be of sterling quality. But, in the case in hand, the  
evidence of the prosecutrix, showing several lacunae, have  
already been projected hereinabove, would go to show that her  
evidence does not fall in that category and cannot be relied  
upon to hold the Appellant guilty of the said offences. Indeed  
G there are several significant variations in material facts in her  
S.164 statement, S.161 statement (Cr.P.C.), FIR and  
deposition in Court.

32. Thus, it was necessary to get her evidence H  
corroborated independently, which they could have done either

by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. Record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant.

33. As per the FIR lodged by the prosecutrix, she first met her mother Narayani and sister at the bus stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Indian Evidence Act, 1872 (for short "The Act") as they would have been Res Gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. There is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the Appellant and others upon her. In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best person to lend support to the prosecution story invoking Section 6 of the Act.

34. We shall now deal with Section 6 of the Act, which reads as under:

"6. Relevancy of facts forming part of same transaction – Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Black's Law Dictionary defines Res Gestae as follows:  
 (Latin: "things done") The events at issue, or other events

A contemporaneous with them In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception (such as present sense impression or excited utterance).

B The said evidence thus becomes relevant and admissible as res gestae under Section 6 of the Act.

C 35. Section 6 of the Act has an exception to the general rule where-under, hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter.

D 36. Admittedly, she had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which prosecution had conducted the investigation then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond shadow of doubt, that it was Appellant who had committed the said offences.

G 37. Learned Single Judge of the High Court, on the same set of evidence has acquitted two accused, without assigning any cogent, valid or specific reasons for it whereas on the same very set of evidence, the Appellant has been found guilty. Why the same benefit could not have been bestowed to the Appellant has not been dealt with specifically in the impugned judgment.

H 38. Prosecution also adopted a peculiar mode in the case as the first statement of prosecutrix was recorded under

Section 164 of the Cr.P.C. on 27.06.1994 before Judicial Magistrate, First Class, Kurukshetra. Only thereafter on 28.06.2004, her further statement under Section 161 of the Cr.P.C. was recorded.

39. In fact, the procedure should have been otherwise. This further shows that right from the beginning the prosecution was doubtful on the trustworthiness of the prosecutrix herself. Precisely that was the reason that she was first bound down by her statement under Section 164 of the Cr.P.C.

40. The Appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the Appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the Appellant.

41. It is pertinent to mention here that Appellant is a physically handicapped person to the extent of 55% as per Doctor's Report, and this fact is not controverted by the prosecution. This much of handicap of any person would be easily noticeable, which Appellant failed to mention at all. In fact, this would have been much better identification of the Appellant, which the prosecutrix did not mention at all.

42. On account of aforesaid shortcomings, irregularities and lacuna on the part of the prosecution, in our considered opinion, it will not be safe to convict the Appellant.

43. With regard to the matching of the semen, we find it from Taylor's 2<sup>nd</sup> Edn. (1965) Principles and Practice of Medical Jurisprudence as under:-

"Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should

A always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months."

44. Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the Appellant.

45. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences.

46. We have also gone through the orders of dismissal passed by this Court in CrI.M.P. No. 9646 on 15.06.2009 as also of the Review Petition dated 05.11.2009 filed by Smt. Hardevi. Admittedly, the said orders passed in the SLP and Review Petition by this Court did not assign any reasons for the dismissal, thus it would not be proper and safe for us to place reliance thereon.

47. Thus, looking to the matter from all angles, we are of the considered opinion that the conviction of the Appellant

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cannot be upheld.

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48. Thus, appeal is hereby allowed. Judgment and order of conviction as recorded by the trial court and confirmed by learned Single Judge of the High Court qua the appellant are hereby set aside and quashed. The Appellant is acquitted of all the charges.

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49. He be set at liberty forthwith if not required in any other criminal case.

B.B.B.

Appeal allowed.

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COMMISSIONER OF CUSTOMS, CALCUTTA

v.

G. C. JAIN AND ANR.

(Civil Appeal Nos.6334-35 of 2003)

JULY 4, 2011

B

[DR. MUKUNDAKAM SHARMA AND ANIL

R. DAVE, JJ.]

C

*Customs Act, 1962:*

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*Classification – Adhesives – Demand of duty on import of Butyl Acrylate Monomer(BAM) – Invocation of extended period of limitation – Respondents imported consignments of BAM and cleared them as adhesives against advanced licenses without payment of duty – Commissioner held that BAM was not adhesive and the benefit of the advance licences was not available to the respondents and accordingly confirmed the demand of duty by invoking the extended and longer period of limitation on the ground that respondents had mis-declared the product in question – Respondents filed appeal before the Tribunal which was allowed – Whether BAM, which attained adhesive properties on polymerisation, could be said to be an adhesive for the purpose of allowing duty free clearances against advance license issued under the DEEC scheme – Held: The word “adhesive” was mentioned in the ex-Bond B/E inasmuch as the appellant sought release of goods under advance licences allowing adhesive as duty free import – The goods were chemically tested in the Customs House and were cleared after satisfaction of the proper officer that BAM is an adhesive –*

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*'aqueous emulsion dispersion' which is used in the 'Leather Industry' as a 'Coating or Binder' to be an Adhesive – No reason why BAM which on aqueous dispersion can be used as a binder in 'Leather Industry', should be denied the benefit of considering the same as adhesives – When the licences produced entitled the Respondents to clear the ex-bond goods free of duty, there were no reasons for them to have mis-declared the values since the goods were duty free – No allegation that the licences produced will not cover the quantity of values, even after the alleged loading of values as declared – Therefore, decision of the Tribunal upheld – Also the demand is hit by the bar of limitation inasmuch as the appellant had cleared the goods in question after declaring the same in the bills of entries and giving correct classification of the same – Availing of benefit of a notification, which the Revenue subsequently formed an opinion was not available, cannot lead to the charge of mis-declaration or mis-statement, etc. and even if an importer has wrongly claimed his benefit of the exemption, it is for the department to find out the correct legal position and to allow or disallow the same – In the instant case the appellant had declared the goods as Butyl Acrylate Monomer with correct classification of the same and the word 'adhesive' was added in the ex-bond bill as per the appellant's understanding that BAM is an adhesive – In these circumstances it was for the Revenue to check whether BAM was covered by the expression adhesive or not and if even after drawing of samples they allowed the clearances to be effective as an adhesive, the appellant cannot be held responsible for the same and subsequently, if the Revenue has changed their opinion as regards the adhesive character of BAM, extended period cannot be invoked against them – As such the demand of duty in respect of the consignments is also barred by limitation.*

*Words and Phrases – Interpretation of – Held: Words and expressions, unless defined in the statute have to be construed in the sense in which persons dealing with them*

A *understand i.e. as per trade and understanding and usage.*

**The Respondents imported consignments of Butyl Acrylate Monomer (BAM) and cleared them as adhesives against advanced licenses without payment of duty. The appellant-Revenue issued show cause notice to the respondents proposing confirmation of demand of duty, as also confiscation of the imported product and imposition of personal penalties alleging that the product imported by the respondents was defined organic chemical and was not an adhesive and exemption had been wrongly claimed by the respondents.**

**During the adjudication proceedings the Respondents took a specific stand that the BAM in question is a liquid which becomes adhesive on polymerisation upon coming into contact with light and heat; that to prevent spontaneous polymerisation BAM is normally stabilised by some inhibitor and that since BAM polymerises readily without much requirement of processing and as after polymerisation the same shows adhesive properties it should be treated as adhesive only. They also placed reliance on the manufacturer's printed literature and contended that it is clear that BAM is used as an adhesive. The Respondents also pleaded their case on the point of time-bar by submitting that they had declared the goods in the bill of entry correctly and the clearances were given by the customs authorities after drawing samples and satisfying themselves that the product was an adhesive and squarely covered by the advance licences. As such they submitted that the longer period of limitation could not be invoked against them inasmuch as there was no mis-declaration on the part of the Respondents. However, the Commissioner held that BAM was not adhesive and the benefit of the advance licences was not available to the respondents and accordingly confirmed the demand of duty by invoking**

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the extended and longer period of limitation on the ground that the Respondents had mis-declared the product in question. Aggrieved, the Respondents filed appeal before the Appellate Tribunal which was allowed.

In the instant appeals, the question which arose for consideration was whether BAM can be said to be an adhesive for the purpose of allowing the duty free clearances against advance license issued under the DEEC scheme.

Dismissing the appeals, the Court

HELD:1. Goods in packed condition are of no use. It can only be used when it is opened and put to use. In the instant case, it is admitted in the Show Cause that end-use of BAM is adhesive in leather industry. However, a distinction is sought to be made in the present case that until monomer becomes polymer, it is not adhesive. It is alleged that in Monomer form, BAM is not adhesive. By putting such an interpretation, an attempt has been made by the appellant to divest BAM from the coverage of adhesive. However, it is well settled that the words and expressions, unless defined in the statute have to be construed in the sense in which persons dealing with them understand i.e. as per trade and understanding and usage. The word "adhesive" was mentioned in the ex-Bond B/E inasmuch as the appellant sought release of goods under advance licences allowing adhesive as duty free import. In any event goods were chemically tested in the Customs House and goods were cleared after satisfaction of the proper officer that BAM is an adhesive. The department was very much conscious that goods were claimed as an adhesive and they were so satisfied after examination of the goods and deliberation made in this regard. The Customs authorities cleared the goods with consciousness and knowing fully well that BAM is an adhesive. There is no question of suppression of any

A fact before customs authorities because no fact was concealed. Each of the consignments were tested and chemically examined. [Paras 14, 15, 16] [810-C-H; 811-A-B]

B 2. Also, acceptance of advance licences for clearance of BAM as adhesive stands absolute and it cannot be repudiated as licences have been debited by customs authorities. Assessment orders already made cannot be disturbed in the facts and circumstances of the case. [Para 17] [811-E]

C 3. It is undisputed that the imported chemical is in its Monomer form and becomes an adhesive on self-polymerisation. It is the case of both the sides that the Monomer form becomes polymer form of the chemical suited to be used as adhesives, when it comes in contact with nature. It is only that in some cases where bulk polymerisation is required, extra heat i.e. more than the heat provided by the nature is required to increase the process of polymerisation, as has been opined in the opinions of experts brought on record by the Revenue. Also, in the technical literature given by the manufacturer, use of the product has been shown as adhesives. Even though the Revenue has disputed that the said literature produced by the Respondents is not correct and is manipulated inasmuch as the same is different than the manufacturer of identical product in India, however, no concrete evidence to that effect has been led by the Revenue. The Tribunal has given a finding that the literature produced by the Respondents is of the Korean manufacturer and is given in English language as well as Korean language and there is no reason to doubt the veracity of the said literature. Inasmuch, as the manufacturers themselves have shown the use of Butyl Acrylate as adhesive as well as textile binders, there are no reasons to take a different view. [Paras 18, 19]

4. Under the DEEC scheme, the word 'adhesives' has not been defined. Under the exemption notification, the word 'materials' has been defined from which it is clear that the 'materials' permissible, are not only raw materials but are also intermediates for such raw materials, which are required for manufacture of export products specified in the licences, which in this cases are 'Leather Industry' products. The term used as 'material' required for manufacture of export products would encompass such entities also which are not only directly used or usable as such in the manufacturing processes but also which could be used with same processing. [Para 20] [812-F-H; 813-A-B]

5. It is apparent and can be concluded that BAM, which is an Acrylate Ester, can be polymerised by using water to prepare the 'aqueous emulsion dispersion' which is used in the 'Leather Industry' as a 'Coating or Binder' to be an Adhesive. The aqueous preparation of this emulsion would not require any elaborate use of technology. There is no reason why BAM which on aqueous dispersion, even if classified under 2916.12, can be used as a binder in 'Leather Industry', should be denied the benefit of considering the same as adhesives. [Para 21] [813-E-F]

*Pioneer Embroideries Ltd v. Commissioner of Customs, Mumbai 2004 (178) E.L.T 933 (tri.) – held inapplicable.*

*Encyclopaedia of Chemical Technology, 4th Edition, published by John Wiley and Sons – referred to.*

6. When it is found that the licences produced entitle the Respondent to clear the ex-bond goods free of duty, there are no reasons for them to have mis-declared the values since the goods are duty free. There appears no incentive to do so. There is no allegation that the licences produced will not cover the quantity of values, even after

A the alleged loading of values as declared. Therefore, the decision of the Tribunal is upheld. [Para 23] [814-A-B]

7. Also the demand is hit by the bar of limitation inasmuch as the appellant had cleared the goods in question after declaring the same in the bills of entries and giving correct classification of the same. Availing of benefit of a notification, which the Revenue subsequently formed an opinion was not available, cannot lead to the charge of mis-declaration or mis-statement, etc. and even if an importer has wrongly claimed his benefit of the exemption, it is for the department to find out the correct legal position and to allow or disallow the same. In the instant case the appellant had declared the goods as Butyl Acrylate Monomer with correct classification of the same and the word 'adhesive' was added in the ex-bond bill as per the appellant's understanding that BAM is an adhesive. In these circumstances it was for the Revenue to check whether BAM was covered by the expression adhesive or not and if even after drawing of samples they have allowed the clearances to be effective as an adhesives appellant cannot be held responsible for the same and subsequently, if the Revenue has changed their opinion as regards the adhesive character of BAM, extended period cannot be invoked against them. As such the demand of duty in respect of the consignments is also barred by limitation. [Para 24] [814-C-G]

**Case Law Reference:**

**2004 (178) E.L.T 933 (tri.) held inapplicable Para 22**

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6334-6335 of 2003.

H From the Judgment & Order dated 17.12.2002 of the Customs Excise and Gold (Control) Appellate Tribunal, at Kolkata, in Appeal No. CRV-75 & 74 of 1999.

WITH

C.A. No. 1757 of 2004.

Arijit Prasad, M. Khairati, B.K. Prasad, Anil Katiyar for the Appellant.

S.K. Bagaria, V. Shekher, Pijush K. Roy, G. Ramakrishna Prasad, Sudhir Kumar Mehta, Puneet Jain, Trishna Mohan, Pratibha Jain for the Respondents.

**DR. MUKUNDAKAM SHARMA, J.** 1. These appeals are directed against the judgment and order dated 17.02.2002 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, Eastern Bench, Kolkata in appeal Nos. CRV-75 and 74 of 1999, whereby the Tribunal had allowed the appeal of the Respondents and set aside the order passed by the Commissioner of Customs on the ground that the Butyl Acrylate Monomer i.e. the chemical imported by the Respondents can safely be held to be an adhesive and was covered by the advance licences produces by the Respondents.

2. As per the facts on record the Respondents, M/s. Sanghvi Overseas imported 14 consignments of Butyl Acrylate Monomer (hereinafter referred to as 'BAM') between April and December, 1997 and cleared the same against advanced licenses by availing the benefit of customs Notification Nos. 203/92 and 79/95, without payment of duty. Another consignment of BAM was cleared by the Respondents under bill of entry dated 06.03.1998 and thereafter one more consignment was imported. The last two consignments were warehoused and not cleared by the authorities.

3. In all these consignments of BAM, the Respondents declared the product as Butyl Acrylate Monomer and claimed the classification under heading 2916.12. The assessments were sought by the Respondents as adhesives under the DEEC license.

4. Enquiries were initiated by the Revenue against the

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A Respondents on the belief that the product imported by the Respondents was defined organic chemical and was not an adhesive. The Revenue/appellant took a stand that the advanced licences covering imports of adhesives submitted by the Respondents for clearance of the consignments under B DEEC scheme, availing the benefit of customs notification were not applicable in the matter of clearance of the goods in question inasmuch as the said licences were for import of adhesives and the product imported was not adhesive. Accordingly, searches were conducted in the offices of the Respondents and their statements were recorded. The customs clearing agent was also interrogated and efforts were made to find out as to whether the product in question was used as a bonding agent or not. Shri R.K. Jain, in his statement, recorded during such investigations, deposed that the product was used as a bonding agent and on polymerisation the same become an adhesive.

5. The Revenue also drew the samples and sent it for testing. The Revenue also sought the opinion of the various experts as also the persons of the trade dealing in identical items. On the basis of the material collected during the investigation the Revenue formed an opinion that the BAM was not adhesive but was one of the raw materials for adhesive formations. As such Revenue was of the opinion that the exemption had been wrongly claimed by the Respondents. In addition, the Revenue also disputed the value of the goods in question.

6. Accordingly, on the above basis the Respondents were served with a show cause notice proposing confirmation of demand of duty, as also confiscation of the imported product and imposition of personal penalties upon the various persons.

7. During the adjudication proceedings the Respondents took a specific stand that the BAM in question is a liquid which becomes adhesive on polymerisation upon coming into contact with light and heat. It was argued on behalf of the Respondents

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A that to prevent spontaneous polymerisation BAM is normally  
stabilised by some inhibitor and that since BAM polymerises  
readily without much requirement of processing and as after  
polymerisation the same shows adhesive properties it should  
be treated as adhesive only. They also placed reliance on the  
manufacturer's printed literature and contended that it is clear  
B that BAM is used as an adhesive. The Respondents clarified  
that BAM does not possess any adhesive properties in the  
Monomer form, but the same is an adhesive in the polymer  
form, which process is undertaken naturally when the Monomer  
form comes in contact with heat and light. The Respondents  
C pleaded that it is not feasible and practicable to import the item  
in polymer form as after polymerisation, the product  
immediately becomes an adhesive which does not has much  
shelf-life. The Respondents also pleaded their case on the point  
of time-bar by submitting that they had declared the goods in  
the bill of entry correctly and the clearances were given by the  
D customs authorities after drawing samples and satisfying  
themselves that the product was an adhesive and squarely  
covered by the advance licences. Their advance licences were  
E accordingly debited by the customs authorities. As such they  
submitted that the longer period of limitation could not be  
invoked against them inasmuch as there was no mis-  
declaration on the part of the Respondents.

8. The said show cause notice culminated into the  
impugned order passed by the Commissioner, whereby, it was  
F held that BAM was not adhesive and the benefit of the advance  
licences and the notification in question was not available to  
the importer. Accordingly, the demand of duty was confirmed  
by invoking the extended and longer period of limitation in  
respect of 14 bills of entries on the ground that the Respondents  
G had mis-declared the product in question.

9. It was also held by the Commissioner that the goods  
are liable to confiscation, but inasmuch as the same were not  
available, no redemption fine had been imposed by him. Penalty  
of equivalent amount was imposed upon M/s. Sanghvi  
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A Overseas. The goods covered by the bills of entry dated  
08.05.1997 and 19.03.1998 which were under seizure by the  
Revenue were confiscated with an option to the Respondents  
to redeem the same on payment of redemption fine of Rs.  
6,00,000/- (Rupees six lakhs). Further penalty of Rs. 3,00,000/  
B - (Rupees three lakhs) was imposed upon M/s. Sanghvi  
Overseas in relation to the importation of the goods under the  
above two bills of entries. Penalty of Rs. 65,00,000/- (Rupees  
sixty-five lakhs) was imposed on the second Respondent  
Shri R.K. Jain on the findings that he was the main person  
C behind the imports which led to evasion of huge amount of  
customs duty and was an adviser to the importers. It was also  
observed that the evidence on record showed his active and  
financial involvement in the matter.

10. Aggrieved by the abovementioned order, the  
D Respondents filed an appeal before the Central Excise Gold  
(Appellate) Tribunal, Kolkata submitting that the BAM in  
question can be classified as an adhesive and the  
Respondents had rightly claimed clearance of the goods on the  
basis of the advanced licences which allowed adhesive to be  
E cleared duty free. It was pointed out that the Revenue also drew  
samples before clearance of the goods and it is only thereafter  
that the clearances were permitted by them. The Tribunal by its  
order dated 17.02.2003 allowed the appeals of the  
Respondents stating that BAM can be rightly classified as an  
F adhesive and therefore, the Respondents had rightfully claimed  
the clearance of goods on the basis of advanced licences.  
Hence, the present Special Leave Petitions have been  
preferred by the Appellant.

11. The learned counsel appearing for the Appellant  
G submitted before us that the Tribunal made a fundamental error  
in ignoring the fact that the BAM was required to undergo a  
further industrial process to become an adhesive, and thus the  
imported item under no circumstances could be classified as  
an adhesive. The contention is that the imported chemical is a  
H Monomer organic chemical, which is one of the raw materials

used in the manufacture of adhesives, the opinion which has been substantiated by various experts from the field of Industry. The appellant has alleged that the imported material i.e. BAM (inhibited), is a colourless liquid, lighter than water, monomer organic chemical having wide use in paint, textile and leather industry as raw material and can in no way be compared with other ployurathene adhesives of well known brands. It was further contended that in the product literature submitted before the Tribunal, the portion specifying that BAM was used as raw material for Adhesive Industry was erased by the Respondent Importers. He also refuted the Respondents' claim that BAM in the Monomer form on coming in mere contact with heat and light undergoes self-polymerization and *au contraire* it was submitted that it requires a specific industrial process.

12. The next contention was that the Tribunal also failed to take into account that the difference in value between acrylates and products obtained after polymerization is one and a half times to three times which means polymerization involves complicated technical and industrial processes. It has been contended that various experts in the fields from industry as well as renowned institutions have categorically opined that BAM is not an adhesive. It was also argued that taking into account the product literature of M/s LG Chemicals Ltd, a manufacturer of the imported product, which was part of the appeal petition, revealed that BAM was a raw material for adhesive. It was claimed that BAM in inhibited state is quite different from product obtained after emulsion polymerisation through industrial process. Thus the form in which the goods were imported could not be termed as an adhesive.

13. The learned counsel for the Respondents refuted all the contentions raised by the Appellant and submitted that 'BAM' is used as adhesive in leather industry and that during transportation and storage it is kept in a manner which would restrict it from self polymerisation. It was thus submitted that when the chemical BAM is packed, an inhibitor is used to keep the goods in storage condition and that as and when the

A container is opened and the chemical comes into contact with air, light and heat at room temperature, the BAM starts self polymerization by itself and *suo moto* and gets the properties of adhesive. He also pointed out the fact that there is no dispute with regard to the fact that the BAM when polymerised becomes adhesive.

14. Dispute in short is whether BAM can be said to be an adhesive for the purpose of allowing the duty free clearances against advance license issued under the DEEC scheme. Goods in packed condition are of no use. It can only be used when it is opened and put to use. We are, therefore, to consider as to whether for all practical purposes BAM is an adhesive. It is admitted in the Show Cause that end-use of BAM is adhesive in leather industry. However, a distinction is sought to be made in the present case that until monomer becomes polymer, it is not adhesive. It is alleged that in Monomer form, BAM is not adhesive. By putting such an interpretation, an attempt has been made by the appellant to divest BAM from the coverage of adhesive. The issue is whether the requirement of opening the container, allowing BAM to contact with air, light and heat and even putting a catalyst could detract from its being an adhesive.

15. Admittedly, the expression "adhesive" is not defined in the Act. It is now well settled that the words and expressions, unless defined in the statute have to be construed in the sense in which persons dealing with them understand i.e. as per trade and understanding and usage.

16. The word "adhesive" was mentioned in the ex-Bond B/E inasmuch as the appellant sought release of goods under advance licences allowing adhesive as duty free import. In any event goods were chemically tested in the Customs House and goods were cleared after satisfaction of the proper officer that BAM is an adhesive. The department was very much conscious that goods were claimed as an adhesive and they were so satisfied after examination of the goods and deliberation made

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in this regard. Therefore, the 14 consignments referred to in para 4 of the Show Cause Notice were cleared on the basis of advance licence under Customs Notification No. 203/92-Cus. or 79/95-Cus. Customs authorities cleared the goods with consciousness and knowing fully well that BAM is an adhesive. There is no question of suppression of any fact before customs authorities because no fact was concealed. Each of the consignments were tested and chemically examined.

17. Therefore, the counsel appearing for the Respondents submitted before us that the allegation made by the customs authorities in the Show Cause Notice cannot be allowed to stand on two counts. Firstly, the goods imported were very much covered by the licence and secondly, assuming, though denying that the goods were not covered under the licence even then customs authorities cannot change their stand inasmuch as after debiting of the licence, the position becomes irreversible. Licence cannot be restored to its original position. The valid order of clearances made under Section 47 of the Customs Act cannot be disturbed because of the irreversible situation. Acceptance of advance licences for clearance of BAM as adhesive stands absolute and it cannot be repudiated as licences have been debited by customs authorities. Assessment orders already made cannot be disturbed in the facts and circumstances of the case. These are important factors and areas which are required to be kept in mind while deciding the issue falling for our consideration.

18. So the undisputed picture which emerges is that the imported chemical is in its Monomer form and becomes an adhesive on self-polymerisation. The Respondents' case is that the self-polymerisation, which is nothing but increase in molecular weight takes place on the chemical coming out of the container. The question is that whether the solution in its Monomer form can be considered as an adhesive or not. According to the Respondents it is not practical and feasible to import the product in its polymerised form and the same is always stored in its Monomer form. In fact inhibitors are added

A to avoid self-polymerisation of the product during storage. It is the case of both the sides that the Monomer form becomes polymer form of the chemical suited to be used as adhesives, when it comes in contact with nature. It is only that in some cases where bulk polymerisation is required, extra heat i.e. more than the heat provided by the nature is required to increase the process of polymerisation, as has been opined in the opinions of experts brought on record by the Revenue. As such the Tribunal was of the view that the Butyl Acrylate Monomer, which undergoes self-polymerisation on coming in contact with the atmosphere, can be safely held to be an adhesive and covered by the various advance licences in question.

19. It is also noted that in the technical literature given by the manufacturer, use of the product has been shown as adhesives. Even though the Revenue has disputed that the said literature produced by the Respondents is not correct and is manipulated inasmuch as the same is different than the manufacturer of identical product in India, however, no concrete evidence to that effect has been led by the Revenue. The Tribunal has given a finding that the literature produced by the Respondents is of the Korean manufacturer and is given in English language as well as Korean language and there is no reason to doubt the veracity of the said literature. Inasmuch, as the manufacturers themselves have shown the use of Butyl Acrylate as adhesive as well as textile binders, we see no reasons to take a different view.

20. Under the DEEC scheme, the word 'adhesives' has not been defined. Under exemption notification, the word 'materials' has been defined as under: -

G "(a) raw materials, components, intermediates, consumables, computer software and parts required for manufacture of export products"

H Therefore 'materials' permissible, are not only raw materials but are also intermediates for such raw materials, which are

required for manufacture of export products specified in the licences, which in this cases are 'Leather Industry' products. The term used as 'material' required for manufacture of export products would encompass such entities also which are not only directly used or usable as such in the manufacturing processes but also which could be used with same processing.

21. From the Encyclopaedia of Chemical Technology 4th Edition published by John Wiley and Sons, it is found for Acrylate Esters as in the present case it prescribes :-

*"Emulsion Polymerization: Emulsion polymerization is the most important industrial method for the preparation of acrylic polymers. The principal markets for aqueous dispersion polymers made by emulsion polymerization of acrylic esters are the print, paper, adhesives, textile, floor polish, and leather industries, where they are used principally as coatings or binders. Copolymers of either ethyl acrylate or butyl acrylate with methyl methacrylate are most common. (Vol. 1, page 328)"*

From this authoritative Book, it is apparent and can be concluded, that BAM, which is an Acrylate Ester, can be polymerised by using water to prepare the 'aqueous emulsion dispersion' which is used in the 'Leather Industry' as a 'Coating or Binder' to be an Adhesive. The aqueous preparation of this emulsion would not require any elaborate use of technology. There is no reason why BAM which on aqueous dispersion, even if classified under 2916.12, can be used as a binder in 'Leather Industry' as per this authoritative Encyclopedia on Technology, should be denied the benefit of considering the same as adhesives.

22. The appellant has placed reliance on the judgment passed by the CEGAT, Mumbai in the matter of *Pioneer Embroideries Ltd v. commissioner of Customs, Mumbai* 2004 (178) E.L.T 933 (tri.). We have gone through the said judgment, however, the same is not applicable to the present case both on facts and law.

23. When it is found that the licences produced entitle the Respondent to clear the ex-bond goods free of duty, there are no reasons for them to have mis-declared the values since the goods are duty free. There appears no incentive to do so. There is no allegation that the licences produced will not cover the quantity of values, even after the alleged loading of values as declared. Therefore, this court upholds the decision of the Tribunal.

24. It is also observed that the demand is hit by the bar of limitation inasmuch as the appellant had cleared the goods in question after declaring the same in the bills of entries and giving correct classification of the same. Availing of benefit of a notification, which the Revenue subsequently formed an opinion was not available, cannot lead to the charge of mis-declaration or mis-statement, etc. and even if an importer has wrongly claimed his benefit of the exemption, it is for the department to find out the correct legal position and to allow or disallow the same. In the instant case the appellant had declared the goods as Butyl Acrylate Monomer with correct classification of the same and the word 'adhesive' was added in the ex-bond bill as per the appellant's understanding that BAM is an adhesive. In these circumstances it was for the Revenue to check whether BAM was covered by the expression adhesive or not and if even after drawing of samples they have allowed the clearances to be effective as an adhesives appellant cannot be held responsible for the same and subsequently, if the Revenue has changed their opinion as regards the adhesive character of BAM, extended period cannot be invoked against them. As such we are of the view that the demand of duty in respect of 14 consignments is also barred by limitation.

25. Therefore, the present appeals are dismissed but without any orders as to costs.

B.B.B. Appeals dismissed.

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JOSEPH SALVARAJ A.  
v.  
STATE OF GUJARAT & ORS.  
(Criminal Appeal No. 1251 of 2011)

JULY 4, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

*Code of Criminal Procedure, 1973 – s.482 – FIR – Quashing of – FIR against appellant complaining that he had committed offences under ss.406, 420 and 506(1) of IPC – Complainant stated that he had got in touch with the appellant so as to extend the benefit of Appellant’s Channel “God TV” to his other brethren residing at Ahmedabad – For the said purposes, he had met the owner of Siti Cable in Ahmedabad and negotiated a settlement for Rs.10 lacs on behalf of the Appellant’s Company as the fee to be paid to Siti cable by Appellant for telecast of channel “God TV” in Ahmedabad – Grievance of the Complainant that despite the telecast of “God TV”, the Appellant, as promised, failed to pay a sum of Rs. 10 lacs to the owners of Siti cables – Held: The matter appears to be purely civil in nature – There appears to be no cheating or a dishonest inducement for the delivery of property or breach of trust by the appellant – A purely civil dispute, is sought to be given a colour of a criminal offence to wreak vengeance against the Appellant – The case in hand does not fall in that category where cognizance of the offence could have been taken by the court, at least after having gone through the FIR, which discloses only a civil dispute – The Appellant cannot be allowed to go through the rigmarole of a criminal prosecution for long number of years, even when admittedly a civil suit has already been filed against the Appellant and Complainant and is still subjudice – Also the complainant has not been able to show that at any material point of time there was any contract, much less any privity of*

A *contract between the Appellant and Complainant – There was no cause of action to even lodge an FIR against the Appellant as neither the Complainant had to receive the money nor he was in any way instrumental to telecast “God TV” in the central areas of Ahmedabad – He appears to be totally a stranger to the same – Appellant’s prosecution would only lead to his harassment and humiliation, which cannot be permitted in accordance with the principles of law – The prosecution of the Appellant for commission of the alleged offences would be clear abuse of the process of law – The FIR under the circumstances deserves to be quashed at the threshold and all criminal proceedings emanating therefrom also stand quashed – Penal Code, 1860 – ss.406, 420 and 506(1).*

**Respondent No.4-complainant was working in Ahmedabad. He went to Hyderabad at his wife’s place where he had the occasion to watch the appellant’s religious channel “God TV”. On his return to Ahmedabad, he approached cable operator ‘L’, owner of Siti Cable and requested him to have this channel also in the bouquet of channels offered by him. He also contacted the appellant’s company directly, requesting it to allow broadcasting of “God TV” in certain areas of Ahmedabad through Siti Cable, Ahmedabad. Eventually, with the aid and enterprise of ‘L’, they were able to commence broadcasting of “God TV” in the eastern zone of Ahmedabad. According to respondent no.4, ‘L’ (and 2 other cable operators) had agreed to broadcast, “God TV” at Ahmedabad, after the appellant had agreed to pay a sum of Rs. 10 lacs to Mr. ‘L’. However, there was no written agreement between Mr. ‘L’ and the Appellant. Furthermore, there was no Agreement between complainant and either of the aforesaid two parties. According to him, on his own, he had acted only as a mediator. From time to time, respondent no.4 kept reminding the appellant about payment of the amount of Rs. 10 lacs to ‘L’, but the said amount as agreed to**

between 'L' and the appellant remained unpaid. The respondent no.4 ultimately sent a notice to which the Appellant replied, denying all accusations and liabilities.

The Respondent No.4 thereafter lodged an FIR against the appellant complaining therein that the appellant had committed offences under Section 406, 420 and 506(1) of IPC. After completion of the investigation, as per the said FIR, the appellant was arrested for commission of the said offences. The appellant filed an application under Section 437 of CrPC for grant of bail to him. The same was granted to him subject to conditions. The appellant, thereafter, filed petition under Section 482 of CrPC in the High Court, with a prayer for quashing of the FIR and to stay further investigation in the case. The said application came to be considered before the Single Judge. By that time, charge sheet was already filed before the Competent Criminal Court. Thus, the Single Judge, was of the opinion that it was not a fit case to be entertained and refused to hear the petition on merits, even though the appellant was given liberty to file an application for his discharge before the Trial Court. Thus the Appellant's petition was dismissed and interim order granted in his favour was vacated. The Order passed by the Single Judge of the High Court in Appellant's Criminal Application was challenged in the instant appeal.

The appellant contended that even after going through the FIR, no case under Section 406 or 420 of the IPC was made out; that the FIR was filed by a person who was indisputably not a contracting party and at best by his own admission, had acted only as a mediator, and had no cause of action to file the complaint; that the complainant failed to produce any evidence worth the name in support of his allegation which was legally acceptable that the contract was concluded, whereunder the appellant was obliged to pay a sum of Rs. 10 lacs to 'L'.

Allowing the appeal, the Court

HELD:1. In the instant case, bare perusal of the FIR lodged by the complainant, would indicate that he had got in touch with the appellant so as to extend the benefit of Appellant's Channel "God TV" to his other brethren residing at Ahmedabad. For the said purposes, he had met the owner of Siti Cable in Ahmedabad and negotiated a settlement for a sum of Rs. 10 lacs on behalf of the Appellant's Company as the fee to be paid to Siti cable by Appellant for telecast of channel "God TV" in Ahmedabad. Further grievance of the Complainant was that despite the telecast of "GOD TV", the Appellant, as promised, failed to pay a sum of Rs. 10 lacs to the owners of Siti cables. This is what has been mentioned in nutshell in the complainant's FIR. This Court has grave doubt whether on such averments and allegations, even a *prima facie* case of the aforesaid offences could be made out against the present appellant. [Para 20] [825-D-G]

2. Criminal breach of trust is defined under Section 405 of the IPC and 406 thereof deals with punishment to be awarded to the accused, if found guilty for commission of the said offence i.e. with imprisonment for a term which may extend to three years, or with fine, or with both. Section 420 of the IPC deals with cheating and dishonestly inducing delivery of property. Cheating has been defined under Section 415 of the IPC to constitute an offence. Under the aforesaid section, it is inbuilt that there has to be a dishonest intention from the very beginning, which is *sine qua non* to hold the accused guilty for commission of the said offence. Categorical and microscopic examination of the FIR certainly does not reflect any such dishonest intention *ab initio* on the part of the appellant. Section 506 of the IPC deals with punishment for criminal intimidation. Criminal intimidation, insult and annoyance have been defined in

A Section 503 of the IPC but the FIR lodged by complainant  
does not show or reflect that any such threat to cause  
injury to person or of property was ever given by the  
Appellant to the Complainant. Thus, from the general  
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3. The matter appears to be purely civil in nature. There appears to be no cheating or a dishonest inducement for the delivery of property or breach of trust by the appellant. The present FIR is an abuse of process of law. The purely civil dispute, is sought to be given a colour of a criminal offence to wreak vengeance against the Appellant. It does not meet the strict standard of proof required to sustain a criminal accusation. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong. In *Bhajan Lal* case seven cardinal principles were carved out before cognizance of offences, said to have been committed, by the accused was taken. The case in hand does not fall in that category where cognizance of the offence could have been taken by the court, at least after having gone through the F.I.R., which discloses only a civil dispute. [Paras 25 to 27] [826-G-H; 827-A-B-E]

*Devendra v. State of U.P.* 2009 (7) SCC 495: 2009 (7) SCR 872 and *State of Haryana v. Bhajan Lal* 1992 (Suppl) 1 SCC 335: 1990 (3) Suppl. SCR 259 – referred to.

4. The Appellant cannot be allowed to go through the rigmarole of a criminal prosecution for long number of

A years, even when admittedly a civil suit has already been filed against the Appellant and Complainant-Respondent No. 4, and is still subjudice. In the said suit, the Appellant is at liberty to contest the same on grounds available to him in accordance with law as per the leave granted by Trial Court. Also the complainant has not been able to show that at any material point of time there was any contract, much less any privity of contract between the Appellant and Respondent No. 4-the Complainant. There was no cause of action to even lodge an FIR against the Appellant as neither the Complainant had to receive the money nor he was in any way instrumental to telecast “God TV” in the central areas of Ahmedabad. He appears to be totally a stranger to the same. Appellant’s prosecution would only lead to his harassment and humiliation, which cannot be permitted in accordance with the principles of law. [Para 28] [827-F-H; 828-A-B]

5. Looking to the matter from all angles, it is clear that the prosecution of the Appellant for commission of the alleged offences would be clear abuse of the process of law. The FIR under the circumstances deserves to be quashed at the threshold. The order of the Single Judge of the High Court is set aside. The FIR lodged by Respondent No. 4- Complainant stands quashed and all criminal proceedings emanating therefrom also stand quashed. [Paras 29, 30] [828-C-D]

Case Law Reference:

2009(7) SCR 872 Para 26 referred to

1990(3) Suppl. SCR 259 Para 27 referred to

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1251 of 2011.

From the Judgment & Order dated 11.01.2007 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 1977 of 2006.

Huzefa Ahmedi, Shamik Sanjanwala, Meenakshi Arora for  
the Appellant. A

Aparna Bhat, P. Ramesh Kumar, Jesal (for Hemantika  
wahi) for the Respondents.

The Judgment of the Court was delivered by B

**DEEPAK VERMA, J.** 1. Leave granted.

2. Respondent No. 4 - complainant, Living Water Finney,  
lodged an FIR on 05.09.2006 at 22.15 hrs with Odhav Police  
Station, Ahmedabad City, complaining therein that the Appellant  
has committed offences under Section 406, 420 and 506(1)  
of the Indian Penal Code (hereinafter shall be referred to as  
'IPC'). C

3. Respondent No.4 was working as Administrative Officer D  
in "Amaaru Family Education Trust" at Ahmedabad and  
claimed that he has been residing there, leading life peacefully.  
He also stated that Shri Dharmendra P. Rami @ Lalabhai was  
running business of Siti Cable in Bapi Nagar area at  
Ahmedabad, was known to him for many years and both of  
them enjoyed good relations with each other. E

4. Sometime in the year 2005, complainant had gone to  
Hyderabad at his wife's place where he had the occasion to  
watch "God TV" which influenced him deeply and profoundly  
touching his holy spirit. He wanted to share his experience with  
the Christian community of Ahmedabad so that they may also  
be blessed through this religious channel. On his return to  
Ahmedabad, he approached cable operator Mr. Lalabhai,  
owner of Siti Cable as mentioned above and requested him  
to have this channel also in the bouquet of channels offered by  
him. He also contacted the Appellant's Company directly,  
requesting it to allow broadcasting of "God TV" in certain areas  
of Ahmedabad through Siti Cables, Ahmedabad. G

5. Eventually, with the aid and enterprise of Mr. Lalabhai, H

A they were able to commence broadcasting of "GOD TV" in the  
eastern zone of Ahmedabad.

6. Initially, Mr. Lalabhai quoted Rs. 30 lacs for persuading  
all the three operators to commence the telecast of "GOD TV"  
in their respective areas in Ahmedabad but the same was  
settled for Rs. 10 lacs. Thus, according to the complainant, Mr.  
Lalabhai (and 2 other cable operators) had agreed to  
broadcast, religious channel "God TV" at Ahmedabad, after the  
Appellant had agreed to pay a sum of Rs. 10 lacs to Mr.  
Lalabhai. B C

7. However, it appears that there was no Agreement in  
writing executed and entered into between Mr. Lalabhai and  
the Appellant. Furthermore, there has not been any Agreement  
between complainant and either of the aforesaid two parties.  
D According to him, on his own, he had acted only as a mediator.

8. From time to time, the Complainant kept reminding the  
appellant about payment of the amount of Rs. 10 lacs to Mr.  
Lalabhai. But according to the Complainant, the appellant  
deliberately avoided his communications. In the meanwhile, the  
cable operators who had started telecasting "God TV" were  
also pressurizing the Complainant for the said amount. E

9. As mentioned hereinabove for about five months, they  
enjoyed watching "God TV" without any disruption but thereafter  
the reception signals of the said channel developed some  
technical snag. Thus, from October 2005, on account of poor  
quality of receivers, the reception was also not clear and was  
blurred. He once again contacted the Appellant who agreed to  
send receiver to the Complainant. After having received the said  
receiver, it was delivered to Mr. Lalabhai but as per the  
Complainant's version, by that time the amount of Rs. 10 lacs  
as agreed to between Mr. Lalabhai and the present Appellant  
was still not paid. Having failed to elicit a verbal response, the  
Complainant thereafter wrote a series of letters and sent e-  
mails to the Appellant, ultimately culminating in a notice dated  
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21.06.2006, to which the Appellant replied on 18.07.2006, denying all accusations and liabilities. Then the problem started and Respondent No. 4 lodged the FIR against the Appellant as mentioned hereinabove.

10. After completion of the investigation, as per the FIR lodged by the Complainant on 05.09.2006, the Appellant was arrested at Chennai for commission of the said offences on 17.11.2006. He was thus constrained to file an application under Section 437 of the Code of Criminal Procedure, 1973 (hereinafter shall be referred to as the 'Code') for grant of bail to him. The same was granted to him on the conditions mentioned in the order dated 22.11.2006.

11. The Appellant, thereafter, was constrained to file the petition under Section 482 of the Code in the High Court of Gujarat at Ahmedabad, with a prayer for quashing of the FIR bearing C.R. No. I-371/2006 registered with Odhav Police Station and to stay further investigation in the case. The said application came to be considered before the learned Single Judge on 11.1.2007. By that time, charge sheet was already filed before the Competent Criminal Court. Thus, learned Single Judge, was of the opinion that it was not a fit case to be entertained and refused to hear the petition on merits, even though the appellant was given liberty to file an application for his discharge before the Trial Court. It may be noted that even in its impugned order the learned Single Judge has emphasized that he had not considered the case on merits. Thus the Appellant's petition was dismissed and interim order granted in his favour was vacated.

12. Now the Order dated 11.01.2007 passed by the learned Single Judge of the High Court in Appellant's Criminal Application No. 1977 of 2006, is subject matter of challenge in this Appeal.

13. We have accordingly heard Mr. Huzefa Ahmedi with Mr. Shamik Sanjanwala for the Appellants Ms. Jesel, for

A respondent No 1,2 and 3 and Ms. Aparna Bhat for respondent No.4 - Complainant at length. Perused the record.

14. Learned counsel for the Appellant contended that even after going through the FIR, no case under Section 406 or 420 of the Penal Code was made out. The FIR was filed by a person who is indisputably not a contracting party and at best by his own admission, had acted only as a mediator, and had no cause of action to file the complaint. He has failed to produce any evidence worth the name in support of his allegation and legally acceptable that the contract was concluded, where under the Appellant was obliged to pay a sum of Rs. 10 lacs to Mr. Lalabhai.

15. The allegations in the F.I.R. clearly discloses a civil dispute between the parties and the FIR seems to have been filed only with an intention to harass and humiliate the Appellant. This was a pre-emptive move by the Complainant.

16. A summary Civil Suit under Order 37 Rule II of Code of Civil Procedure (hereinafter to be referred as 'CPC') has already been filed by Dharmendra P. Rami @ Lalabhai against the Appellant and the Respondent No.4, Complainant herein, before the City Civil Court, Ahmedabad claiming a sum of Rs. 10 lacs together with interest thereon. In the said suit an unconditional leave to defend has already been granted to the Appellant and the matter is still pending. In the light of the aforesaid submissions, it was contended that it is a fit case where the FIR deserves to be quashed otherwise the same would amount to abuse of the process of law.

17. On the other hand, the learned counsel for Respondents especially Respondent No. 4, contended that intention to cheat the complainant was clearly made out by the action of the Appellant, ultimately resulting in lodging of F.I.R. against Appellant and Respondent No.4 both. Learned Single Judge was fully justified in rejecting the Appellant's Petition as it was not a fit case to invoke the jurisdiction conferred on the

court under Section 482 of the CrPC. Thus, a prayer was made that no case for interference was made out and the Appeal be dismissed.

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18. In the light of the rival contentions we have to examine whether cognizance of the offences could have been taken by the Competent Criminal Court in the light of the averments made by the complainant in the FIR.

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19. Even though the learned counsel appearing for contesting parties have cited numerous authorities in support of their respective contentions, but in view of the well settled legal position of law, by long catena of cases of this Court, on this and related points, we are not dealing with each one of them separately and independently. However, the ratio and gist of these would be reflected in our order.

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20. In the instant case, we have to first examine whether any of the ingredients under Section 406, 420 or 506 (1) of the IPC have been made out to enable the Court to take cognizance thereof against the appellant or not. Bare perusal of the FIR lodged by the complainant, would indicate that he had got in touch with the appellant so as to extend the benefit of Appellant's Channel "GOD TV" to his other brethren residing at Ahmedabad. For the said purposes, he had met the owner of Siti Cable, Bapi Nagar in Ahmedabad and negotiated a settlement for a sum of Rs. 10 lacs on behalf of the Appellant's Company as the fee to be paid to Siti cable by Appellant for telecast of channel "God TV" in Ahmedabad. Further grievance of the Complainant was that despite the telecast of "GOD TV", the Appellant, as promised, failed to pay a sum of Rs. 10 lacs to the owners of Siti cables. This is what has been mentioned in nutshell in the complainant's FIR. We have grave doubt, in our mind whether on such averments and allegations, even a prima facie case of the aforesaid offences could be made out against the present appellant.

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21. Criminal breach of trust is defined under Section 405

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A of the IPC and 406 thereof deals with punishment to be awarded to the accused, if found guilty for commission of the said offence i.e. with imprisonment for a term which may extend to three years, or with fine, or with both.

B 22. Section 420 of the IPC deals with cheating and dishonestly inducing delivery of property. Cheating has been defined under Section 415 of the IPC to constitute an offence. Under the aforesaid section, it is inbuilt that there has to be a dishonest intention from the very beginning, which is *sine qua non* to hold the accused guilty for commission of the said offence. Categorical and microscopic examination of the FIR certainly does not reflect any such dishonest intention *ab initio* on the part of the appellant.

C 23. Section 506 of the IPC deals with punishment for criminal intimidation. Criminal intimidation, insult and annoyance have been defined in Section 503 of the IPC but the FIR lodged by complainant does not show or reflect that any such threat to cause injury to person or of property was ever given by the Appellant to the Complainant.

D 24. Thus, from the general conspectus of the various sections under which the Appellant is being charged and is to be prosecuted would show that the same are not made out even *prima facie* from the Complainant's FIR. Even if the charge sheet had been filed, the learned Single Judge could have still examined whether the offences alleged to have been committed by the Appellant were *prima facie* made out from the complainant's FIR, charge sheet, documents etc. or not.

E 25. In our opinion, the matter appears to be purely civil in nature. There appears to be no cheating or a dishonest inducement for the delivery of property or breach of trust by the Appellant. The present FIR is an abuse of process of law. The purely civil dispute, is sought to be given a colour of a criminal offence to wreak vengeance against the Appellant. It does not

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meet the strict standard of proof required to sustain a criminal accusation. A

26. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong as has been succinctly held by this Court in *Devendra Vs. State of U.P.*, 2009 (7) SCC 495, relevant part thereof is reproduced hereinbelow: B

“A distinction must be made between a civil wrong and a criminal wrong. When dispute between the parties constitute only a civil wrong and not a criminal wrong, the courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.” C

27. In fact, all these questions have been elaborately discussed by this Court in the most oft quoted judgment reported in 1992 (Suppl) 1 SCC 335 *State of Haryana Vs. Bhajan Lal*, where seven cardinal principles have been carved out before cognizance of offences, said to have been committed, by the accused is taken. The case in hand unfortunately does not fall in that category where cognizance of the offence could have been taken by the court, at least after having gone through the F.I.R., which discloses only a civil dispute. D

28. The Appellant cannot be allowed to go through the rigmarole of a criminal prosecution for long number of years, even when admittedly a civil suit has already been filed against the Appellant and Complainant-Respondent No. 4, and is still subjudice. In the said suit, the Appellant is at liberty to contest the same on grounds available to him in accordance with law as per the leave granted by Trial Court. It may also be pertinent to mention here that the complainant has not been able to show that at any material point of time there was any contract, much less any privity of contract between the Appellant and Respondent No. 4 - the Complainant. There was no cause of H

A action to even lodge an FIR against the Appellant as neither the Complainant had to receive the money nor he was in any way instrumental to telecast “GOD TV” in the central areas of Ahmedabad. He appears to be totally a stranger to the same. Appellant’s prosecution would only lead to his harassment and humiliation, which cannot be permitted in accordance with the principles of law. B

29. Thus, looking to the matter from all angles, we are of the considered opinion that the prosecution of the Appellant for commission of the alleged offences would be clear abuse of the process of law. C

30. The FIR under the circumstances deserves to be quashed at the threshold. We accordingly do so. The Appeal is, therefore, allowed. The order of learned Single Judge is set aside. The FIR dated 05.09.2006 lodged by Respondent No. 4 - Complainant with Odhav Police Station, Ahmedabad stands quashed and all criminal proceedings emanating therefrom also stand quashed. The parties to bear their respective costs. D

B.B.B. Appeal allowed.

##NEXT FILE  
RAMESHWARI DEVI & ORS.

v.

NIRMALA DEVI & ORS.  
(Civil Appeal Nos. 4912-4913 of 2011)

JULY 4, 2011

**[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]**

*Administration of justice – Civil litigation – Delay in disposal of civil cases/Uncalled for and frivolous litigation – Curbing of – Held: Steps to be taken by trial courts while dealing with criminal trials – Stated.*

*Code of Civil Procedure, 1908:*

*Actual or realistic costs – Determination of – Held: Pragmatic realities are to be taken into consideration and courts have to be realistic to what the defendants or the respondents had to actually incur in contesting the litigation before different courts – Prevalent fee structure of the lawyers and other miscellaneous expenses are to be taken into consideration – It is to be seen that for how long the defendants or respondents were compelled to contest and defend the litigation in various courts – On facts, appellants harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts – They also wasted judicial time of the various courts for the last 40 years – Thus, the appeals are dismissed with costs, quantified as Rs.2,00,000/- alongwith the costs imposed by the High Court which is Rs. 75,000/-, payable by the appellants to the respondents.*

*Ex-parte ad interim injunctions – When to be granted – Held: The court should grant interim injunction or stay order only after hearing the defendants or the respondents – In case the court has to grant ex-parte injunction in exceptional cases,*

A *then it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner would pay full restitution, actual or realistic costs and mesne profits – If an ex-parte injunction order is granted, then the court should dispose of the application for injunction as expeditiously as may be possible, as soon as the defendant appears in the court – It should be granted only for a short period – If party obtains an injunction based on false averments and forged documents, he should be prosecuted.*

C *Framing of issues – Duty of the court – Held: Framing of issues is a very important stage in the civil litigation – Due care, caution, diligence and attention must be bestowed by the Presiding Judge while framing of issues – On facts, the trial court ought not to have framed an issue on a point which was finally determined upto this Court – The same was exclusively barred by the principles of res judicata – Doctrines/Principles.*

E **‘RP’ was allotted a house and on humane considerations of shelter, he allowed his brothers-appellants to reside with him. The appellants filed a suit for partition in the year 1977, which was dismissed. Thereafter, they filed a Regular First Appeal. During pendency, ‘RP’ filed a suit against the appellants for mandatory injunction to remove them and for recovery of mesne profits. Meanwhile, ‘RP’ sold part of his property. Thereafter, RFA was dismissed. The Special Leave Petition filed thereagainst was also dismissed. The suit for mandatory injunction stood revived. Thereafter, applications after applications were filed by the appellants at every stage raising various claims. The issues were framed. Finally, the High Court dismissed the Civil Miscellaneous Petition which was filed in the year 2010, rendered at the preliminary hearing and imposed cost of Rs. 75,000/-. The Review Petition filed thereagainst was also dismissed. Thus, the appellants**

filed the instant appeals.

Disposing of the appeals, the Court

HELD: 1.1 If the remedial measures and suggestions to improve the aspect of delay in disposal of civil cases are implemented in proper perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent. [Para 32]

*“Justice, Courts and Delays”* by Dr. Arun Mohan – referred to.

1.2 90% of the time and resources of the Indian courts are consumed in attending to uncalled for litigation, which is created only because our current procedures and practices hold out an incentive for the wrong- doer. Those involved receive less than full justice and there are many more in the country, in fact, a greater number than those involved who suffer injustice because they have little access to justice, in fact, lack of awareness and confidence in the justice system. In the Indian legal system, uncalled for litigation gets encouragement because our courts do not impose realistic costs. The parties raise unwarranted claims and defences and also adopt obstructionist and delaying tactics because the courts do not impose actual or realistic costs. Ordinarily, the successful party usually remains uncompensated in the courts and that operates as the main motivating factor for unscrupulous litigants. Unless the courts, by appropriate orders or directions remove the cause for motivation or the incentives, uncalled for litigation will continue to accrue, and there will be expansion and obstruction of the litigation. Court time and resources will be consumed and justice will be both delayed and denied. [Paras 33 and 34]

1.3 Lesser the court’s attention towards full

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A restitution and realistic costs, which translates as profit for the wrongdoer, the greater would be the generation of uncalled for litigation and exercise of skills for achieving delays by impurity in presentation and deployment of obstructive tactics. The cost (risk) - benefit ratio is directly dependent on what costs and penalties will the court impose on him; and the benefit will come in as: the other ‘succumbing’ en route and or leaving a profit for him, or even if it is a fight to the end, the court still leaving a profit with him as unrestituted gains or unassessed short levied costs. Litigation perception of the probability of the other party getting tired and succumbing to the delays and settling with him and the court ultimately awarding what kind of restitution, costs and fines against him - paltry or realistic. This perception ought to be the real risk evaluation. [Paras 35, 36]

1.4 If the appellants had the apprehension of imposition of realistic costs or restitution, then this litigation perhaps would not have been filed. Ideally, having lost up to the highest court (2001), the appellants (defendants in the suit) ought to have vacated the premises and moved out on their own, but the appellants seem to have acted as most parties do—calculate the cost (risk)-benefit ratio between surrendering on their own and continuing to contest before the court. Procrastinating litigation is common place because, in practice, the courts are reluctant to order restitution and actual cost incurred by the other side. [Para 37]

1.5 Every lease on its expiry, or a license on its revocation cannot be converted itself into litigation. Unfortunately, the courts are flooded with these cases because there is an inherent profit for the wrong- doers in our system. It is a matter of common knowledge that domestic servants, gardeners, watchmen, caretakers or security men employed in a premises, whose status is that of a licensee indiscriminately file suits for injunction

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not to be dispossessed by making all kinds of averments and may be even filing a forged document, and then demands a chunk of money for withdrawing the suit. It is happening because it is the general impression that even if ultimately unauthorized person is thrown out of the premises the court would not ordinarily punish the unauthorized person by awarding realistic and actual mesne profits, imposing costs or ordering prosecution. [Para 38]

1.6 It is a matter of common knowledge that lakhs of flats and houses are kept locked for years, particularly in big cities and metropolitan cities, because owners are not certain that even after expiry of lease or licence period, the house, flat or the apartment would be vacated or not. It takes decades for final determination of the controversy and wrongdoers are never adequately punished. Pragmatic approach of the courts would partly solve the housing problem of this country. The courts have to be extremely careful in granting ad-interim ex-parte injunction. If injunction has been granted on the basis of false pleadings or forged documents, then the concerned court must impose costs, grant realistic or actual mesne profits and/or order prosecution. This must be done to discourage the dishonest and unscrupulous litigants from abusing the judicial system. In substance, the incentive or profit for the wrongdoer is to be removed. While granting ad interim ex-parte injunction or stay order the court must record undertaking from the plaintiff or the petitioner that he will have to pay mesne profits at the market rate and costs in the event of dismissal of interim application and the suit. [Paras 40 and 41]

1.7 In the instant case, the court should have first examined the pleadings and then not only granted leave to amend but directed amendment of the pleadings so that the parties were confined to those pleas which still

A survived the High Court's decision. Secondly, it should have directed discovery and production of documents and their admission/denial. Thirdly, if the civil judge on 6.10.2004, which was three and a half years after the dismissal of the Special Leave Petition, instead of framing the issues that he did, had, after recording the statements of the parties and partially hearing the matter should have passed the order that the pleadings were not sufficient to raise an issue for adverse possession and that the pleadings and contentions before the High Court had the effect of completely negating any claim to adverse possession. [Para 42]

1.8 Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the Presiding Judge while framing of issues. In the instant case, when the entire question of title had been determined by the High Court and the Special Leave Petition against that judgment was dismissed by this Court, thereafter, the trial court ought not to have framed such an issue on a point which has been finally determined upto this Court. In any case, the same was exclusively barred by the principles of res judicata. That clearly demonstrates total non-application of mind. [Para 44]

1.9 Unless it is ensured that wrong- doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. [Para 45]

1.10 Usually the court should be cautious and

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extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits. If an ex-parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court. [Paras 46 and 47]

1.11 It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement. The common impression is to be dispelled that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in the courts

A because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. [Para 48]

B 1.12 With regard to the issue of curbing the prevailing delay in civil litigation, the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

C A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

D B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

F C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

H D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while

granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed.

F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare complete schedule and fix dates for all the stages of the suit, right from filing of the written statement till pronouncement of judgment and the courts should strictly adhere to the said dates and the said time table as far as possible. If any

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interlocutory application is filed then the same be disposed of in between the said dates of hearings fixed in the said suit itself so that the date fixed for the main suit may not be disturbed.

The aforementioned steps may help the courts to drastically improve the existing system of administration of civil litigation in our Courts. No doubt, it would take some time for the courts, litigants and the advocates to follow the said steps, but once it is observed across the country, then prevailing system of adjudication of civil courts is bound to improve. [Para 53]

1.13 While imposing costs the pragmatic realities are to be taken into consideration and be realistic what the defendants or the respondents had to actually incur in contesting the litigation before different courts. The prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc. are to be also broadly taken into consideration. It should not be forgotten while imposing costs that for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years. [Paras 54 and 55]

1.14 On consideration of totality of the facts and circumstances of the instant case, there is no infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which is quantified as Rs.2,00,000/- (Rupees Two Lakhs only). The costs are imposed not out of anguish but by following

the fundamental principle that wrongdoers should not get benefit out of frivolous litigation. The appellants are directed to pay the costs imposed by this Court along with the costs imposed by the High Court to the respondents within the stipulated period. The suit pending before the trial court is at the final stage of the arguments, therefore, the said suit is directed to be disposed of as expeditiously as possible. [Paras 56, 57 and 58]

1.15 It is made abundantly clear that the trial court should not be influenced by any observation or finding arrived at by this Court in dealing with these appeals as the matter has not been decided on merits of the case. [Para 59]

*Swaran Singh v. State of Punjab (2000) 5 SCC 668: 2000 (3) SCR 572; Mahila Vinod Kumari v. State of Madhya Pradesh (2008) 8 SCC 34: 2008 (10) SCR 869 – referred to.*

**Case Law Reference:**

**2000 (3) SCR 572** Referred to **Para 48**

**2008 (10) SCR 869** Referred to **Para 51**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4912-4913 of 2011.

From the Judgment & Order dated 01.09.2010 of the High Court of Delhi at New Delhi in Civil Misc. (Main) No. 1084 of 2010 and order dated 25.10.2010 in Review Petition No. 429 of 2010.

Dr. Arun Mohan, (A.C.), Vikas Mahajan, Vinod Sharma, Tulika Prakash, Kuber Giri for the Appellants.

R.P. Sharma for the Respondents.

A The Judgment of the Court was delivered by  
**DALVEER BHANDARI, J.** 1. Leave granted.

B 2. These appeals are directed against the judgment and order dated 01.09.2010 passed in Civil Miscellaneous Petition (Main) No. 1084 of 2010 and the order dated 25.10.2010 passed in Review Petition No. 429 of 2010 in Civil Miscellaneous Petition (Main) No. 1084 of 2010 by the High Court of Delhi at New Delhi.

C 3. The apparent discernible question which requires adjudication in this case seems to be a trivial, insignificant and small one regarding imposition of costs, but in fact, these appeals have raised several important questions of law of great importance which we propose to deal in this judgment. Looking to the importance of the matter we requested Dr. Arun Mohan, a distinguished senior advocate to assist this court as an Amicus Curiae.

E 4. This is a classic example which abundantly depicts the picture of how the civil litigation moves in our courts and how unscrupulous litigants (appellants in this case) can till eternity harass the respondents and their children by abusing the judicial system.

F 5. The basic facts which are necessary to dispose of these appeals are recapitulated as under:-

G 6. In the year 1952, almost about half a century ago, the government allotted a residential house bearing nos. 61-62, I-Block, Lajpat Nagar-I, measuring 200 yards to Ram Parshad. The Lease Deed was executed in his favour on 31.10.1964.

H 7. On humane considerations of shelter, Ram Parshad allowed his three younger brothers – Madan Lal, Krishan Gopal and Manohar Lal to reside with him in the house. On 16.11.1977, these three younger brothers filed a Civil Suit No.993 of 1977 in the High Court of Delhi claiming that this Lajpat Nagar

property belonged to a joint Hindu Family and sought partition of the property on that basis. A

8. The suit was dismissed by a judgment dated 18.01.1982 by the learned Single Judge of the High Court of Delhi. The appellants (younger brothers) of Ram Parshad, aggrieved by the said judgment preferred a Regular First Appeal (Original Side) 4 of 1982 which was admitted to hearing on 09.03.1982. During the pendency of the appeal, Ram Parshad on 15.01.1992 filed a suit against his three younger brothers for mandatory injunction to remove them and for recovery of mesne profits. In 1984 Ram Parshad sold western half (No.61) to an outsider. That matter is no longer in dispute. B C

9. The first appeal filed by the other three younger brothers of Ram Parshad against Ram Parshad was dismissed on 09.11.2000. Against the concurrent findings of both of the judgments, the appellants filed a Special Leave Petition No.3740 of 2001 in this court which was also dismissed on 16.03.2001. D

10. In the suit filed by Ram Parshad (one of the respondents) (now deceased) against the appellants in these appeals the following issues were framed: E

1. Whether the suit is liable to be stayed under Section 10 CPC as alleged in para no.1 of Preliminary Objection? F
2. Whether defendants are licencees in the suit premises and if so whether the plaintiff is entitled to recover possession of the same from them? G
3. Whether suit of plaintiff is time barred?
4. Whether suit has been properly valued for the purpose of court fees and jurisdiction? H

A 5. Whether the suit property is joint family property of parties?

B 6. Whether the plaintiff is entitled to mesne profits for use and occupation of the suit property by the defendants and if so at what rate and for which period?

C 7. Whether defendants have become the owner of three-fourth share of the suit property by adverse possession?

C 8. Relief.

and fixed the matter for evidence on 22.11.2004.

D 11. The defendants in the suit contended that inasmuch as Regular First Appeal (Original Side) 4 of 1982 was still pending, therefore, Ram Parshad's suit be stayed under section 10 of the Code of Civil Procedure. Accepting the contention, on 20.07.1992, the 1992 suit was ordered to be stayed.

E 12. The Regular First Appeal was dismissed on 9.11.2000 and the Special leave petition against the said appeal was also dismissed on 16.3.2001. Consequently, the suit filed by Ram Parshad for mandatory injunction and for mesne profit stood revived on 05.12.2001.

F 13. In the first round of litigation from 16.11.1977 to 16.3.2001 it took about twenty four years and thereafter it had taken 10 years from 16.3.2001. In the 1992 suit, the defendants (appellants herein) sought amendment of the written statement which was refused on 28.07.2004. Against this order, a Civil Miscellaneous (Main) 1153 of 2004 was filed in the High Court which was disposed of on 02.09.2004 with liberty to move an application before the trial court for framing an additional issue. The additional issue regarding the claim of adverse possession by the three younger brothers was framed on 6.10.2004. The issue was whether the defendants have become the owner of H

three-fourth share of the suit property by adverse possession and the case was fixed up for recording of the evidence. According to the learned Amicus Curiae, the court before framing Issue Number 7 and retaining the other issues, ought to have recorded the statement of defendants under Order 10 Rule 2 of the Code of the Civil Procedure (for short, CPC) and then re-cast the issues as would have been appropriate on the pleadings of the parties as they would survive after the decision in the previous litigation.

14. According to the learned Amicus Curiae, the practice of mechanically framing the issues needs to be discouraged. Framing of issues is an important exercise. Utmost care and attention is required to be bestowed by the judicial officers/judges at the time of framing of issues. According to Dr. Arun Mohan, twenty minutes spent at that time would have saved several years in court proceedings.

15. In the suit, on 6.11.2004 the application seeking transfer of the suit from that court was filed which was dismissed by the learned District Judge on 22.3.2005. The trial commenced on 22.11.2004, adjournment was sought and was granted against costs. The plaintiffs' evidence was concluded on 10.2.2005.

16. On 28.5.2005 the defendants failed to produce the evidence and their evidence was closed. Against that order, Civil Miscellaneous (Main) 1490 of 2005 was filed in the Delhi High Court. Stay was granted on 15.7.2005 and the application was dismissed on 17.12.2007 with liberty to move an application for taking on record further documents.

17. On 12.2.2008, an application under Order 18 Rule 17A of the CPC was moved. On 'No Objection' from the plaintiff, it was allowed on 31.7.2008 and the documents and affidavits were taken on record. On 23.10.2009, the matter was fixed for evidence. The appellants filed an application under Order 7 Rule 11 (b) of the CPC for rejection of the 1992 plaint on the ground of not paying ad valorem court fees on the market value

A of property and for under-valuation of relief. This application was dismissed by the Civil Judge on 09.07.2010 by the following order :-

"M-61/2006  
 09.07.2010

B Present : Ld. Counsel for plaintiff  
 Ld. Counsel for defendant

C Application under section 151 CPC is filed by defendant for treating Issue No.4 as preliminary issue. It pertains to court fees and jurisdiction. It is pertinent to mention that suit is at the stage of final arguments and both the parties have led the entire evidence. Ld. Counsel for defendant submits that this application has been filed by the defendant in view of the liberty granted to the defendant by the Hon'ble High Court vide order dated 26.4.2010 dismissing the Civil Revision Petition application no.76/10 as withdrawn against the order dated 12.10.2006 passed by this court. It is pointed out to the counsel for defendant that case is at the stage of final arguments and law enjoins upon the court to return finding on all the issues. Counsel for the defendant filing this application seeks disposal of the same. Perused the application and gone through record. Order 20 Rule 5 clearly states that court has to return finding on each issue. Even Order 14 Rule 2 CPC states that the court has to pronounce the judgment on all issues notwithstanding that the case may be disposed off on preliminary issue. Sub Rule 2 refers to the discretion given to the court where the court may try issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as preliminary issue. It further relates to disposal of the suit treating these points as preliminary issues and also relates to deferring the settlement of other issues. But there is no such case. Entire evidence has been led, the matter is at the stage of final arguments and the point raised does not relate to the point pertaining to Sub Rule

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2. Neither it relates to bar created by any law nor the jurisdiction of the court to entertain the suit. It is averments made in the plaint. Contention of the applicant for treating the issue as preliminary issue is against the spirit of law as referred in Order 20 Rule 5 and Order 14 Rule 5 CPC. I do not see any merit in this application and the same is dismissed with the costs of Rs.2000/-.

To come up for payment of cost and final arguments.

Put up on 09.08.2010

(Vipin Kumar Rai)  
ACJ/ARC(W)"

18. Aggrieved by the order dated 23.10.2009, the defendants (appellants herein) preferred a Civil Revision Petition No.76 of 2010 in the High Court of Delhi. At the preliminary hearing, the petition was allowed to be withdrawn, leaving the trial court at liberty to consider the request of the appellants to treat Issue Number 4 regarding court fee as a preliminary issue.

19. On 09.07.2010, the defendants filed an application before the Civil Judge for treating Issue Number 4 as a preliminary issue. This application was rejected by the Civil Court on 9.7.2010 with costs. The matter is at the stage of final arguments before the trial court. At this stage, against the order of the Civil Judge, on 7.8.2010, the appellants filed a petition being Civil Miscellaneous (Main) No.1084 of 2010 under Article 227 of the Constitution in the High Court which came up for preliminary hearing on 26.8.2010. On 1.9.2010, the High Court dismissed the Civil Miscellaneous (Main) No.1084 of 2010 by a detailed judgment rendered at the preliminary hearing and imposed cost of Rs.75000/- to be deposited with the Registrar General. Review Petition No. 429 of 2010 was filed which was dismissed on 25.10.2010.

20. These appeals have been filed against the order

A imposing costs and dismissing the review petition.

21. The learned Single Judge observed that the present appellants belong to that category of litigants whose only motive is to create obstacles during the course of trial and not to let the trial conclude. Applications after applications are being filed by the appellants at every stage, even though orders of the trial court are based on sound reasoning. Moreover, the appellants have tried to mislead the court also by filing wrong synopsis and incorrect dates of events.

22. The High Court further observed that the purpose of filing of brief synopsis with list of dates and events is to give brief and correct summary of the case and not to mislead the court. Those litigants or their advocates who mislead the courts by filing wrong and incorrect particulars (the list of dates and events) must be dealt with heavy hands.

23. In the list of dates and events, it is stated that the respondents filed a suit for mandatory injunction and recovery of Rs.36,000/- on 22nd September, 2003. In fact, as per typed copy of the plaint placed on record, the suit was filed by the predecessor-in-interest of the respondents in 1992. Written statement was filed by the predecessor-in-interest of the appellants in 1992. Thus, the appellants tried to mislead the court by mentioning wrong date of 22nd September, 2003 as the date of filing.

24. The High Court has also dealt with number of judgments dealing with the power of the High Court under Article 227 of the Constitution. According to the High Court, the suit was filed in the trial court in 1992. The written statement was filed as far back on 15th April, 1992. On pleadings, Issue Number 4 was framed with regard to court fee and jurisdiction. The appellants never pressed that Issue Number 4 be treated as a preliminary issue. Both the parties led their respective

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evidence. When the suit was fixed before the trial court for final arguments, application in question was filed. The appellants argued that Issue Number 4 would also be determined along with other issues.

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25. In the impugned judgment, it is also observed that it is revealed from the record that the appellants have been moving one application after the other, though all were dismissed with costs.

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26. It may be pertinent to mention that the appellants also moved transfer application apprehending adverse order from the trial judge, which was also dismissed by the learned District Judge. This conduct of the appellants demonstrates that they are determined not to allow the trial court to proceed with the suit. They are creating all kinds of hurdles and obstacles at every stage of the proceedings.

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27. The learned Single Judge observed that even according to Order 14 Rule 2 CPC the court has to pronounce the judgment on all issues notwithstanding that the case may be disposed of on preliminary issue. Order 14 Rule 2 of the CPC is reads as under:

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“ORDER XIV: SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

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2. Court to pronounce judgment on all issues: (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

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... ..”

28. Sub Rule 2 refers to the discretion given to the court

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A where the court may try issue relating to the jurisdiction of the court or the bar to the suit created by any law for the time being in force as preliminary issue. It further relates to disposal of the suit treating these points as preliminary issues and also relates to deferring the settlement of other issues, but there is no such case. The entire evidence has been led, the matter is at the stage of final arguments and the point raised does not relate to the point pertaining to Sub Rule 2. Neither it relates to bar created by any law nor the jurisdiction of the court to entertain the suit. It is just an averment made in the plaint. Contention of the appellants for treating the said issue as preliminary issue is against the spirit of law as referred in Order 20 Rule 5 and Order 14 Rule 5 of the CPC. These observations of the courts below are correct and in pursuance of the provisions of the Act. The High Court properly analysed the order of the trial court and observed as under:-

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“Looking from any angle, no illegality or infirmity can be found in the impugned order. The only object of petitioners is just to delay the trial, which is pending for the last more than 18 years. To a large extent, petitioners have been successful in delaying the judicial proceedings by filing false, frivolous and bogus applications, one after the other.

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It is well settled that frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to the genuine litigations.

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Dismissed

List for compliance on 7th October, 2010.”

G 29. We have carefully examined the impugned judgment of the High Court and also order dated 9.7.2010 passed by the learned Civil Judge, Delhi.

H 30. It is abundantly clear from the facts and circumstances of this case that the appellants have seriously created obstacles at every stage during the course of trial and virtually

prevented the court from proceeding with the suit. This is a typical example of how an ordinary suit moves in our courts. Some cantankerous and unscrupulous litigants on one ground or the other do not permit the courts to proceed further in the matter.

31. The learned Amicus Curiae has taken great pains in giving details of how the case has proceeded in the trial court by reproducing the entire court orders of 1992 suit. In order to properly comprehend the functioning of the trial courts, while dealing with civil cases, we deem it appropriate to reproduce the order sheets of 1992 suit. This is a typical example of how a usual civil trial proceeds in our courts. The credibility of entire judiciary is at stake unless effective remedial steps are taken without further loss of time. Though original litigation and the appeal which commenced from 1977 but in order to avoid expanding the scope of these appeals, we are dealing only with the second litigation which commenced in 1992. The order sheets of the suit of 1992 are reproduced as under :-

Proceedings of Suit - 1992

17.01.1992	Summons to Defendants on plaintiff and RC
28.02.1992	Fresh summons to Defendants 1 & 2. Defendant No. 3 refused service. Proceeded ex-parte
30.03.1992	Time sought to file Written Statement for all the Defendants. Allowed.
20.04.1992	Written Statement filed. Fixed on 30.04.1992 for replication, admission/denial and framing of issues.
01.05.1992	Plaintiff sought time to file replication.

A	11.05.1992	Replication filed. Adjourned for admission/ denial on joint request.
	26.05.1992	No document for admission/ denial. Issues framed. Fixed for arguments on 17.07.1992.
B	17.07.1992	Arguments heard on preliminary issue.
	20.07.1992	Suit stayed. Plaintiff granted liberty to make application for revival after disposal of RFA (OS) 4/82.
C	01.06.2001	File sent to District Judge for transferring the case to proper court.
	04.06.2001	District Judge marked to case to the court of Shri Naipal Singh, Additional District Judge.
D	02.07.2001	Presiding Officer is on vacation leave. Fixed for 03.07.2001.
	03.07.2001	Miscellaneous application notice issued to the respondent. Main Suit 47/92 summoned.
E	23.08.2001	Suit file be summoned. Notice of application to Defendant on PF & RC.
	16.10.2001	Copy of application given to all the Defendants. Adjourned for reply to application and further proceedings.
F	05.12.2001	Suit has to proceed for the decision on merits.
G	28.02.2002	Application under Order 6 Rule 17 moved by Defendant for amendment of Written Statement. Adjourned for reply and arguments on the application.

16.04.2002	As the value of the suit is below 3 lakhs, the suit transferred to the court of Civil Judge.	A	A	22.05.2004	Plaintiff wants to file written submissions with regard to clarification. Allowed.
23.04.2002	Reply to application filed. Summons to Defendants other than Defendant No. 3.			03.07.2004	None for Defendants. Written submissions filed by Plaintiff.
21.08.2002	Counsel for the parties not present.	B	B	28.07.2004	Present none. Order 6 Rule 17 dismissed.
28.11.2002	Presiding Officer on leave.			02.09.2004	None for Defendants. Fixed for PE to 06.10.2004
07.12.2002	At joint request, adjourned. Last opportunity.	C	C	28.09.2004	Defendant moved application Order 14 Rule 5. Notice issued.
22.09.2003	None present. Adjourned for arguments on Order 6 Rule 17. File transferred to the court of Shri Prashant Kumar, Civil Judge.			06.10.2004	Issues reframed. Defendant sought time to cross-examine PW.
12.11.2003	Son of the Plaintiff stated that the Plaintiff has expired. Adjourned.	D	D	22.11.2004	PW present. Defendant prayed for adjournment. Defendant moved application for transfer of the case. Last opportunity for cross-examination.
06.12.2003	Presiding Officer not available.	E	E	21.12.2004	PW present. Previous cost not pressed for. PW sought time for obtaining copies of documents.
16.01.2004	Copy of application under Order 22 Rule 3 supplied. As requested, adjourned.			10.02.2005	PW cross-examined. PE closed.
16.02.2004	Reply not filed. Counsel for the Defendant seeks time to file reply.	F	F	15.03.2005	No DW present
01.03.2004	Reply filed. Counsel for the Defendant objected that the addresses of Legal Representatives are not correct.			19.04.2005	Affidavit of DW filed. However DW stated that he is not feeling well. Adjourned.
24.03.2004	Application Order 22 Rule 3 is allowed. Right to sue survives. Order 6 Rule 17 pending for disposal.	G	G	28.05.2004	Defendant stated that he does not want to lead evidence. DE closed. Fixed for final arguments.
27.04.2004	Arguments heard.	H	H	15.07.2005	Stay by the High Court in CM (Main) 1490/2005.

18.07.2005	Counsel for the Defendant states that the High Court has stayed the matter. Directed to file the copy of the order.	A	A	31.07.2008	Defendant sought adjournment on the ground that witness is not feeling well.
25.08.2005	No copy of the order is filed.			29.09.2008	Plaintiff moved application Order 6 Rule 17. Copy supplied.
29.10.2005	Matter under stay by High Court.	B	B	23.12.2008	Reply filed. Come up for arguments on the application.
30.01.2006	Fresh suit received by transfer. Adjourned for proper orders.			21.05.2009	Part arguments heard.
02.05.2006	Notice to Defendants.	C	C	22.07.2009	Plaintiff does not press for the application. Dismissed. To come up for DE.
31.05.2006	Counsel for the Defendants served but none appeared. Adjourned for final arguments.			05.10.2009	Defendants witness not present. Application for exemption allowed. Affidavit already filed.
21.08.2006	File not traceable. Adjourned.	D	D	23.10.2009	Application under Order 7 Rule 1 CPC filed. Dismissed. Affidavit of Kishan Gopal tendered as DW1, and he is cross-examined and discharged. No other witness. DE closed.
09.12.2006	Present: Counsel for the plaintiff. Adjourned for final arguments.			11.01.2010	Presiding Officer on leave.
19.02.2007	Counsel for the plaintiff. Proceedings stayed by the High Court.	E	E	23.03.2010	Defendant seeks adjournment on the ground that main counsel not available.
21.08.2007	Counsel for the Plaintiff. Matter under stay by the High Court.			03.05.2010	Adjournment sought on behalf of the parties.
17.12.2007	CM (Main) 1490/2005 dismissed by the High Court. Stay vacated.	F	F	26.05.2010	File not traceable.
10.01.2008	Counsel for the Plaintiff. None for the Defendant. Adjourned.			09.07.2010	Application under Section 151 CPC for treating No. 4 as preliminary issue. Dismissed with cost of Rs.2,000/-
12.02.2008	Defendant filed application O18 R17A. Copy supplied. Adjourned for reply and arguments.	G		09.08.2010	Application for adjournment filed.
30.04.2008	Reply filed by the Plaintiff. Application allowed to cost of Rs.7,000/-, out of which Rs.1,000/- to be deposited in Legal Aid. Adjourned for DE.	H		27.09.2010	Presiding Officer on leave.

23.10.2010 For final arguments. A

18.12.2010 For final arguments.

22.01.2011 For final arguments.

05.02.2011 For final arguments. B

26.02.2011 Sought adjournment on the ground that the matter regarding cost is pending in Hon'ble Supreme Court.

32. Dr. Arun Mohan, learned amicus curiae, has written an extremely useful, informative and unusual book "*Justice, Courts and Delays*". This book also deals with the main causes of delay in the administration of justice. He has also suggested some effective remedial measures. We would briefly deal with the aspect of delay in disposal of civil cases and some remedial measures and suggestions to improve the situation. According to our considered view, if these suggestions are implemented in proper perspective, then the present justice delivery system of civil litigation would certainly improve to a great extent.

33. According to the learned author, 90% of our court time and resources are consumed in attending to uncalled for litigation, which is created only because our current procedures and practices hold out an incentive for the wrong-doer. Those involved receive less than full justice and there are many more in the country, in fact, a greater number than those involved who suffer injustice because they have little access to justice, in fact, lack of awareness and confidence in the justice system.

34. According to Dr. Mohan, in our legal system, uncalled for litigation gets encouragement because our courts do not impose realistic costs. The parties raise unwarranted claims and defences and also adopt obstructionist and delaying tactics because the courts do not impose actual or realistic costs. Ordinarily, the successful party usually remains uncompensated in our courts and that operates as the main

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A motivating factor for unscrupulous litigants. Unless the courts, by appropriate orders or directions remove the cause for motivation or the incentives, uncalled for litigation will continue to accrue, and there will be expansion and obstruction of the litigation. Court time and resources will be consumed and justice will be both delayed and denied.

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C 35. According to the learned author lesser the court's attention towards full restitution and realistic costs, which translates as profit for the wrongdoer, the greater would be the generation of uncalled for litigation and exercise of skills for achieving delays by impurity in presentation and deployment of obstructive tactics.

D 36. According to him the cost (risk) – benefit ratio is directly dependent on what costs and penalties will the court impose on him; and the benefit will come in as: the other 'succumbing' en route and or leaving a profit for him, or even if it is a fight to the end, the court still leaving a profit with him as unrestituted gains or unassessed short levied costs. Litigation perception of the probability of the other party getting tired and succumbing to the delays and settling with him and the court ultimately awarding what kind of restitution, costs and fines against him – paltry or realistic. This perception ought to be the real risk evaluation.

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F 37. According to the learned Amicus Curiae if the appellants had the apprehension of imposition of realistic costs or restitution, then this litigation perhaps would not have been filed. According to him, ideally, having lost up to the highest court (16.03.2001), the appellants (defendants in the suit) ought to have vacated the premises and moved out on their own, but the appellants seem to have acted as most parties do—calculate the cost (risk)-benefit ratio between surrendering on their own and continuing to contest before the court. Procrastinating litigation is common place because, in practice, the courts are reluctant to order restitution and actual cost incurred by the other

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**Profits for the wrongdoer**

38. According to the learned Amicus Curiae, every lease on its expiry, or a license on its revocation cannot be converted itself into litigation. Unfortunately, our courts are flooded with these cases because there is an inherent profit for the wrongdoers in our system. It is a matter of common knowledge that domestic servants, gardeners, watchmen, caretakers or security men employed in a premises, whose status is that of a licensee indiscriminately file suits for injunction not to be dispossessed by making all kinds of averments and may be even filing a forged document, and then demands a chunk of money for withdrawing the suit. It is happening because it is the general impression that even if ultimately unauthorized person is thrown out of the premises the court would not ordinarily punish the unauthorized person by awarding realistic and actual mesne profits, imposing costs or ordering prosecution.

39. It is a matter of common knowledge that lakhs of flats and houses are kept locked for years, particularly in big cities and metropolitan cities, because owners are not certain that even after expiry of lease or licence period, the house, flat or the apartment would be vacated or not. It takes decades for final determination of the controversy and wrongdoers are never adequately punished. Pragmatic approach of the courts would partly solve the housing problem of this country.

40. The courts have to be extremely careful in granting ad-interim ex-parte injunction. If injunction has been granted on the basis of false pleadings or forged documents, then the concerned court must impose costs, grant realistic or actual mesne profits and/or order prosecution. This must be done to discourage the dishonest and unscrupulous litigants from abusing the judicial system. In substance, we have to remove the incentive or profit for the wrongdoer.

41. While granting ad interim ex-parte injunction or stay order the court must record undertaking from the plaintiff or the

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A petitioner that he will have to pay mesne profits at the market rate and costs in the event of dismissal of interim application and the suit.

42. According to the learned Amicus Curiae the court should have first examined the pleadings and then not only granted leave to amend but directed amendment of the pleadings so that the parties were confined to those pleas which still survived the High Court's decision. Secondly, it should have directed discovery and production of documents and their admission/denial. Thirdly, if the civil judge on 6.10.2004, which was three and a half years after the dismissal of the Special Leave Petition on 16.3.2001, instead of framing the issues that he did, had, after recording the statements of the parties and partially hearing the matter should have passed the following order:

D "In my prima facie view, your pleadings are not sufficient to raise an issue for adverse possession, secondly how can you contend adverse possession of three-fourth share? And thirdly, your pleadings and contentions before the High Court had the effect of completely negating any claim to adverse possession. ..."

E 43. Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the learned Presiding Judge while framing of issues.

F 44. In the instant case when the entire question of title has been determined by the High Court and the Special Leave Petition against that judgment has been dismissed by this court, thereafter the trial court ought not to have framed such an issue on a point which has been finally determined upto this Court. In any case, the same was exclusively barred by the principles of res judicata. That clearly demonstrates total non-application of mind.

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45. We have carefully examined the written submissions of the learned Amicus Curiae and learned counsel for the parties. We are clearly of the view that unless we ensure that wrong-doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

46. Usually the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits.

47. If an exparte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court.

48. It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so

A because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining *ex-parte* injunction orders or stay orders may not find encouragement. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In *Swaran Singh v. State of Punjab* (2000) 5 SCC 668 this court was constrained to observe that perjury has become a way of life in our courts.

D 49. It is a typical example how a litigation proceeds and continues and in the end there is a profit for the wrongdoer.

50. Learned amicus articulated common man's general impression about litigation in following words:

E "Make any false averment, conceal any fact, raise any plea, produce any false document, deny any genuine document, it will successfully stall the litigation, and in any case, delay the matter endlessly. The other party will be coerced into a settlement which will be profitable for me and the probability of the court ordering prosecution for perjury is less than that of meeting with an accident while crossing the road."

This court in *Swaran Singh* (Supra) observed as under:

G "... .. Perjury has also become a way of life in the law courts. A trial Judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself

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which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340 (3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure.”

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pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

51. In a recent judgment in the case of *Mahila Vinod Kumari v. State of Madhya Pradesh* (2008) 8 SCC 34 this court has shown great concern about alarming proportion of perjury cases in our country.

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D. The Court must adopt realistic and pragmatic approach in granting mesne profits. The Court must carefully keep in view the ground realities while granting mesne profits.

52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

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E. The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed.

A. Pleadings are foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

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F. Litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

B. The Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Code. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at truth of the matter and doing substantial justice.

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G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false

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H. Every case emanates from a human or a commercial problem and the Court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well settled principles of law and justice.

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I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction