

ENERCON (INDIA) LTD. &amp; ORS.

v.

ENERCON GMBH &amp; ANR.

(Civil Appeal No. 2086 of 2014 etc.)

FEBRUARY 14, 2014

**[SURINDER SINGH NIJJAR AND FAKKIR MOHAMED  
IBRAHIM KALIFULLA, JJ.]**

*ARBITRATION AND CONCILIATION ACT, 1996:*

*s.45 r/w s.16 - International Commercial Arbitration - Suit for declaration that Intellectual Property Licence Agreement (IPLA) was not concluded contract and correspondingly there was no arbitration agreement therein - Application by respondent u/s 45 - Held: parties have irrevocably agreed to resolve all the disputes through arbitration - Parties can not be permitted to avoid arbitration, without satisfying the court that it would be just and in the interest of all the parties not to proceed with arbitration - Findings recorded by appellate court that the parties can proceed to arbitration are affirmed - Findings recorded by trial court dismissing the application u/s 45 are set aside -- Application filed by respondents for reference of the dispute to arbitration u/s 45 has been correctly allowed by appellate court as well as by High Court - Issue as to whether there is a concluded contract between the parties can be left to arbitral tribunal - All the disputes arising between the parties in relation to the following agreements viz. SHA, TKHA, SSHAs and STKHA, Agreed Principles and IPLA, including the controversy as to whether IPLA is a concluded contract are referred to arbitral tribunal for adjudication - Third arbitrator who shall act as Chairman of Arbitral Tribunal, is appointed -- Arbitration clause (agreement) is independent of the underlying contract, i.e. the IPLA containing the arbitration clause -- s.16 provides that arbitration clause forming part of a contract shall be treated*

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A *as an agreement independent of such a contract -- UNCITRAL Model Law.*

B *s.16 - Separability of arbitration clause from underlying contract - Held: Concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of parties to resolve disputes by arbitration does not get frustrated with every challenge to legality, validity, finality or breach of the underlying contract - The Act, u/s 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts - Therefore, it cannot be accepted that Arbitration Agreement will perish as the IPLA has not been finalised - Rule of necessity.*

D *Arbitration clause - Seemingly unworkable arbitration clause - Held: It would be the duty of court to make the same workable within the permissible limits of law - A common sense approach has to be adopted to give effect to the intention of parties to arbitrate - Arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute - In the instant case, the arbitration clause as it stands cannot be frustrated on the ground that it is unworkable - Unworkability in the case is attributed only to the machinery provision - Arbitration agreement, otherwise, fulfils the criteria laid down u/s 44 of the Act - Given that two arbitrators have been appointed, the missing line that "the two arbitrators appointed by the parties shall appoint the third arbitrator" can be read into the arbitration clause - Omission is so obvious that the court can legitimately supply the missing line - In the circumstances, the Court would apply the officious bystander principle - Parties can be permitted to proceed to arbitration.*

*'Seat' of arbitration and 'venue' -- International Commercial Arbitration - Held: In an International Commercial Arbitration, venue can often be different from the*

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*seat of arbitration - In the instant case all the three laws: (i) the law governing the substantive contract; (ii) the law governing the agreement to arbitrate and the performance of that agreement; and (iii) the law governing the conduct of the arbitration, are Indian - Therefore, the parties have designated India as the seat - Parties being Indian and German, except for London being chosen as a convenient place/venue for holding the meetings of arbitration, there is no other factor connecting the arbitration proceedings to London - In such circumstances, hearing of arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of arbitration - Therefore, the seat would remain in India.*

*Concurrent jurisdiction - International Commercial Arbitration - Held: High Court having fixed the seat in India, committed an error in concluding that Courts in England would have concurrent jurisdiction - It runs counter to the settled position of law in India as well as in England and would lead to unnecessary complications and inconvenience - Once the seat of arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the arbitration - In view of s.2, CPC, Daman trial court (India) has jurisdiction over the matter.*

*Anti suit injunction - International Commercial Arbitration - Suit in Daman court (India) for declaration that substantial contract was not a concluded contract and correspondingly there was no arbitration agreement therein - Anti suit injunction granted by Daman Court against proceedings initiated in the English High Court - Held: Conclusion of the Bombay High Court that the anti-suit injunction granted by the Daman trial court has been correctly vacated by Daman appellate court is overruled and set aside -- Consequential directions given in the judgment.*

**Appellants No.2 and 3 and respondent No.1 (a company incorporated under the laws of Germany,**

**having its registered office in Germany), entered into a joint venture business by setting up appellant No. 1- Company - Enercon (India) Ltd., with its registered office at Daman. On 12.1.1994 appellants nos. 2 and 3 entered into a Share Holding Agreement (SHA) with respondent no. 1. On the same day appellant no. 1 and respondent no. 1 entered into a Technical Know-How Agreement ("TKHA"). On 29-9-2006, the appellants and respondent No. 1 executed an Intellectual Property License Agreement ("IPLA"). Dispute arose between the parties and appellants No.2 and 3 filed a derivative suit before the Bombay High Court, seeking resumption of supplies, parts and components. In the said suit, respondent No.1 took out an application u/s 45 of the Arbitration and Conciliation Act, 1996 (the Act). Respondent no.1 also initiated proceedings before the High Court of Justice, Queens Bench Division, Commercial Court, United Kingdom ("the English High Court"). The reliefs which were claimed included the constitution of an arbitral tribunal under the IPLA. On 8-4-2008, the appellants filed Regular Suit No. 9 of 2008 (Daman Suit) before the Court of Civil Judge, Sr. Division, ("Daman Trial Court") seeking, inter alia, a declaration to the effect that the draft IPLA was not a concluded contract and correspondingly there was no arbitration agreement between the parties to the draft IPLA. The Daman Trial Court passed an order in the favour of the appellants, wherein the respondents were directed to maintain status quo with regard to the proceedings initiated by them before the English High Court. The respondents filed an application u/s 45 of the Act in the Daman Suit. The appellants moved an application for interim injunction ex-parte in the same suit, seeking to restrain the respondents from pursuing the proceedings they had initiated in the English High Court (anti-arbitration injunction). The Daman Court dismissed the application u/s 45 of the Act on 5.1.2009 and allowed the application filed by the appella**

reliefs in the form of anti-arbitration injunction. The respondents filed four appeals, which were allowed by the District Court of Daman ("Daman Appellate Court). The anti-arbitration injunction was vacated, and the application u/s 45 of the Act was allowed. The appellants filed two writ petitions before the High Court of Bombay, which ultimately held: (a) "Prima facie, there is an arbitration agreement; (b) The curial law of the arbitration agreement is India; (c) London, designated as the venue in Clause 18.3 of the draft IPLA, is only a convenient geographical location; (d) London is not the seat; and (e) English Courts have concurrent jurisdiction since the venue of arbitration is London."

In the instant appeals, the following issues arose for consideration of the Court:

- "(i) Is the IPLA a valid and concluded contract?
- (ii) Is it for the Court to decide issue No. (i) or should it be left to be considered by the Arbitral Tribunal?
- (iii) Linked to (i) and (ii) is the issue whether the appellants can refuse to join arbitration on the plea that there is no concluded IPLA"?
- "(iv) Assuming that the IPLA is a concluded contract; is the Arbitration Clause 18.1 vague and unworkable."
- "(v) In case the arbitration clause is held to be workable, is the seat of arbitration in London or in India?
- (vi) In the event it is held that the seat is in India, would the English Courts have the concurrent jurisdiction for taking such measures as required in support of the arbitration as the

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venue for the arbitration proceedings is London?

(vii) Linked to (v) and (vi) is the issue whether the Appellants are entitled for an anti-suit injunction?"

Disposing of the appeals, the Court

HELD:

Issues (i), (ii) and (iii):

1.1 There is a legal relationship between the parties of a long standing. Section 44 of the Arbitration and Conciliation Act, 1996 (the Act) applies to arbitral awards of differences between persons arising out of legal proceedings. Such a relationship may be contractual or not, so long it is considered as commercial under the laws in force in India. Further, that legal relationship must be in pursuance of an agreement, in writing, for arbitration, to which the New York Convention applies. The court can decline to make a reference to arbitration in case it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. There are no pleadings to that effect in the plaint. Before this Court also, it is not the plea of the appellants that the agreement is null and void, inoperative and incapable of being performed as it violates any of the provisions u/ss 14, 15, 16, 17, 18, 19, 19A and 20 of the Contract Act, 1872. The issue as to whether there is a concluded contract between the parties can be left to the arbitral tribunal. [para 75] [907-E-G; 908-C-D; 909-B]

1.2 All the issues raised by the appellants about the non-existence of a concluded contract pale into insignificance in the face of "Heads of Agreement on the proposed IPLA dated 23.5. 2006". A

A clause makes it abundantly clear that the parties have  
irrevocably agreed that clause 18 of the proposed IPLA shall apply to settle any dispute or claim that arises out of or in connection with this Memorandum of Understanding and negotiations relating to IPLA. It must also be noticed that the relationship between the parties formally commenced on 12.1.1994 when the parties entered into the first SHA and TKHA. Even under that SHA, Art. 16 inter alia provided for resolution of disputes by arbitration. The TKHA also contained an identically worded arbitration clause, under Article XIX. This intention to arbitrate has continued without waiver. In the face of this, the question of the concluded contract becomes irrelevant, for the purposes of making the reference to arbitral tribunal. [para 76-77] [909-C-D, G-H; 910-A-B]

D 1.3 It must be clarified that the doubt raised by the appellant is that there is no concluded IPLA, i.e. the substantive contract. But this can have no effect on the existence of a binding arbitration agreement in view of Clause 3. The parties have irrevocably agreed to resolve all the disputes through arbitration. Parties can not be permitted to avoid arbitration, without satisfying the court that it would be just and in the interest of all the parties not to proceed with arbitration. Besides, in arbitration proceedings, courts are required to aid and support the arbitral process, and not to bring it to a grinding halt. This would be of no benefit to any of the parties. [para 77] [910-B-E]

G 1.4 Further, the arbitration agreement contained in clause 18.1 to 18.3 of IPLA is very widely worded and would include all the disputes, controversies or differences concerning the legal relationship between the parties. It would include the disputes arising in respect of the IPLA with regard to its validity, interpretation,

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A construction, performance, enforcement or its alleged breach. [para 79] [910-F-G]

B 1.5 Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of least intervention by courts or judicial authorities in matters covered by the Act. In this view of the matter, it is not possible to accept that the arbitration agreement will perish as the IPLA has not been finalised. This is also because the arbitration clause (agreement) is independent of the underlying contract, i.e. the IPLA containing the arbitration clause. Section 16 provides that the arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract. [para 79] [910-G-H; 911-A-B]

D 1.6 In the facts of the case, this Court holds that the parties must proceed with the arbitration. All the difficulties pointed out on behalf of appellants can be addressed by the arbitral tribunal. [para 78] [910-E-F]

E 1.7 The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not get frustrated with every challenge to the legality, validity, finality or breach of the underlying contract. The Act, u/s 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the National Courts would be required to ensure the success of arbitration, but this would not detract from

independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties. Therefore, it cannot be accepted that Arbitration Agreement will perish as the IPLA has not been finalised. [para 80-81] [911-C-F; 913-C]

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*Reva Electric Car Company P. Ltd. v. Green Mobil.* 2011 (13) SCR 359 = 2012(2) SCC 93; *Today Homes and Infrastructure Pvt. Ltd. vs. Ludhiana Improvement Trust and Anr.*, 2013 (7) SCALE 327 - relied on.

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Issue (iv)

2.1 Respondent No.1 is the licensor and respondent No.2 is 100% shareholder of respondent No.1, but that is not the same as being an independent licensor. [para 82] [913-F]

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2.2 The courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. A common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. [para 83] [913-G-H; 914-A-C]

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*Visa International Ltd. v. Continental Resources (USA) Ltd.* 2008 (16) SCR 1043 = 2009 (2) SCC 55 *Nandan*

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A *Biometrix Ltd. v. D.I. Oils.* 2009 (3) SCR 115 = 2009 (4) SCC 495 - relied on.

*The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191 - referred to.

B 2.3 It is a well recognized principle of arbitration jurisprudence in almost all the jurisdictions, especially those following the UNCITRAL Model Law, that the courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. C Another equally important principle recognized in almost all jurisdictions is the least intervention by the courts. Under the Act, s.5 specifically lays down, "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, D no judicial authority shall intervene except where so provided in this Part". [para 84] [915-H; 916-A-B]

2.4 Therefore, in the instant case, the arbitration clause as it stands cannot be frustrated on the ground that it is unworkable. The un-workability in the case is attributed only to the machinery provision. And the arbitration agreement, otherwise, fulfils the criteria laid down u/s 44 of the Act. Given that two arbitrators have been appointed, the missing line that "the two arbitrators appointed by the parties shall appoint the third arbitrator" F can be read into the arbitration clause. The omission is so obvious that the court can legitimately supply the missing line. In these circumstances, the Court would apply the officious bystander principle. It is permissible for the court to construe the arbitration clause in a particular manner to make the same workable when there is a defect or an omission in it, albeit such an exercise would not permit the court to re-write the contract. In the instant case, the crucial line which seems to be an omission or an error can be inserted by the court. [para G 84-86] [916-C-E; 917-E-F]

*Shin Satellite Public Co. Ltd. Vs. Jain Studio Ltd.* 2006 A  
(1) SCR 933 = 2006 (2) SCC 628 - referred to.

*Shirlaw v. Southern Foundries* [1937 S. 1835] referred to

*Halsbury's Laws of England* Vol. 13, Fourth Edition, B  
2007 Reissue - referred to.

2.5 The object of ss. 10 and 11 of the Act is to avoid failure of the arbitration agreement or the arbitration clause if contained in contract. Under s. 10(1), there is freedom given to the parties to determine the number of arbitrators, provided that such number shall not be an even number. The arbitration clause in the instant case provides that the arbitral tribunal shall consist of three arbitrators. Further, it must also be noticed that the respondents have been trying to seek adjudication of disputes by arbitration. Respondent No.2 in its email dated 13.3. 2008 clearly offered that the third and the presiding arbitrator be appointed by the respective arbitrators of the appellants and the respondents. On the other hand, the attitude of the appellants is to avoid arbitration at any cost. The parties can be permitted to proceed to arbitration. [para 87-88] [918-D-F; 919-E]

*MMTC v. Sterlite Industries (India) Ltd.* 1996 (8) Suppl. SCR 676 = 1996 (6) SCC 716 - referred to.

Issue No. v/Re: Seat

3.1 There are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India, and London would only be the "venue" to hold the proceedings of arbitration. Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of the Act would apply to the arbitration proceedings. By making such a choice, the parties have made the curial law provisions contained in Chapters III, H

A IV, V and VI of the Act applicable. In the instant case, London is mentioned only as a "venue" of arbitration, which, in the facts of the case cannot be read as the "seat" of arbitration. This is also because, all the three laws applicable in arbitration proceedings are Indian laws.  
B The law governing the contract, the law governing the arbitration agreement and the law of arbitration/curial law are all stated to be Indian. [para 90-91] [919-G-H; 920-B-C, D-F]

C *'Naviera Amazonica Peruana S.A. Vs. Compania Internacional De Seguros Del Peru* 1988 (1) Lloyd's Rep 116 - relied on.

*Bharat Aluminium Company Vs. Kaiser Aluminium* 2012 (12) SCR 327 = 2012 (9) SCC 552 - referred to.

D *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* [1970] 1 Lloyd's Rep. 269; [1970] A.C.583; *Mustill, J. in Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1981] 2 Lloyd's Rep. 446 at P. 453 - referred to.

E *Dicey & Morris on the Conflict of Laws* (11th Edn.) - cited.

F 3.2 In the instant case all the three laws: (i) the law governing the substantive contract; (ii) the law governing the agreement to arbitrate and the performance of that agreement; and (iii) the law governing the conduct of the arbitration, are Indian. The curial law of England would become applicable only if there was clear designation of the seat in London. Since the parties have deliberately chosen London as a venue, as a neutral place to hold the meetings of arbitration only, it cannot be accepted that London is the seat of arbitration. Businessmen do not intend absurd results. If seat is in London, then challenge to the award would also be in London. But the parties having chosen Indian Arbitration Act

IV, V and VI, s.11 would be applicable for appointment of arbitrator in case the machinery for appointment of arbitrators agreed between the parties breaks down. Therefore, to interpret that London has been designated as the seat would lead to absurd results, and it would, therefore, be vexatious and oppressive if respondent no. 1 is permitted to compel appellant no. 1 to litigate in England. This would unnecessarily give rise to the undesirable consequences. [para 105 and 107] [928-H; 929-A-E; 930-C]

*Braes of Doune Wind Farm (Scotland) Limited Vs. Alfred McAlpine Business Services Limited* [2008] EWHC 426 (TCC) - relied on.

*Abidin Vs. Daver.* [1984] AC 398 - referred to.

3.3 In the instant case, the parties have only designated London as a venue. Therefore, the parties have designated India as the seat. This is even more so as the parties have not agreed that the courts in London will have exclusive jurisdiction to resolve any dispute arising out of or in connection with the contract. In the instant case, except for London being chosen as a convenient place/venue for holding the meetings of the arbitration, there is no other factor connecting the arbitration proceedings to London. [para 109] [930-H; 931-A-C]

*C v. D* [2007] EWCA Civ 1282 - referred to.

*Shashoua v. Sharma,* (2009) 2 LLR 376 - distinguished.

3.4 In an International Commercial Arbitration, venue can often be different from the seat of arbitration. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration. Therefore, in the instant case, the seat would remain in India. [para 125] [941-C-D]

*Braes of Doune Wind Farm (Scotland) Limited Vs. Alfred McAlpine Business Services Limited* [2008] EWHC 426 (TCC); *'Naviera Amazonica Peruana S.A. Vs. Compania Internacional De Seguros Del Peru* 1988 (1) Lloyd's Rep 116 - referred to.

*Redfern and Hunter on International Arbitration* (5th Edn., Oxford University Press, Oxford/New York 2009), referred to.

**Issue No. vi/ Re: Concurrent Jurisdiction:**

4.1 The High Court having fixed the seat in India, committed an error in concluding that the Courts in England would have concurrent jurisdiction. It runs counter to the settled position of law in India as well as in England and would lead to unnecessary complications and inconvenience. This, in turn, would be contrary to underlying principle of the policy of dispute resolution through arbitration. The whole aim and objective of arbitration is to enable the parties to resolve the disputes speedily, economically and finally. Once the seat of arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the arbitration. [para 127 and 128] [941-F-H; 942-F-G]

*(1) Enercon GMBH (2) Wobben Properties GMBH Vs. Enercon (India) Ltd.,* (2012) EWHC 3711(Comm) - referred to.

4.2 The Courts in England have time and again reiterated that an agreement as to the seat is analogous to an exclusive jurisdiction clause. This agreement of the parties would include the determination by the court as to the intention of the parties. The natural forum for all remedies, in the facts of the instant case, is only India. [para 135] [948-C-D]

*Shashoua v. Sharma*, (2009) 2 LLR 376 *Bharat Aluminium Company Vs. Kaiser Aluminium* 2012 (12) SCR 327 = 2012 (9) SCC 552; *A Vs. B* [2007] 1 Lloyds Report 237 - referred to.

Issue (vii)/Re: Anti-Suit Injunction:

5.1 It must be noticed that respondent No. 1 was initially having 51 per cent shareholding of appellant No.1 company, which was subsequently increased to 56 per cent. This would be an indicator that respondent No. 1 is actively carrying on business at Daman. This Court considered the expression "carries on business" as it occurs in s.20 of the Code of Civil Procedure. Therefore, Daman Trial Court has jurisdiction over the matter. [para 141 and 142] [951-A-B, F]

*Oil & Natural Gas Commission Vs. Western Company of North America* 1987 SCR (1) 1024; *Modi Entertainment Network & Anr. Vs. W.S.G. Cricket Pte. Ltd.* 2003 (1) SCR 480 = 2003 (4) SCC 341; *Dhodha House Vs. S.K. Maingi* 2005 (5) Suppl. SCR 751 = 2006 (9) SCC 41- referred to.

*Harshad Chimam Lal Modi Vs. DLF Universal* 2005 (3) Suppl. SCR 495 = 2005 (7) SCC 791 - relied on.

5.2 Besides, the main contract, the IPLA is to be performed in India. The governing law of the contract is the law of India. Neither party is English. One party is Indian, the other is German. The enforcement of the award will be in India. Any interim measures which are to be sought against the assets of appellant No. 1 ought to be in India as the assets are situated in India. Respondent No.1 has not only participated in the proceedings in the Daman courts and the Bombay High Court, but also filed independent proceedings under the Companies Act at Madras and Delhi. All these factors would indicate that respondent No.1 does not even

A consider the Indian courts as forum-non-conveniens. In this view of the matter, this Court is of the considered opinion that the objection raised by the appellants to the continuance of the parallel proceedings in England is not wholly without justification. The only single factor which prompted respondent No.1 to pursue the action in England was that the venue of the arbitration has been fixed in London. The considerations for designating a convenient venue for arbitration can not be understood as conferring concurrent jurisdiction on the English Courts over the arbitration proceedings or disputes in general. Therefore, this Court is inclined to restore the anti-suit injunction granted by the Daman trial court. [para 143] [952-B-F]

6.1 In the result, the findings recorded by the Appellate Court that the parties can proceed to arbitration are affirmed. The findings recorded by the Trial Court dismissing the application u/s 45 of the Act are set aside. The application filed by respondents for reference of the dispute to arbitration u/s 45 has been correctly allowed by the Appellate Court as well as by the High Court. The findings of the High Court are affirmed to that extent. All the disputes arising between the parties in relation to the agreements, viz. SHA, TKHA, SSHAs and STKHA, Agreed Principles and IPLA, including the controversy as to whether IPLA is a concluded contract are referred to the arbitral tribunal for adjudication. The third arbitrator who shall act as the Chairman of the Arbitral Tribunal is appointed. [para 144-145] [952-G-H; 953-A-B, E]

6.2 Regular Civil Suit No. 9 of 2008, pending before the Court of Civil Judge, Senior Division, Daman, and the application u/s 45 of the Arbitration Act, 1996 filed in the Civil Suit No.2667 of 2007 and Contempt Petition in relation to Civil Suit No.2667 of 2007 pending before the Bombay High Court at the instance

stayed. Parties are at liberty to approach the court for the appropriate orders, upon the final award being rendered by the Arbitral Tribunal. This will not preclude the parties from seeking interim measures u/s 9 of the Act. [para 146] [953-E-G]

6.3 (a) The conclusion of the Bombay High Court that the seat of the arbitration is in India is upheld; (b) The conclusion that the English Courts would have concurrent jurisdiction is overruled and consequently set aside; (c) The conclusion of the Bombay High Court that the anti-suit injunction granted by the Daman Trial Court has been correctly vacated by Daman Appellate Court is overruled and set aside; (d) Consequential directions given in the judgment. [para 147] [953-A-D]

*Godhra Electricity Co. Ltd. And Anr. Vs. The State of Gujarat and Anr.* 1975 (2) SCR 42 = 1975 (1) SCC 199; *Kollipara vs. Aswathanarayana* (1968) 3 SCR 387 and *Dresser Rand vs. Bindal Agro.* 2006 (1) SCR 308 = 2006 (1) SCC 751; *Chloro Controls (I) Pvt. Ltd. Vs. Severn Trent Water Purification Inc. & Ors.* 2013 (1) SCC 641; *National Insurance Company Ltd. V. Bhogara Polyfab Pvt. Ltd.* 2008 (13) SCR 638 = 2009 (1) SCC 267; *Jagdish Chander v. Ramesh Chander & Ors.* 2007 (5) SCR 720 = 2007 (5) SCC 719 *Smt. Rukmanibai Gupta v. Collector, Jabalpur & Ors.* 1980 (4) SCC 556; *Grasim Industries Ltd. & Anr. v. Agarwal Steel* 2009 (15) SCR 283 = 2010 (1) SCC 83; and *J.K. Jain v. Delhi Development Authority* 1995(4) Suppl. SCR 72 = 1995 (6) SCC 571; *Dozco India Pvt. Ltd. V. Doosan Infracore Company Ltd.* 2010 (12) SCR 259 = 2011 (6) SCC 179; *Videocon Industries v. Union of India* 2011 (8) SCR 569 = 2011 (6) SCC 161; *Yograj Infrastructure Ltd. V. Ssang Yong Engineering and Construction Ltd.* 2011(14) SCR 301 = 2011 (9) SCC 735 - cited.

*British Electrical vs. Patley Pressings*, [1953] 1 WLR 280 *Harvey vs. Pratt*, [1965] 1 W.L.R. 1025; *Bushwall vs. Vortex*,

A [1976] 1 WLR 591; *C vs. D.* (2007) 2 Lloyd's Law Reports 367 and *Union of India v/s McDonnel.* (1993) 2 Lloyd's Rep 48 - cited.

Case Law Reference:

B	B	1975 (2) SCR 42	cited	para 35
		1975 (1) SCC 199	cited	para 35
		[1953] 1 WLR 280	cited	para 36
C	C	[1965] 1 W.L.R. 1025	cited	para 36
		[1976] 1 WLR 591	cited	para 36
		(1968) 3 SCR 387	cited	para 36
		2006 (1) SCR 308	cited	para 36
D	D	2013 (1) SCC 641	cited	para 37
		2006 (1) SCR 933	referred to	para 39
		1988 (1) Lloyd's Rep 116	relied on	Para 40
E	E	2012 (12) SCR 327	referred to	Para 40
		1987 SCR (1) 1024	referred to	Para 44
		2003 (1) SCR 480	referred to	para 44
		2005 (3) Suppl. SCR 495	relied on	para 46
F	F	2008 (13) SCR 638	cited	para 49
		1996 (8) Suppl. SCR 676	referred to	para 55
		2008 (16) SCR 1043	relied on	para 55
G	G	2007 (5) SCR 720	cited	para 55
		2009 (3) SCR 115	relied on	para 55
		2009 (15) SCR 283	cited	para 58
		1995 (4) Suppl. SCR 72	cited	para 58
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(2009) 2 LLR 376	distinguished	para 61	A
2010 (12) SCR 259	cited	para 61	
2011 (14) SCR 301	cited	para 61	
2011 (8) SCR 569	cited	para 61	B
(2007) 2 Lloyd's Law Reports 367	cited	para 66	
(19993) 2 Lloyd's Rep 48	cited	para 66	
2011 (13) SCR 359	cited	Para 68	C
[1985] 1 AC 191	referred to	para 83	
[1937 S. 1835]	referred to	para 85	
[1970] 1 Lloyd's Rep. 269	referred to	para 92	D
[1970] A.C.583			
[1981] 2 Lloyd's Rep. 446	referred to	para 92	
[2008]EWHC 426 (TCC)	relied on	Para 99	E
[2007] EWCA Civ 1282	referred to	Para 111	
(2012) EWHC 3711 (Comm)	referred to	Para 134	
[2007] 1 Lloyds Report 237	referred to	Para 134	
2005 (5) Suppl. SCR 751	referred to	Para 141	F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2086 of 2014.

From the Judgment and Order dated 05.10.2012 of the High Court of Bombay in CWP No. 7636 of 2009.

WITH

Civil Appeal No. 2087 of 2014.

Rohinton Nariman, Nikhil Sakhardande, Ashim Sood, H

A Manu Agarwal, Sonali Mathur, Swagata Naik, N. Ganpathy for the Appellants,

B Dr. A.M. Singhvi, C.U. Singh, Akhil Sibal, Vivek A. Vashi, Naira Jejeebhoy, Jehangir Jejeebhoy, Kum Kum Sen, Shamika Haldipurkar, Nidiram Sharma, Nikhil Chawla for the Respondents.

The Judgment of the Court was delivered by

**SURINDER SINGH NIJJAR, J.** 1. Leave granted.

C 2. These civil appeals have been filed against the order and judgment dated 5th October, 2012, passed by the Bombay High Court in CWP Nos.7804 of 2009 and 7636 of 2009. The Bombay High Court by the impugned order dismissed both the aforesaid Civil Writ Petitions.

D 3. Appellants No.2 and 3 (members of the Mehra family) and the Respondent No.1 (a company incorporated under the laws of Germany, having its registered office at Aurich, Germany) entered into a joint venture business by setting up the Appellant No. 1-Company - Enercon (India) Ltd. (hereinafter referred to as "EIL"), in 1994. EIL, having its registered office at Daman, was to manufacture and sell Wind Turbine Generators ("WTGs") in India. One Dr. Alloys Wobben is the Chairman of the Respondent No.1. Respondent No.2, a company incorporated under the laws of Germany, has the patent of technology in connection with the aforesaid WTGs. In furtherance of their business venture, the parties entered into various agreements, which can be briefly noticed:

G **Share Holding Agreement:**

H 4. On 12th January, 1994, the Appellant Nos. 2 and 3 entered into a Share Holding Agreement ("SHA") with the Respondent No.1. In terms of the SHA, the Respondent No. 1 was to hold 51% shares of the Appellant No. 1 Company and the Appellant Nos. 2 and 3, collective

shares.

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**Technical Know How Agreement:**

5. On the same day, i.e. 12th January, 1994, the Appellant No. 1 and the Respondent No. 1 entered into a Technical Know-How Agreement ("TKHA") by which the Respondent No. 1 agreed to transfer to the Appellant No. 1 the right and the technical know-how for the manufacture of WTGs specified therein and their components. Under the terms of the TKHA, the Respondent No. 1 has to supply special components to the Appellant No. 1. Under the TKHA, the Respondent No. 1 is the licensor and the Appellants are the licensees.

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**Supplementary Shareholding Agreements:**

6. The SHA was subsequently amended by two Supplementary Share Holding Agreements ("SSHAs") dated 19th May, 1998 and 19th May, 2000. Pursuant to the said SSHAs, the shareholding of Respondent No. 1 in the Appellant No. 1-Company increased to 56% whilst the shareholding of the Appellant Nos. 2 and 3 was reduced to 44%.

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**Supplementary Technical Know-How Agreement:**

7. A Supplementary Technical Know-How Agreement ("STKHA") amending the TKHA was executed on 19th May, 2000, by which a further license to manufacture the E-30 and E-40 WTGs was granted by the Respondent No. 1 to the Appellants.

F

**Heads of Agreement:**

8. In April 2004, the period of the TKHA expired; however, the Respondent No. 1 continued to supply the WTGs and components to the Appellant No.1. At this stage, there were discussions between the parties about the possibility of a further agreement which would cover future technologies developed by Respondents. On 23rd May, 2006, these negotiations were

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A recorded in a document titled "Heads of Agreement".

**Agreed Principles:**

9. On 29th September, 2006, the Appellants and the Respondent No. 1 entered into what is known as the "Agreed Principles" for the use and supply of the windmill technology. The second page of the Agreed Principles, inter alia, provides as follows:

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"The Agreed Principles as mentioned above, in their form and substance, would be the basis of all the final agreements which shall be finally executed.

The agreed principles shall be finally incorporated into the

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A. IPLA "Draft enclosed"

B. Successive Technology Transfer Agreement

C. Name Use Licence Agreement

D. Amendment to Existing Share Holding Agreement.

The above agreements will be made to the satisfaction of all parties. And then shall be legally executed."

**IPLA (dated 29th September, 2006):**

10. On the same day, i.e. 29th September, 2006, Intellectual Property License Agreement ("IPLA") was executed between the parties. It appears that Appellant No.2 has signed the IPLA on behalf of the Appellants No. 2 and 3. However, the Appellants have contended that this IPLA is not a concluded contract. According to the Appellants, the draft IPLA was initialled by Appellant No.2 only for the purpose of identification, with the clear understanding that the said draft still contained certain discrepancies which had to be brought in line with the Agreed Principles. Thus, the case of the Appellant is that the draft IPLA was not a concluded contract.

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Respondent No.1 has taken the stand that IPLA is a concluded contract and hence, binding on the parties. Both the parties refer to various e-mails/letters addressed to each other for substantiating their respective stands. It would be useful to notice here some of the emails and other communication exchanged between the parties:

E-mails, letters & Text message:

- i. 30.09.2006: A handwritten letter was addressed by Appellant No.2 to Dr. Wobben, Chairman of Respondent No. 2. In this letter, Appellant No.2 admits signing the IPLA. The fact that IPLA does not provide for E-82 model is also referred to in this letter.
- ii. 02.10.2006: Dr. Wobben, Chairman of Respondent No.2, addressed a letter to Appellant No.2, stating therein his offer to acquire 6% of Equity shares of the Appellant No.1 Company which were being held by the Mehra Family, for 40 million Euros.
- iii. 04.10.2006: Email by one Ms. Nicole Fritsch, on behalf of Respondent no.1, wherein it was inter alia stated as follows:  
"...we will do our utmost to prepare/adapt the agreements according to the agreed principles until 19, October and will send the drafts to you."
- iv. 18.10.2006: Ms. Fritsch wrote a letter to the Appellant No.2, stating therein that IPLA has been signed on 29th September, 2006 and also that the drafts of the remaining agreements have been prepared in the light of the Agreed Principles.
- v. 01.11.2006: SMS/text message sent by Dr. Wobben to the Appellant No.2, wherein it was stated that he wishes to buy 12% of shares held by

Appellant No.2 for 40 million Euros.

- vi. 03.11.2006: E-mail written by the Appellant No.2 to Dr. Wobben, wherein the aforesaid offer of acquisition of shares of the Appellant No.1 company was rejected. Further, Appellant No.2 wrote that it would be a prudent exercise to put together the IPLA and the relevant amendments to the SHA in good shape, so that Agreed Principles get reflected in the documents at the time of their signing. Appellant No.2 also highlighted certain discrepancies between IPLA and the Agreed Principles.
- vii. 24.11.2006: E-mail sent by Ms. Fritsch to Appellant No.2, wherein she apologised for the delay in sending outstanding drafts of the "Final IPLA, Shareholding Agreement, and other Successive Agreements". It was also mentioned that there are some discrepancies in the contracts and the Agreed Principles for which the Respondent has to discuss the matter internally.
- viii. 01.01.2007: Ms. Fritsch wrote an email to the Appellant No.2, wherein it was stated that the Respondent No.2 would be sending the revised drafts of the outstanding contracts to the Appellants, so as to let Appellant No.2 and their lawyers verify those drafts.
- ix. 29.01.2007: Ms. Fritsch forwarded the amended SHA of 1994, Corporate Name User Agreement, and Successive Technology Licence Agreement to Appellant No.2.
- x. 31.01.2007: An email was sent to Respondent No.1 by the Appellant No.1, wherein it was categorically stated that the IPLA is not a

being not in conformity with the Agreed Principles. A

11. The Appellants claim that Respondent No.1, in February, 2007, unilaterally decided to stop all shipments of supplies to India in order to pressurize them to sell the share holding as desired by Dr. Wobben. However in March, 2007, after discussions between the parties, Respondent No.1 resumed supplies. Thereafter, the supplies were stopped once again in July, 2007. This was followed by institution of the following legal proceedings: B

**LITIGATION:** C

12. We may notice only those proceedings between the parties that have a bearing on the issues arising before us.

**Derivative Suit:** D

13. Appellants No.2 and 3 filed a derivative suit (in Civil Suit No.2667 of 2007) on 11th September, 2007 before the Bombay High Court ("Bombay Suit"), seeking resumption of supplies, parts and components. In this suit, Respondent No.1 has taken out an Application under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Indian Arbitration Act, 1996'). The Bombay Suit and the Application under Section 45 of the Indian Arbitration Act, 1996 are pending disposal. On 31st October, 2007, the Bombay High Court, by an interim order without prejudice to the individual contentions of the parties, directed the Respondent No.1 to resume the supplies to Appellant No.1 until further orders. It appears that initially the supplies were resumed in compliance of the aforesaid order. However, the Appellants claim that the Respondent no.1 after sometime stopped the supplies again. Thereafter, a Contempt Petition was filed before the Bombay High Court at the instance of the Appellants for non-compliance of the aforesaid order by Respondent No.1. This contempt petition is pending adjudication. E F G

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A **Nomination of Arbitrator :**

14. On 13th March, 2008, a letter was sent on behalf of the Respondent No. 1 to the Appellant Nos. 2 and 3, wherein the Respondent No. 1 invoked the arbitration agreement, contained in Clause 18.1 of the IPLA. The letter nominates Mr. V.V. Veedor QC as the licensors' arbitrator. It inter-alia stated that "Enercon and WPG are happy to allow EIL to nominate its arbitrator and for the two party (sic) nominated arbitrators to select the third arbitrator, subject to consultation with the parties. The third arbitrator will act as the Chairman of the Tribunal." In the aforesaid letter, the Respondent No.1 also identified the issues that require determination through arbitration. B C

**Arbitration Claim Form:**

15. On 27th March, 2008, "Arbitration Claim Form" was issued by the Respondents seeking several declaratory reliefs in relation to the IPLA from the High Court of Justice, Queens Bench Division, Commercial Court, United Kingdom ("the English High Court"). The reliefs which were claimed included the constitution of Arbitral Tribunal under the IPLA. Claim form was annexed to the letter dated 2nd April, 2008 sent by the UK Solicitors of Respondent No.1 to the Appellants. D E

16. Meanwhile on 31st March, 2008, a letter was addressed by the Appellant No.2 on behalf of himself and Appellant No.3, in response to letter of Respondent No.1 dated 13th March, 2008, wherein it was stated that since the draft IPLA was not a concluded contract, there is no question of a valid arbitration agreement between the parties and as such, there is no question of nominating any arbitrator. F G

17. In response to the aforesaid, a letter was addressed by the UK Solicitors of Respondent to the Appellants on 2nd April, 2008, stating therein that in the event the Appellants do not nominate their arbitrator within 7 days of the receipt of the said letter, the Respondents shall proce H

A of the English Arbitration Act, 1996 to appoint their nominee  
arbitrator Mr. V.V. Veeder, QC, as the sole arbitrator. The  
C aforesaid letter was received by the Appellants on 3rd April,  
2008 in Daman. The Arbitration Claim Form which had been  
D filed before the English High Court was also served on the  
Appellant No.1 in Daman on 4th April, 2008.

**Daman Suit:**

18. On 8th April, 2008, the Appellants filed Regular Suit  
No. 9 of 2008 (Daman Suit) before the Court of Civil Judge,  
Sr. Division, "Daman Trial Court" seeking, inter alia, a  
C declaration to the effect that the draft IPLA was not a concluded  
contract and correspondingly there was no arbitration  
D agreement between the parties to the draft IPLA. On the same  
day, i.e. 8th April, 2008, the Daman Trial Court passed an order  
in the favour of the Appellants, wherein the Respondents were  
directed to maintain status quo with regard to the proceedings  
initiated by them before the English High Court.

19. Meanwhile on 11th April, 2008, Appellant No.1, without  
prejudice, nominated Mr. Justice B.P. Jeevan Reddy, a former  
E Judge of this court as arbitrator. On 24th May, 2008, Mr. Justice  
B.P. Jeevan Reddy intimated to the Solicitors of the Appellants  
that the arbitrators felt that there were inherent defects in the  
arbitration clause contained in the draft IPLA and therefore, the  
same was unworkable. The letter also expressed the inability  
F of the arbitrators to appoint the third arbitrator. On 5th August,  
2008, a joint letter was addressed by both the nominated  
arbitrators, wherein it was reiterated that they are unable to  
appoint the third and presiding arbitrator.

20. Thereafter, the Respondents filed an Application under  
G Section 45 of the Indian Arbitration Act in the Daman Suit. On  
the other hand, the Appellants moved an Application for interim  
injunction ex-parte in the same suit, seeking to restrain  
Respondents from pursuing the proceedings they had initiated  
H in the English High Court (anti-arbitration injunction). The

A Daman Court dismissed the Application under Section 45 of  
the Indian Arbitration Act, 1996 on 5th January, 2009. On the  
other hand, the Application filed by the Appellants, seeking  
interim reliefs in form of anti-arbitration injunction was allowed  
on 9th January, 2009. Both the aforesaid orders of the Daman  
B Trial Court were challenged by the Respondents by filing four  
appeals before the District Court of Daman ("Daman Appellate  
Court").

**Daman Appellate Court :**

C 21. The Daman Appellate Court allowed all the appeals  
of the Respondents by order dated 27th August, 2009 and set  
aside both the orders of the Daman Trial Court. The anti-  
arbitration injunction was vacated, and the Application under  
Section 45 of the Indian Arbitration Act, 1996 was allowed. The  
D aforesaid order dated 27th August, 2009 was challenged by  
the Appellants herein by filing two writ petitions before the High  
Court of Bombay, viz. Writ Petition No. 7636 of 2009, filed in  
respect of the anti-arbitration injunction and Writ Petition No.  
7804 of 2009, filed in respect of Section 45 of the Indian  
E Arbitration Act.

**Bombay High Court :**

F 22. On 4th September, 2009, the Bombay High Court  
ordered that the status quo order dated 8th April, 2008, passed  
by the Daman Trial Court be continued in Writ Petition No. 7636  
of 2009. On 9th September, 2009, the Bombay High Court  
continued the stay of the reference under Section 45 of the  
Indian Arbitration Act until the next date of hearing. In the course  
of hearing of the both writ petitions, the Bombay High Court,  
G on 25th January, 2010, directed that the interim order(s)  
granted earlier be continued until further orders.

**English Proceedings:**

H 23. In spite of the aforesaid i

Respondents filed Arbitration Claim Form 2011 Folio No.1399 before the English High Court, under Section 18 of the English Arbitration Act, 1996 for the constitution of an Arbitral Tribunal under the provisions of IPLA. The following two grounds were raised by the Respondents:-

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- A. that the anti-arbitration injunction passed by the Bombay High Court had fallen away;
- B. that the Appellants had not pursued the writ petitions before the Bombay High Court.

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24. On 25th November, 2011, the English High Court passed an order in form of an anti-suit injunction that had the effect of restraining the Appellants from prosecuting/arguing the writ petitions before the Bombay High Court. The Appellants were restrained from approaching the Bombay High Court to clarify whether ad-interim stay granted by it was in place. Meanwhile, on 15th February, 2012, the English High Court passed an ex-parte freezing injunction restraining the Appellant No.1 from disposing of its assets in excess of 90 Million Euros.

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25. On 23rd March, 2012, the English High Court (Eder, J.) delivered its judgment, wherein the freezing injunction was discharged. It was inter-alia held in Paragraph 51 of the judgment that anti-arbitration injunction of the Bombay High Court was in force. On 27th March, 2012, the English High Court discharged the anti-suit injunction subject to the undertakings given by Appellant No.1. It would be useful to notice here some of these undertakings:

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- (i) to apply forthwith to the Bombay High Court to have the hearing of the Writ Petitions expedited and to take all reasonable and necessary steps within its power to have the writ petitions concluded as expeditiously as possible;

A

- (ii) until the determination of the Application filed by the Respondents in the English High Court, not to seek further directions in relation to prayer (c) of the Writ Petition No.7636 of 2009 - which is a prayer for interim relief.

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26. The Appellants took necessary steps for an expeditious listing and hearing of the writ petitions before the Bombay High Court. However on 11th June, 2012, the Respondents filed an Application before the English High Court for constituting an Arbitral Tribunal. On 26th June, 2012, since the High Court had not disposed of early hearing Application of the Appellants, the Appellants approached this Court by Special Leave Petitions No.11676 and 11677 of 2012 for expeditious hearing of the writ petitions. This Court vide order /judgment dated 22nd June, 2012, requested the Bombay High Court to take up the writ petitions for hearing on 2nd July, 2012.

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#### **Resumption of Writ Petitions before Bombay High Court:**

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27. The hearing of the writ petitions in the Bombay High Court resumed on 2nd July, 2012. On 3rd July, 2012, the English High Court passed an order by consent, adjourning the Respondents' Application dated 11th June, 2012, until after the Bombay High Court delivers judgment in the writ petitions, and also vacating the hearing listed for 3rd-4th July, 2012. On 5th October, 2012, the Bombay High Court dismissed the writ petitions by the order/judgment impugned before us, wherein it has been, inter alia, held as under:

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- A. The scope of the enquiry under the Writ Petition No.7804 of 2009 is restricted to the existence of the arbitration agreement and not the main underlying contract (which can be challenged before the Arbitral Tribunal);
- B. Prima facie, there is an arbitration agreement;

- C. The curial law of the arbitration agreement is India; A
- D. London, designated as the venue in Clause 18.3 of the draft IPLA, is only a convenient geographical location;
- E. London is not the seat; B
- F. English Courts have concurrent jurisdiction since the venue of arbitration is London. C

**English Proceedings :**

28. On 5th October, 2012, the English Solicitors of Respondent No.1 addressed a letter to the English Solicitors of Appellant No.1, in relation to re-listing of their Application dated 11th June, 2012 for appointment of a third arbitrator/re-constitution of the Arbitral Tribunal. In October, 2012, the parties communicated with each other for getting Applications of both the parties listed, which, apart from the Application dated 11th June, 2012, included the following:

- A. An Application notice issued by Appellant No.1 on 16th October, 2012: E
  - i. for a declaration that the undertaking given by Appellant No.1 as set out in Appendix A to the order dated 27th March, 2012 do not prevent it from filing a Special Leave Petition before the Supreme Court of India and, if leave be granted, pursuing such appeals; or F
  - ii. if the undertakings (contrary to Appellant No.1's contention), do prevent Appellant No.1 from filing Special Leave Petitions before the Supreme Court of India or pursuing the same, then, a variation of the Undertakings to permit such Special Leave Petitions to be filed and, if leave be granted, H

- A to permit such appeals to be pursued.
- B. An Application notice issued by the Respondents on 17th October, 2012 for:
  - i. a declaration that Appellant No.1 would be breaching the Undertakings by filing Special Leave Petitions to the Indian Supreme Court. B
  - ii. an anti-suit injunction to restrain Appellant No.1 from filing Special Leave Petitions; and
  - iii. expedition for the hearing of the Respondent's Application issued on 11th June, 2012. C

29. In the aforesaid Applications, the English High Court (Cooke, J.) in its judgment dated 30th November, 2012 observed inter alia as follows:

"Paragraph 32: There are two critical issues with which the Damman (sic) Court and the Bombay High Court have been concerned. First, is there a binding arbitration agreement? Secondly, is the seat of the putative arbitration in London? What has arisen out of the Bombay High Court decision in addition is the question whether there is room for a supervisory jurisdiction in the English Courts where the seat is not in England under the provisions of s.2(4) of the English Arbitration Act."

"Paragraph 60: If the Supreme Court of India were, in due course, to consider that the Bombay High Court was wrong in its conclusion as to the seat of the arbitration or that there was a prima facie valid arbitration or that the English Court had concurrent supervisory jurisdiction, it would be a recipe for confusion and injustice if, in the meantime, the English Court were to conclude that England was the seat of the putative arbitration, and to assume jurisdiction over EIL and the putative arbitration, and

A was a valid arbitration agreement, whether on the basis of a good arguable case or the balance of probabilities. Further, for it to exercise its powers, whether under s.2(1) or 2(4) or s.18 of the Arbitration Act in appointing a third arbitrator, would create real problems, should the Supreme Court decide differently.

B Paragraph 61: These are the very circumstances which courts must strive to avoid in line with a multitude of decisions of high authority, from the Abidin Daver (1984) AC 398 onwards, including E.I. Dupont de Nemours v. Agnew [1987] 2 Lloyd's Rep 585. The underlying rationale of Eder J.'s judgment leads inexorably, in my view, to the conclusion that the issues to be determined in India, which could otherwise fall to be determined here in England, must be decided first by the Indian Courts and that, despite the delay and difficulties involved, the decision of the Indian Supreme Court should be awaited."

E 30. From 3rd December to 14th December, 2012, the learned counsel for the parties made efforts to finalize a draft of the Form of Order and the accompanying undertaking(s) to be submitted to the English High Court; and ultimately, parties agreed to a short hearing before the English High Court. After a hearing, on 19th December, 2012 the parties again made efforts to finalize the Form of Order. Ultimately on 15th February, 2013, the English High Court passed an order declaring that the undertakings given on 27th March, 2012 (dealt with earlier in Para 25 of this judgment) do not prevent the defendant (Appellant herein) from filing and pursuing the Special Leave Petitions and, if leave be granted, the Substantive Appeals. The English High Court further ordered the Appellant No.1 herein to give some fresh undertaking which will supersede and replace the undertakings given earlier on 27th March, 2012. These undertakings restrain the Appellants herein from seeking an injunction against the Respondents save if this Court determines that the seat of the arbitration is in India. It was

A further directed that the Appellants shall not seek an injunction restraining the Respondents from pursuing proceedings instituted in the English High Court against the Appellant on various grounds enumerated in the said undertakings.

B 31. Thereafter in February, 2013, the order/judgment dated 5th October, 2012 passed by the Bombay High Court was challenged in this court by way of present appeals.

**Submissions:**

C 32. We have heard the learned senior counsel for the parties.

**I. Re: Concluded Contract:**

D 33. The first submission of Mr. Rohinton Nariman is that there can be no arbitration agreement in the absence of a concluded contract. It was submitted that IPLA is not a concluded contract since it is not in consonance with the Agreed Principles. It was submitted that the parties merely entered into the 'Agreed Principles' on 29th September, 2006, to which a draft IPLA was annexed. Mr. Nariman submitted that the Agreed Principles formed the fundamental basis on which the final IPLA "was to be made to the satisfaction of all parties and then to be legally finally executed". Mr. Nariman reiterated that there are certain discrepancies between the Agreed Principles and the IPLA. By its letter dated 3rd November, 2006, Appellant pointed out material discrepancies between the IPLA and the Agreed Principles. These discrepancies have been accepted to be present by the Respondents in the letter dated 24th November, 2006. In fact, the Respondents have never contended that IPLA is in accordance with the Agreed Principles. The Respondents have by their letters dated 29th October, 2006 and 24th November, 2006 accepted the primacy of the Agreed Principles.

H 34. Further, the Appellants h

A correspondence prior and subsequent to the signing of the IPLA to demonstrate that there is no concluded contract. According to the learned senior counsel, the Respondents have deliberately not dealt with the correspondence subsequent to the IPLA except to submit that the same refers to agreements other than the IPLA. This, according to the learned senior counsel, is incorrect in view of the fact that email dated 24th November, 2006 refers to "final IPLA". According to Mr. Nariman, the outstanding contracts had to be in consonance with the Agreed Principles; therefore, there is no plausible explanation as to why only the IPLA should not be in consonance with the Agreed Principles. The subsequent correspondence, therefore, necessarily refers to all the four agreements mentioned in the Agreed Principles.

D 35. Mr. Nariman also pointed out that the reliance upon prior contracts/agreements or correspondence is not permissible to determine whether IPLA is concluded or not. On the contrary, subsequent correspondence and contracts can be looked into for the purpose of determining whether the substantive contract containing arbitration agreement is concluded or not. He relied on *Godhra Electricity Co. Ltd. And Anr. Vs. The State of Gujarat and Anr.*<sup>1</sup> According to Mr. Nariman, subsequent correspondence in this regard clearly demonstrates the unconcluded nature of the IPLA.

F 36. Mr. Nariman submitted that under Clause 12 of the IPLA, the duration of the IPLA was till the expiry of the last of the patents, and since the patents portfolio was absent, the duration of IPLA could not be ascertained. He pointed out that the Respondents have wrongly contended that the IPLA has been concluded as the parties have duly signed the same. According to Mr. Nariman, mere signing of a document will not make it a concluded document, if in law, the contract is not concluded. In this context, reliance was placed upon *British*

1. (1975) 1 SCC 199.

A *Electrical vs. Patley Pressings*,<sup>2</sup> *Harvey vs. Pratt*,<sup>3</sup> *Bushwall vs. Vortex*,<sup>4</sup> *Kollipara vs. Aswathanarayana*<sup>5</sup> and *Dresser Rand vs. Bindal Agro*.<sup>6</sup>

## II. Re: Existence of Arbitration Agreement

B 37. As noticed above, the primary submission of the Appellants, is that IPLA is not a concluded contract. It was then submitted that since there is no concluded contract, there is no question of an arbitration agreement coming into existence. In any event, the challenge to the existence of the substantive agreement is a matter required to be determined by the Court seized of the matter in the exercise of jurisdiction under Section 45 of the Indian Arbitration Act, 1996. Reliance was placed upon *Chloro Controls (I) Pvt. Ltd. Vs. Severn Trent Water Purification Inc. & Ors.*<sup>7</sup> According to Mr. Nariman, it is no longer open to contend that the question whether the contract is concluded or not can be gone into by the Arbitral Tribunal.

## III. Re: Un-workability of Arbitration Agreement

E 38. It was submitted that Clause 18.1 of the IPLA is incapable of being performed and therefore, there can be no reference to arbitration under Section 45 of the Indian Arbitration Act, 1996. It was submitted that the High Court has held that "each of the licensors (Respondents) has to appoint an arbitrator and the licensee (Appellant No.1) is to appoint one arbitrator ..... making it in all three arbitrators". As such, the High Court has misread Clause 18.3 of the IPLA to mean that each of the licensors (Respondent No.1 and Respondent No.2) has a right to appoint an arbitrator

G 2. [1953] 1 WLR 280.

3. [1965] 1 W.L.R. 1025.

4. [1976] 1 WLR 591.

5. (1968) 3 SCR 387.

6. (2006) 1 SCC 751.

H 7. (2013) 1 SCC 641.

and that the Appellant No.1 also has the right to appoint an arbitrator. The construction of Clause 18.1 of the IPLA in the aforesaid manner, according to learned senior counsel, is contrary to the expressed terms of Clause 18.1 in the light of the definition of licensor and licensors contained therein as well as certain other provisions of the IPLA. Mr. Nariman also pointed out that the Respondents, however, have not sought to sustain the aforesaid reasoning of the High Court.

39. He further submitted that even though an arbitration clause can be construed by the Court in such a way as to make it workable when there is a defect or an omission, nonetheless, such an exercise would not permit the Court to rewrite the clause. In support of the submissions, he relied upon *Shin Satellite Public Co. Ltd. Vs. Jain Studio Ltd.*<sup>8</sup> He also submitted that the reconstruction of the arbitration clause in the present case cannot be achieved without doing violence to the language to the arbitration clause; and that this would not be permissible in law. For this proposition, reliance was placed upon *Bushwall Vs. Vortex* (supra). He submitted that the submissions made by the Respondents fly in the face of Section 45 of the Indian Arbitration Act, 1996 which does not permit the Court to make a reference to arbitration if the arbitration agreement relied upon is incapable of being performed.

**IV. Re: Seat of Arbitration.**

40. Mr. Nariman submitted that for the purposes of fixing the seat of arbitration the Court would have to determine the territory that will have the closest and most intimate connection with the arbitration. He pointed out that in the present case provisions of the Indian Arbitration Act, 1996 are to apply; substantive law of the contract is Indian law; law governing the arbitration is Indian Arbitration law; curial law is that of India; Patents law is that of India; IPLA is to be acted upon in India; enforcement of the award is to be done under the Indian law;

8. (2006) 2 SCC 628.

A Joint Venture Agreement between the parties is to be acted upon in India; relevant assets are in India. Therefore, applying the ratio of law in *'Naviera Amazonica Peruana S.A. Vs. Compania Internacional De Seguros Del Peru'*<sup>9</sup>, the seat of arbitration would be India. The submission is also sought to be supported by the Constitution Bench decision of this Court in *"Bharat Aluminium Company Vs. Kaiser Aluminium"*<sup>10</sup> ("BALCO"). Mr. Nariman submitted that the interpretation proposed by the Respondents that the venue London must be construed as seat is absurd. Neither party is British, one being German and the other being Indian. He submits that the Respondents have accepted that the choice of law of the underlying agreement is Indian. But, if 'venue of arbitration' is to be interpreted as making London the seat of arbitration it would: (a) make the English Act applicable when it is not chosen by the parties; (b) would render the parties' choice of the Indian Arbitration Act, 1996 completely nugatory and otiose. It would exclude the application of Chapter V of the Indian Arbitration Act, 1996 i.e. the curial law provisions and Section 34 of the Indian Arbitration Act, 1996. On the other hand, interpretation propounded by the Appellants would give full and complete effect to the entire clause as it stands.

41. Mr. Nariman also submitted that there are even more clear indicators within the arbitration clause which show that the parties intended to be governed only by the Indian Arbitration Act, 1996. The clause uses the word Presiding Arbitrator and not Chairman; this language is expressly used in Sections 11 and 29 of the Indian Arbitration Act, 1996 as distinct from Section 30 of the English Arbitration Act, 1996.

42. Mr. Nariman gave another reason as to why London can't be the seat of the Arbitration. According to him, if the interpretation propounded by the Respondents is accepted, it would lead to utter chaos, confusion and unnecessary

9. 1988 (1) Lloyd's Rep 116.

10. (2012) 9 SCC 552.

A complications. This would result in absurdity because the Indian  
Arbitration Act, 1996 would apply to the process of appointment  
under Section 11; English Arbitration Act, 1996 would apply to  
the arbitration proceedings (despite the choice of the parties  
to apply Chapter V to the Part I of the Indian Arbitration Act,  
1996); challenge to the award would be under English  
B Arbitration Act, 1996 and not under the Part I of the Indian  
Arbitration Act, 1996; Indian Arbitration Act, 1996 (Section 48)  
would apply to the enforcement of the award.

C 43. Lastly, it was submitted by Mr. Nariman that provisions  
of Section 18 of the English Arbitration Act, 1996 are derogable  
and in any event the parties have chosen the Indian Court for  
constitution of Arbitral Tribunal.

#### **V. Re: Anti Suit Injunction**

D 44. It was submitted on behalf of the Appellants that since  
the seat of arbitration is India, the Courts of England would have  
no jurisdiction. Appellants rely upon *Oil & Natural Gas  
Commission Vs. Western Company of North America*<sup>11</sup>.  
E Reliance was also placed upon *Modi Entertainment Network  
& Anr. Vs. W.S.G. Cricket Pte. Ltd.*<sup>12</sup>, in support of the  
submission that in exercising discretion to grant an anti-suit  
injunction, the Court must be satisfied that the defendant is  
F amenable to the personal jurisdiction of the Court and that if  
the injunction is declined the ends of justice will be defeated.  
The Court is also required to take due notice of the principle of  
comity of Courts, therefore, where more than one forum is  
available, the Court would have to examine as to which is forum  
conveniens.

G 45. According to Mr. Nariman, all the tests which authorise  
the Indian Courts to exercise jurisdiction to grant the necessary  
relief, as laid down are being satisfied by the Appellants.  
According to Mr. Nariman, the English Courts are not available

11. 1987 SCR (1) 1024.

12. (2003) 4 SCC 341

A to the Respondents since London is only a venue. Therefore,  
an injunction ought to be issued restraining the Respondents  
from pursuing proceedings before the English Court. Mr.  
Nariman pointed out that the Respondents have given up the  
contention that Indian and English Courts have concurrent  
B jurisdiction.

C 46. Reliance is placed on the judgment of this Court in  
*Harshad Chiman Lal Modi Vs. DLF Universal*<sup>13</sup>, in support of  
the submission that since Respondent No.1 has share holding  
in a company which has registered office within the territorial  
limits of the Daman Court, therefore relief can be necessarily  
granted to the Appellants for restraining Respondent No.1 for  
proceeding in the English Courts. It was also pointed out that  
Respondent No.1 has approached the Company Law Board  
under Section 397 of the Companies Act; the Delhi High Court  
D alleging infringement of its intellectual property rights; and the  
Madras High Court against the orders passed by the Intellectual  
Property Appellate Board, revoking patents in the name of Dr.  
Wobben in India. Therefore, it has already submitted to the  
jurisdiction of Courts in India. Mr. Nariman, however, points out  
E that in view of the orders of the English Court dated 15th  
February, 2013, restraining the Appellants from seeking an  
injunction against the Respondents save if this Court  
determines the seat of the arbitration is India, the Appellants  
shall not seek any injunction from this Court, unless this Court  
F determines that the seat of arbitration is in India.

#### **Respondents' Submissions:**

G 47. Dr. Abhishek Manu Singhvi, learned senior counsel,  
appeared for Respondents No.1 and 2. Dr. Singhvi submitted  
that the over-riding principle for the Courts in Arbitration is to  
see whether there is an intention to arbitrate. According to Dr.  
Singhvi, the Appellants attack the existence of the main  
contract, but it is only the arbitration clause that the court has

H 13. (2005) 7 SCC 791.

to concern itself with. The court in this case, according to Dr. Singhvi, is not required to determine whether there is a concluded contract, under the Indian Contract Act, 1872. The court has to see whether there is a valid Arbitration Agreement. Dr. Singhvi emphasised that it is for the arbitrator to decide the question with regard to the formation of the underlying contract (IPLA). Further, learned senior counsel submitted that the status of IPLA will not nullify the arbitration clause.

48. The Respondent, according to the learned senior counsel, has to establish the existence of arbitration agreement. Dr. Singhvi, in this context, relied upon Section 7 of the Indian Arbitration Act, 1996 which has three constituents, viz. (i) Intention to arbitrate; (ii) Existence of a dispute; (iii) Existence of some legal relationship. Further, it was submitted that an agreement under Section 7 of the Indian Arbitration Act, 1996 does not require any offer and acceptance.

49. It was further submitted that Section 16 of the Indian Arbitration Act, 1996 is a drastic departure since the Arbitral Tribunal can rule on its own jurisdiction. Further, it was submitted under Section 16(a) of the Indian Arbitration Act, 1996 the existence of the arbitration clause in the contract would be treated as an agreement independent of the contract. Learned senior counsel also brought to our attention Section 45 of the Indian Arbitration Act, 1996 and its interpretation by this court in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc* (supra). In the aforesaid case, this Court, in Para 120, relied upon the earlier judgment of *National Insurance Company Ltd. V. Bhogara Polyfab Pvt. Ltd.*<sup>14</sup>, and categorised the issues that have to be decided under Section 45 as follows:

A. The issues which the Chief Justice/his designate will have to decide: the question as to whether there is an arbitration agreement.

14. (2009) 1 SCC 267.

A B. The issues which the Chief Justice/his designate may choose to decide or leave them to be decided by the Arbitral Tribunal: the question as to whether the claim is a dead claim (long-barred) or a live claim.

B C. The issues which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal. The question concerning the merits or any claim involved in the arbitration.

C 50. Dr. Singhvi then submitted that leaving aside the question of un-workability of the arbitration clause for the moment, the intention of the parties in the instant case may be determined from the following clauses of IPLA:

"17 GOVERNING LAW

17.1 This Agreement and any dispute of claims arising out of or in connection with its subject matter are governed by and construed in accordance with the Law of India.

18. DISPUTES AND ARBITRATION

18.1 All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may refer dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of who one will be appointed by each of the Licen

and the arbitrator appointed by Licensor shall also act as the presiding arbitrator. A

18.2 \* \* \*

18.3 A proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be in London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable-fees of counsel) to the Party (ies) that substantially prevail on merit. The provisions of Indian Arbitration and Conciliation Act, 1996 shall apply. B C

The reference of any matter, dispute or claim or arbitration pursuant to this Section 18 or the continuance of any arbitration proceedings consequent thereto or both will in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this Agreement." D

51. Dr. Singhvi also drew our attention to the fact that the Heads of the Agreement have been accepted to be final and binding and that the parties have irrevocably accepted the Arbitration Agreement contained in Clause 18. It was also brought to our notice that the said document has been signed by the Appellant No.1 and Respondent No.1. E

52. Learned Senior Counsel also submitted that an arbitration agreement would include the following: F

- a. Intention to arbitrate;
- b. Intention to settle by Arbitration after failure of ADR i.e. negotiations/conciliation/mediation. G
- C. Some law (i.e. proper law) to settle the Disputes (which in this case is Indian Law)
- D. Does the arbitration clause cover all disputes or is H

A there a carve out? In this case the clause covers all disputes.

E. Substantive Law to Arbitrate. Here it is the Indian Arbitration Act, 1996.

B It was further submitted that since all the essential elements of the arbitration are present, clumsy drafting will not make any difference in interpretation of the Arbitration clause.

C 53. The next submission of Dr. Singhvi, broadly put, is that the arbitration clause is not un-workable. The crucial question in this context is not whether the Arbitration Clause could be differently drafted, but the clause has to be seen in the manner it has been drafted. Dr. Singhvi submitted that in fact there is no mismatch between different parts of the clause. The clause, according to Dr. Singhvi, talks of three arbitrators: one by the licensee, one by the licensor. The implication is that the third one is to be appointed by the two arbitrators. Dr. Singhvi submits that the sentence "the third arbitrator shall be appointed by the two arbitrators" seems to have been missed out by the draftsman. This can be supplied by the Court to make the arbitration clause workable. D E

F 54. It was further submitted that the missing sentence in the arbitration clause can be supplied with the aid of some of the provisions of the Indian Arbitration Act, 1996. In this context, learned senior counsel brought to our attention Sections 10 (1) and (2) read with section 11 of the Indian Arbitration Act, 1996. Section 10 (1) and 2 read as:

"10. Number of arbitrators.

G (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

H (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of H

Section 11(1) & (2) reads as:

Appointment of arbitrators.

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub- section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

55. Learned senior counsel also pointed out that the object underlying Sections 10 and 11 is to avoid failure in appointment of arbitrators. In fact, the Respondents tried to avoid the failure by making a concession to let the third arbitrator to be the Presiding Arbitrator. The Letter/email dated 13th March, 2008 clearly demonstrates this intention of Respondents. It was also submitted that the Appellant is determined to avoid the arbitration. Dr. Singhvi submitted that there exists a manifest intention to refer disputes to arbitration and even if there is lacuna it can be cured. Furthermore, according to Dr. Singhvi, the number of arbitrators is only machinery and, therefore, its failure cannot affect the Arbitration Clause. Learned senior counsel relied upon the law laid down in *MMTC v. Sterlite Industries (India) Ltd.*,<sup>15</sup> *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, (*supra*) *Visa International Ltd. v. Continental Resources (USA) Ltd.*,<sup>16</sup> *Jagdish Chander v. Ramesh Chander & Ors.*,<sup>17</sup> *Smt. Rukmanibai Gupta v. Collector, Jabalpur & Ors.*,<sup>18</sup> and *Nandan Biometrix Ltd. v. D.I. Oils.*<sup>19</sup> After taking us through the afore cited cases, Dr. Singhvi submitted that the parties in the instant case had expressed an intention to arbitrate and that there is no contrary intention.

15. AIR 1997 SC 605 Para 8-13.  
16. (2009) 2 scc 55, Paras 24-25.  
17. (2007) 5 scc 719, pp. 7-8.  
18. (1980) 4 scc 556, pp. 6-7.  
19. (2009) 4 scc 495, pp. 26-30 & 40.

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56. The next submission of Dr. Singhvi is that the IPLA is final. It was submitted that IPLA was to succeed the Know How Agreement that contained an Arbitration Clause. Learned Senior counsel brought to our attention following provisions of the Heads of Agreement on a Proposed IPLA dated 23.05.2006:

"1.6 The Parties have discussed intensively the most appropriate structure and arrangements reflected in the draft IPLA dated 22, May 2006 attached as ANNEX 1 ("Draft IPLA"). This draft IPLA expresses the final views of the parties and provides for detailed terms whereunder Enercon will make available to EIL the benefit of all its technology including patents, design rights, copyrights, trademarks and know how relating to the Products, including but not limited to:

....."  
"3. GOVERNING LAW AND JURISDICTION

3.1 This paragraph is legally binding.  
3.2 This Heads of Agreement is (and all negotiations and any legal agreement prepared in connection with IPLA shall be governed by and construed in accordance with the law of Germany.

3.3 The parties irrevocably agree that Clause 18 of the proposed draft IPLA shall apply to settle any dispute or claim that arises out or in connection with this memorandum of understanding and negotiations relating to the proposed IPLA."

"4.1 This Heads of Agreement represents the good faith intentions of the parties to proceed with the proposed IPLA on the basis of the Draft IPLA but is not legally binding and creates no legal obligations on either party. Its sole



purpose is to set out the principles on which the parties intend in good faith to negotiate legally definitive agreements."

57. Learned Senior Counsel also pointed out the email sent on 27.06.2006 by Nicole Fritsch on behalf of Respondents to the Appellant No.2 and also the email sent by Appellant No.2 on 16.09.2006 to Nicole Fritsch in context of the submission that IPLA is final. These emails have already been noticed in the earlier part of this judgment.

58. It was also pointed out that the Appellant by his letter dated 30th September, 2006 expressly admitted to having signed the IPLA. Thus, it was submitted that the Appellant cannot get out of the contract unless there is coercion and/or fraud. To argue that there is now a presumption of validity in favour of IPLA being a concluded contract, reliance was sought to be placed upon *Grasim Industries Ltd. & Anr. v. Agarwal Steel*<sup>20</sup> and *J.K. Jain v. Delhi Development Authority*.<sup>21</sup>

59. Dr. Singhvi also brought to our notice that the execution and finality of the IPLA is also demonstrated by the fact that first page of Heads of Agreement dated 23rd May, 2006 reads as "A PROPOSED INTELLECTUAL PROPERTY LICENSE AGREEMENT." Whereas, the word proposed or draft is conspicuously absent in the IPLA dated 29th September, 2006. This, according to the learned senior counsel, shows that the IPLA was a concluded contract. Dr. Singhvi further submitted that on 29th September, 2006 three drafts, viz. Successive Technical Transfer Agreement, Name Use License Agreement and amendments to the existing Shareholders Agreement were ready and available to the parties, but at that point of time these agreements were under discussion and being negotiated. Admittedly, none of these agreements were initialled, let alone signed by the parties. This, according to Dr. Singhvi, is a clear indication that the parties were aware of the documents that

20. (2010) 1 SCC 83, p6.

21. (1995) 6 SCC 571.

A were to be finalised between them and also of the documents that were required to be executed. This fact was also relied upon to support the contention that IPLA is a final and concluded agreement that was knowingly and willingly executed by Appellant No.2. To add credibility to this submission, learned senior counsel pointed out that 'E-82 Model' is expressly excluded from the product description in the IPLA. This according to Dr. Singhvi, is a deviation from the earlier agreement, and it has been acknowledged by the Appellant. Dr. Singhvi also pointed out the difference as to the provision of royalty between the IPLA and earlier draft to support his contention.

60. The next set of submissions made by Dr. Singhvi relate to the seat of arbitration. Learned senior counsel submitted that the court has to determine where the centre of gravity for arbitration is situated. The terms that are normally used to denote seat are "venue", "place" or "seat". According to the learned senior counsel, the court cannot adopt a semantic approach. It was also submitted that under sub sections (1), (2) and (3) of Section 20 of Arbitration Act, 1996 the term 'place' connotes different meanings. Under Section 20(1), place means seat of arbitration, whereas under section 20(3), place would mean venue. Therefore, the expression "the venue of arbitration proceedings" will have reference only to the seat of arbitration. It was submitted that all the surrounding circumstances would also show that parties intended to designate England as the seat of arbitration.

61. It was also submitted that all the proceedings between the parties would indicate that there is nothing to indicate India as the choice of the seat of arbitration. Learned senior counsel relied upon *Shashoua v. Sharma*,<sup>22</sup> *Dozco India Pvt. Ltd. V. Doosan Infracore Company Ltd.*<sup>23</sup> *Videocon Industries v. Union of India*,<sup>24</sup> *Yograj Infrastructure Ltd. V. Ssang Yong*

22. (2009) 2 LLR 376.

23. (2011) 6 SCC 179 (Paras 4, 15 and 18).

H 24. (2011) 6 SCC 161 (Paras and Paras 20 to 2

*Engineering and Construction Ltd.*<sup>25</sup> *National Agricultural Coop. Marketing Federation India* (supra). A

62. It was further submitted that three potential laws that govern an arbitration agreement are as follows :

1. The proper law of the contract ; B
2. The law governing the arbitration agreement ;
3. The law governing the conduct of the arbitration also known as curial law or lex arbitri. C

63. Reliance was placed upon the following except of *Naviera Amazonica Peruana SA* (supra):

".....in the majority of cases all three will be same but (1) will often be different from (2) and (3). And occasionally, but rarely, (2) may also differ from (3)." D

64. The next submission of Dr. Singhvi is that law of the seat dictates the curial law, and that the proper law of the arbitration agreement does not overwhelm law of the seat. Laying particular emphasis on *Naviera*, Dr. Singhvi submitted that intention of the parties is important to determine the seat. If place is designated then curial law will be that of such place. Dr. Singhvi relied on the ratio of *Naviera* and submitted that the proper law, law of arbitration and the curial law have all been expressly mentioned in the present case. It was also submitted that in the present case London as venue has to be interpreted having conferred London the status of seat, unless some contrary intention has been expressed. E F

65. According to Dr. Singhvi, closest connection test is completely irrelevant when the parties have specified all the three laws applicable in a contract. Further, close connection test is to be applied only when nothing has been mentioned in the agreement. The effort of the court is always to find the

25. (2011) 9 SCC 735 (Paras 46-52). H

A essential venue. He relied upon Dicey, Morris & Collins<sup>26</sup> to submit that in most cases, seat is sufficiently indicated by the country chosen as the place of the arbitration. Dr. Singhvi submitted that the proper law and law of arbitration cannot override curial law.

B 66. Dr. Singhvi relied heavily on the ratio of the law laid down in *Naviera* (supra). Reliance was also placed upon the cases of *C vs. D.*<sup>27</sup> and *Union of India v/s McDonnell.*<sup>28</sup> He also relied upon the ratio of Balco in support of the submission that London is the seat of arbitration. Particular reference was made to Paras 75,76, 96, 100, 104, 113, 116 and 117 of BALCO's judgment to submit that since the seat is outside India, only those provisions of Part I of the Indian Arbitration Act, 1996 will be applicable, which are not inconsistent with the English Law, i.e., English Arbitration Act, 1996. C D

#### **Anti-Suit injunction:**

E 67. Dr. Singhvi submitted that the prayer of Appellants for an anti suit injunction is subject to determination by this court that the seat is India. Dr. Singhvi, however, argued that such an injunction be denied even if this court holds that the seat of arbitration is India since there is no occasion that warrants the grant of such an injunction. The Respondents relied upon the judgment of this court in *Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.* (supra) to submit that the present case does not fall within any, let alone all, of the parameters set out in the aforesaid case that determine the grant of an anti-suit injunction. F

G 68. Mr. C.U. Singh, learned senior advocate, appeared for Respondent no.2. Mr. Singh adopts the submissions made before this court by Dr. Singhvi. Besides, Mr. Singh submitted that after the enactment of the Indian Arbitration Act, 1996 the distinction between the seat and the venue has blurred. The

26. Dicey, Morris & Collins Fifteenth Edition at 16-035.

27. (2007) 2 Lloyd's Law Reports 367.

28. (1993) 3 Lloyd's Rep 48. H

term that has been used by the Parliament is 'place' which denotes the place of physical sitting of the Arbitral Tribunal. This is the place which governs the curial law. However, Arbitrators have been given the flexibility to hold meetings anywhere. He also relied upon the judgment of this court in *Chloro* (supra) (Paras 80-83) to submit that the approach of the court is to make the arbitration clause workable. Reliance was also placed upon *Reva Electric Car Company P. Ltd. v. Green Mobil*.<sup>29</sup>

**Issues :**

69. We have anxiously considered the submissions of the learned counsel for the parties. We have also considered the written submissions.

The issues that arise for consideration of this Court are :

- (i) Is the IPLA a valid and concluded contract?
- (ii) Is it for the Court to decide issue No. (i) or should it be left to be considered by the Arbitral Tribunal?
- (iii) Linked to (i) and (ii) is the issue whether the Appellants can refuse to join arbitration on the plea that there is no concluded IPLA?
- (iv) Assuming that the IPLA is a concluded contract; is the Arbitration Clause 18.1 vague and unworkable, as observed by both the Arbitrators i.e. Mr. V.V. Veeder QC and Mr. Justice B.P. Jeevan Reddy?
- (v) In case the arbitration clause is held to be workable, is the seat of arbitration in London or in India?
- (vi) In the event it is held that the seat is in India, would the English Courts have the concurrent jurisdiction for taking such measures as required in support of

29. (2012) 2 SCC 93.

A the arbitration as the venue for the arbitration proceedings is London?

(vii) Linked to (v) & (vi) is the issue whether the Appellants are entitled for an anti-suit injunction?

B These, of course, are only broad based issues; many other supplementary questions will have to be examined in order to give a definitive determination.

**Our Conclusions :**

**Issues (i), (ii) and (iii)**

D 70. Is the IPLA a valid and a concluded contract? Is it for the Court to decide this issue or have the parties intended to let the arbitral tribunal decide it?

E 71. The Bombay High Court upon consideration of the factual as well as the legal issues has concluded that "there can be no escape for the Appellants from the consequences flowing from the signing of the IPLA; and the signing of the IPLA by the parties is therefore a strong circumstance in arriving at a prima facie conclusion as enunciated in *Shin-Etsu Chemicals Co. Ltd.'s* case for referring the parties to arbitration."

F 72. The Daman Trial Court on the basis of the material on record came to the conclusion that IPLA was not a concluded contract for the want of free consent, and was executed due to undue influence, fraud, misrepresentation and mistake. It further held that the plaintiffs (the Appellants herein) would suffer heavy economic loss if the arbitration is held at London. These findings were reversed by the Daman Appellate Court. It was held that since IPLA has been signed by the parties, there was a valid arbitration agreement for reference of the disputes to arbitration. It was also held that assuming that there was some defect in the methodology for appointment of the arbitrators that would not come in the way of enforcement of the arbitration agreement. The Daman Appellate Cou

since the parties had agreed to London being the seat of arbitration, the Appellants (plaintiffs) could not raise a grievance as regards the jurisdiction of the English Courts.

73. Mr. R.F. Nariman, learned senior counsel, appearing for the Appellants has vehemently argued that there is neither a concluded IPLA between the parties nor is there a legally enforceable arbitration agreement. In any event, the arbitration can not proceed as the arbitration clause itself is unworkable. As noticed earlier, learned senior counsel has submitted that in the absence of a concluded contract, there can be no arbitration agreement. In short, the submission is that there can be no severability of the arbitration clause from the IPLA. Since the IPLA is not a concluded contract there can be no arbitration agreement.

74. On the other hand, Dr. Singhvi has submitted, as noticed earlier, that the intention of the parties to arbitrate is clear. Even if the existence of the main contract is under dispute, the court is concerned only with the arbitration agreement i.e. the arbitration clause. The submission of Dr. Singhvi is that the absence of IPLA will not nullify the arbitration clause.

75. We find considerable merit in the submissions made by Dr. Singhvi. It cannot be disputed that there is a legal relationship between the parties of a long standing. Section 44 of the Indian Arbitration Act, 1996 applies to arbitral awards of differences between persons arising out of legal proceedings. Such a relationship may be contractual or not, so long it is considered as commercial under the laws in force in India. Further, that legal relationship must be in pursuance of an agreement, in writing, for arbitration, to which the New York Convention applies. The court can decline to make a reference to arbitration in case it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. There are no pleadings to that effect in the plaint. The Daman Trial Court findings that the contract is null and void and not based on free consent were rendered in the absence of relevant

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A pleadings. There is a mention in one of the e-mails that Dr. Wobben has taken advantage of his friendship with Mr. Yogesh Mehra. But that seems to be more of a sulk than a genuine grievance. Even if one accepts the truth of such a statement, the same is not reflected in the pleadings. Therefore, no serious note could be taken of that statement at this stage. The Daman Appellate Court upon reconsideration of the pleadings found that there is no plea to the effect that the agreement is null, void or incapable of being performed. Justice Savant has not examined the pleadings as the issue with regard to the underlying contract has been left to be examined by the Arbitral Tribunal. Before us also, it is not the plea of the Appellants that the arbitration agreement is without free consent, or has been procured by coercion, undue influence, fraud, misrepresentation or was signed under a mistake. In other words, it is not claimed that the agreement is null and void, inoperative and incapable of being performed as it violates any of the provisions under Sections 14, 15, 16, 17, 18, 19, 19A and 20 of the Indian Contract Act, 1872. The submission is that the matter cannot be referred to arbitration as the IPLA, containing the arbitration clause/agreement, is not a concluded contract. This, in our opinion, would not fall within the parameters of an agreement being "null and void, inoperative or incapable of being performed", in terms of Sections 14, 15, 16, 17, 18, 19 and 20 of the Indian Contract Act, 1872. These provisions set out the impediments, infirmities or eventualities that would render a particular provision of a contract or the whole contract void or voidable. Section 14 defines free consent; Section 15 defines coercion in causing any person to enter into a contract. Section 16 deals with undue influence. Fraud in relation to a contract is defined under Section 17; whereas misrepresentation is defined and explained under Section 18. Section 19 states that "when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused". Section 19A gives the party who was unduly influenced to enter into a contract an op

provided by the preceding section. Section 20 makes an agreement void where both the parties thereto are under a mistake as to a matter of fact. In our opinion, all the aforesaid eventualities refer to fundamental legal impediments. These are the defences to resist a claim for specific performance of a concluded contract; or to resist a claim for damages for breach of a concluded contract. We agree with Savant, J. that the issue as to whether there is a concluded contract between the parties can be left to the Arbitral Tribunal, though not for the same reasons.

76. In our opinion, all the issues raised by the Appellants about the non-existence of a concluded contract pale into insignificance in the face of "Heads of Agreement on the proposed IPLA dated 23rd May, 2006". Clause 3 of the Heads of Agreement provides as under:-

"3. Governing Law and Jurisdiction

3.1 This paragraph is legally binding.

3.2 This Heads of Agreement is (and all negotiations and any legal agreements prepared in connection with the IPLA shall be) governed by and construed in accordance with the law of Germany.

3.3 The parties irrevocably agree that Clause 18 of the proposed draft IPLA shall apply to settle any dispute or claim that arises out of or in connection with this memorandum of understanding and negotiations relating to the proposed IPLA."

77. A bare perusal of this clause makes it abundantly clear that the parties have irrevocably agreed that clause 18 of the proposed IPLA shall apply to settle any dispute or claim that arises out of or in connection with this Memorandum of Understanding and negotiations relating to IPLA. It must also be noticed here that the relationship between the parties formally commenced on 12th January, 1994 when the parties

A entered into the first SHA and TKHA. Even under that SHA, Article XVI inter alia provided for resolution of disputes by arbitration. The TKHA also contained an identically worded arbitration clause, under Article XIX. This intention to arbitrate has continued without waiver. In the face of this, the question of the concluded contract becomes irrelevant, for the purposes of making the reference to the Arbitral Tribunal. It must be clarified that the doubt raised by the Appellant is that there is no concluded IPLA, i.e. the substantive contract. But this can have no effect on the existence of a binding Arbitration Agreement in view of Clause 3. The parties have irrevocably agreed to resolve all the disputes through Arbitration. Parties can not be permitted to avoid arbitration, without satisfying the Court that it would be just and in the interest of all the parties not to proceed with arbitration. Furthermore in arbitration proceedings, courts are required to aid and support the arbitral process, and not to bring it to a grinding halt. If we were to accept the submissions of Mr. Nariman, we would be playing havoc with the progress of the arbitral process. This would be of no benefit to any of the parties involved in these unnecessarily complicated and convoluted proceedings.

78. In the facts of this case, we have no hesitation in concluding that the parties must proceed with the Arbitration. All the difficulties pointed out by Mr. Rohinton Nariman can be addressed by the Arbitral Tribunal.

79. Further, the arbitration agreement contained in clause 18.1 to 18.3 of IPLA is very widely worded and would include all the disputes, controversies or differences concerning the legal relationship between the parties. It would include the disputes arising in respect of the IPLA with regard to its validity, interpretation, construction, performance, enforcement or its alleged breach. Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of least intervention by courts or judicial authorities in matters covered by the

1996. In view of the aforesaid, it is not possible for us to accept the submission of Mr. Nariman that the arbitration agreement will perish as the IPLA has not been finalised. This is also because the arbitration clause (agreement) is independent of the underlying contract, i.e. the IPLA containing the arbitration clause. Section 16 provides that the Arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract.

80. The concept of separability of the arbitration clause/ agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the National Courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties.

81. The scope and ambit of provision contained in Section 16 of the Indian Contract Act has been clearly explained in *Reva Electric Car* (supra), wherein it was inter alia observed as follows:

"54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the

arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Mr. Ahmadi that with the termination of the MoU on 31-12-2007, the arbitration clause would also cease to exist."

The aforesaid reasoning has also been approved by a two Judge bench of this Court in *Today Homes and Infrastructure Pvt. Ltd. vs. Ludhiana Improvement Trust and Anr.*,<sup>30</sup> wherein it was inter alia held as under:

"14. The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding the case of *Reva Electric Car Company Private Limited Vs. Green Mobil* [(2012) 2 SCC 93], wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which

A provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void." B

C In view of the aforesaid, we are not inclined to accept the submission of Mr. Nariman that Arbitration Agreement will perish as the IPLA has not been finalised.

**Issue (iv)**

D 82. We now come to the next issue that even if there is a valid arbitration agreement/clause, can the parties be denied the benefit of the same on the ground that it is unworkable? Both the Arbitrators, as noticed above, are of the opinion that the parties cannot proceed to arbitration as the arbitration clause is unworkable. The Bombay High Court has taken the view that the arbitration clause is workable as two Arbitrators are to be appointed by the licensors and one by the licensee. We are not inclined to agree with the aforesaid finding/conclusion recorded by the High Court. Respondent No.1 is the licensor and Respondent No.2 is undoubtedly 100% shareholder of Respondent No.1, but that is not the same as being an independent licensor. It would also be relevant to point out here that before this Court the Respondent has not even tried to support the aforesaid conclusion of the High Court. E

F 83. In our opinion, the Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the Court to make the G H

A same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. We may just add here the words of Lord Diplock in *The Antaios Compania Neviera SA v Salen Rederierna AB*,<sup>31</sup> which are as follows: C

"If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense." D

We entirely agree with the aforesaid observation.

E This view of ours is also supported by the following judgments which were relied upon by Dr. Singhvi:

In *Visa International Limited* (supra), it was inter alia held that:

F "25....No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

G 26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties...." H

31. [1985] 1 AC 191.

Similar position of law was reiterated in *Nandan Biomatrix Ltd.* (supra), wherein this court observed inter alia as under:

28. This Court in *Rukmanibai Gupta v. Collector, Jabalpur* has held (at SCC p. 560, para 6) that what is required to be ascertained while construing a clause is "whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement".

29. In *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd.*, this Court has held that: (SCC p. 142, para 8)

"8. ... an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or 'arbitrator' or 'arbitrators' has been used in the agreement."

(original emphasis supplied)

30. The Court is required, therefore, to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties, the agreement in question and the surrounding circumstances. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application under Section 11 of the 1996 Act is: whether there is an arbitration agreement as defined in the said Act."

84. It is a well recognized principle of arbitration jurisprudence in almost all the jurisdictions, especially those

A following the UNCITRAL Model Law, that the Courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdictions is the least intervention by the Courts. Under the Indian Arbitration Act, 1996, Section 5 specifically lays down that : "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part". Keeping in view the aforesaid, we find force in the submission of Dr. Singhvi that the arbitration clause as it stands cannot be frustrated on the ground that it is unworkable.

85. Dr. Singhvi has rightly submitted that the un-workability in this case is attributed only to the machinery provision. And the arbitration agreement, otherwise, fulfils the criteria laid down under Section 44 of the Indian Arbitration Act, 1996. Given that two Arbitrators have been appointed, the missing line that "the two Arbitrators appointed by the parties shall appoint the third Arbitrator" can be read into the arbitration clause. The omission is so obvious that the court can legitimately supply the missing line. In these circumstances, the Court would apply the officious bystander principle, as explained by MacKinnon, LJ in *Shirlaw v. Southern Foundries*,<sup>32</sup> to interpret the clause. In *Shirlaw*, it was held that:

F "prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

In construing an arbitration clause, it is not necessary to employ the strict rules of interpretation which may be necessary to construe a statutory provision. The court would be well within 32. [1937 S. 1835].

its rights to set right an obvious omission without necessarily leaving itself open to the criticism of having reconstructed the clause.

Further, we find support in this context from the following extract of Halsbury's Laws of England (Vol. 13, Fourth Edition, 2007 Reissue):

"The words of a written instrument must in general be taken in their ordinary or natural sense notwithstanding the fact that such a construction may appear not to carry out the purpose which it might otherwise be supposed the parties intended to carry out; but if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words; and where the literal (in the sense of ordinary, natural or primary) construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned."

86. Mr. Rohinton Nariman had very fairly submitted that it is permissible for the Court to construe the arbitration clause in a particular manner to make the same workable when there is a defect or an omission in it. His only caveat was that such an exercise would not permit the Court to re-write the contract. In our opinion, in the present case, the crucial line which seems to be an omission or an error can be inserted by the Court. In this context, we find support from judgment of this court in *Shin Satellite Public Co. Ltd.* (supra), wherein the 'offending part' in the arbitration clause made determination by the arbitrator final and binding between the parties and declared that the parties have waived the rights to appeal or an objection against such award in any jurisdiction. The Court, inter-alia, held that such an objectionable part is clearly severable being independent of the dispute that has to be referred to be resolved through arbitration. By giving effect to the arbitration clause, the

A court specifically noted that the "it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is rewriting the contract which is in the nature of 'novatio' (sic). The intention of the parties is explicit and clear; they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a Court of law can be separated and severed by using a 'blue pencil'."

87. There is another reason which permits us to take the aforesaid view and accept the submission made by Dr. Singhvi that while construing the arbitration agreement/clause the same can be construed to make it workable, as such an approach is statutorily provided for. For this submission, Dr. Singhvi has rightly relied upon the provision contained in Sections 10 and 11 of the Indian Arbitration Act, 1996. The object of these two provisions is to avoid failure of the arbitration agreement or the arbitration clause if contained in contract. Under Section 10(1), there is freedom given to the parties to determine the number of Arbitrators, provided that such number shall not be an even number. The arbitration clause in this case provides that the arbitral tribunal shall consist of three arbitrators. Further, it must also be noticed that the Respondents have been trying to seek adjudication of disputes by arbitration. As noted earlier, the Respondent No.2 in its email dated 13th March, 2008 clearly offered that the third and the presiding arbitrator be appointed by the respective arbitrators of the Appellants and the Respondents. On the other hand, the attitude of the Appellants is to avoid arbitration at any cost.

88. In this context, reliance placed by Dr. Singhvi upon *MMTC Limited* (supra) is justified. In *MMTC*, the provisions contained in Sections 10(1) and (2) of the Indian Arbitration Act, 1996 have been held to be machinery provisions by this Court. It was further held that the validity of an arbitration agreement does not depend on the number of arbit

The Court declined to render the arbitration agreement invalid on the ground that it provided an even number of arbitrators. In the present case, Mr. Rohinton Nariman had rightly not even emphasised that the arbitration agreement itself is illegal. The learned sr. counsel only emphasised that the arbitrators having expressed the view that the arbitration clause is unworkable, the parties ought not to be sent to the arbitration.

Similarly, other provisions contained in Sections 8, 11 and 45 of the Indian Arbitration Act, 1996 are machinery provisions to ensure that parties can proceed to arbitration provided they have expressed the intention to Arbitrate. This intention can be expressed by the parties, as specifically provided under Section 7 of the Indian Arbitration Act, 1996 by an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. Such intention can even be expressed in the pleadings of the parties such as statements of claim and defence, in which the existence of the agreement is alleged by one party and not denied by the other. In view of the above, we are of the opinion that the parties can be permitted to proceed to arbitration.

**Issue No. V/Re: Seat**

89. This now clears the decks for the crucial question, i.e., is the 'seat' of arbitration in London or in India. This is necessarily so as the location of the seat will determine the Courts that will have exclusive jurisdiction to oversee the arbitration proceedings. Therefore, understandably, much debate has been generated before us on the question whether the use of the phrase "venue shall be in London" actually refers to designation of the seat of arbitration in London.

90. We find much substance in the submissions of Mr. Nariman that there are very strong indicators to suggest that the parties always understood that the seat of arbitration would be in India and London would only be the "venue" to hold the proceedings of arbitration. We find force in the submission

A made by learned senior counsel for the Appellants that the facts of the present case would make the ratio of law laid down in *Naviera Amazonica Peruana S.A.* (supra) applicable in the present case. Applying the closest and the intimate connection to arbitration, it would be seen that the parties had agreed that the provisions of Indian Arbitration Act, 1996 would apply to the arbitration proceedings. By making such a choice, the parties have made the curial law provisions contained in Chapters III, IV, V and VI of the Indian Arbitration Act, 1996 applicable. Even Dr. Singhvi had submitted that Chapters III, IV, V and VI would apply if the seat of arbitration is in India. By choosing that Part I of the Indian Arbitration Act, 1996 would apply, the parties have made a choice that the seat of arbitration would be in India. Section 2 of the Indian Arbitration Act, 1996 provides that Part I "shall apply where the place of arbitration is in India". In *Balco*, it has been categorically held that Part I of the Indian Arbitration Act, 1996, will have no application, if the seat of arbitration is not in India. In the present case, London is mentioned only as a "venue" of arbitration which, in our opinion, in the facts of this case can not be read as the "seat" of arbitration.

91. We are fortified in taking the aforesaid view since all the three laws applicable in arbitration proceedings are Indian laws. The law governing the Contract, the law governing the arbitration agreement and the law of arbitration/Curial law are all stated to be Indian. In such circumstances, the observation in *Naviera Amazonica Peruana S.A.* (supra) would become fully applicable. In this case, the Court of Appeal in England considered the agreement which contained a clause providing for the jurisdiction of the courts in Lima, Peru in the event of judicial dispute; and at the same time contained a clause providing that the arbitration would be governed by the English law and the procedural law of arbitration shall be the English law. The Court of Appeal summarised the state of the jurisprudence on this topic. Thereafter, the conclusions which arose from the material were summaris

A "All contracts which provide for arbitration and contain a  
foreign element may involve three potentially relevant  
systems of law: (1) the law governing the substantive  
contract; (2) the law governing the agreement to arbitrate  
and the performance of that agreement; (3) the law  
governing the conduct of the arbitration. In the majority of  
cases all three will be the same. But (1) will often be  
different from (2) and (3). And occasionally, but rarely, (2)  
may also differ from (3)."

C It was observed that the problem about all these  
formulations, including the third, is that they elide the distinction  
between the legal localisation of arbitration on the one hand  
and the appropriate or convenient geographical locality for  
hearings of the arbitration on the other hand.

D 92. On the facts of the case, it was observed in *Naviera*  
*Amazonica* case (supra) that since there was no contest on  
Law 1 and Law 2, the entire issue turned on Law 3, "the law  
governing the conduct of the arbitration". This is usually referred  
to as the curial or procedural law, or the *lex fori*. Thereafter, the  
Court approvingly quoted the following observation from Dicey  
& Morris on the Conflict of Laws (11th Edn.): "English Law does  
not recognise the concept of a delocalised arbitration or of  
arbitral procedures floating in the transnational firmament,  
unconnected with any municipal system of law". It is further held  
that "accordingly every arbitration must have a 'seat' or 'locus  
arbitri' or 'forum' which subjects its procedural rules to the  
municipal law which is there in force". The Court thereafter culls  
out the following principle:

G "Where the parties have failed to choose the law governing  
the arbitration proceedings, those proceedings must be  
considered, at any rate *prima facie*, as being governed by  
the law of the country in which the arbitration is held, on  
the ground that it is the country most closely connected with  
the proceedings."

A The aforesaid classic statement of the conflict of law rules  
as quoted in *Dicey & Morris on the Conflict of Laws* (11th  
Edn.), Vol. 1, was approved by the House of Lords in *James*  
*Miller & Partners Ltd. v. Whitworth Street Estates*  
*(Manchester) Ltd.*<sup>33</sup> Mustill, J. in *Black Clawson International*  
*Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*<sup>34</sup>, a little later  
characterised the same proposition as "the law of the place  
where the reference is conducted, the *lex fori*". The position of  
law in India is the same.

C 93. The Court in *Naviera Amazonica*, also, recognised the  
proposition that "there is equally no reason in theory which  
precludes parties to agree that an arbitration shall be held at a  
place or in country X but subject to the procedural laws of Y".  
But it points out that in reality parties would hardly make such  
a decision as it would create enormous unnecessary  
complexities. Finally it is pointed out that it is necessary not to  
confuse the legal seat of arbitration with the geographically  
convenient place or places for holding hearings. In the present  
case, Dr.Singhvi, it seems to us, is confusing the geographically  
convenient place, which is London, with the legal seat which,  
in our opinion, is undoubtedly India.

F 94. Further, on examination of the facts in *Naviera*  
*Amazonica* case, the Court of Appeal observed that there is  
nothing surprising in concluding that these parties intended that  
any dispute under this policy should be arbitrated in London.  
But it would always be open to the Arbitral Tribunal to hold  
hearings in Lima if this was thought to be convenient, even  
though the seat or forum of the arbitration would remain in  
London. In the present case, with the utmost ease, "London"  
can be replaced by India, and "Lima" with London.

G 95. Having chosen all the three applicable laws to be  
Indian laws, in our considered opinion, the parties would not  
have intended to have created an exceptionally difficult

33. [1970] 1 Lloyd's Rep. 269; [1970] A.C. 583.

34. [1981] 2 Lloyd's Rep. 446 at P. 453.

situation, of extreme complexities, by fixing the seat of arbitration in London. A

In view of the above, we are unable to accept the submissions made by Dr. Singhvi that in this case, the term "venue" ought to be read as seat. B

96. We are also unable to accept the submission made by Dr. Singhvi that in this case the venue should be understood as reference to place in the manner it finds mention in Section 20(1), as opposed to the manner it appears in Section 20(3), of the Indian Arbitration Act, 1996. Such a submission cannot be accepted since the parties have agreed that Curial law would be the Indian Arbitration Act, 1996. C

97. In *Balco*, it has been clearly held that concurrent jurisdiction is vested in the Courts of seat and venue, only when the seat of arbitrations is in India (Para 96). Reason for the aforesaid conclusion is that there is no risk of conflict of judgments of different jurisdictions, as all courts in India would follow the Indian Law. Thus, the reliance placed by D. Singhvi on *Balco* in this context is misplaced. D

98. It is correct that, in virtually all jurisdictions, it is an accepted proposition of law that the seat normally carries with it the choice of that country's arbitration/Curial law. But this would arise only if the Curial law is not specifically chosen by the parties. Reference can be made to *Balco* (supra), wherein this Court considered a number of judgments having a bearing on the issue of whether the venue is to be treated as seat. However, the court was not required to decide any controversy akin to the one this court is considering in the present case. The cases were examined only to demonstrate the difficulties that the court will face in a situation similar to the one which was considered in *Naviera Amazonica* (supra). E

99. We also do not agree with Dr. Singhvi that parties have not indicated they had chosen India to be the seat of arbitration. F

A The judgments relied upon by Dr. Singhvi do not support the proposition canvassed. In fact, the judgment in the case *Braes of Doune Wind Farm (Scotland) Limited Vs. Alfred McAlpine Business Services Limited*<sup>35</sup>, has considered a situation very similar to the factual situation in the present case.

B 100. In *Braes of Doune*, the English & Wales High Court considered two Applications relating to the first award of an arbitrator. The award related to an EPC (engineering, procurement and construction) contract dated 4th November, 2005 (the EPC contract) between the claimant (the employer) and the defendant (the contractor), whereby the contractor undertook to carry out works in connection with the provision of 36 WTGs at a site some 18 km from Stirling in Scotland. This award dealt with enforceability of the clauses of the EPC contract which provided for liquidated damages for delay. The claimant applied for leave to appeal against this award upon a question of law whilst the defendant sought, in effect, a declaration that the court had no jurisdiction to entertain such an Application and for leave to enforce the award. The Court considered the issue of jurisdiction which arose out of application of Section 2 of the English Arbitration Act, 1996 which provides that: C

D **"2. Scope of application of provisions.-**(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland." E

F 101. The Court notices the singular importance of determining the location of juridical seat in terms of Section 3, for the purposes of Section 2, in the following words of Akenhead, J.: G

G "15. I must determine what the parties agreed was the 'seat' of the arbitration for the purposes of Section 2 of the Arbitration Act, 1996. This means by Section 3 what the parties agreed was the 'juridical' seat. The word 'iuridical'

H 35. [2008] EWHC 426 (TCC).

is not an irrelevant word or a word to be ignored in ascertaining what the 'seat' is. It means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration."

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(emphasis supplied)

102. Thus, it would be evident that if the "juridical seat" of the arbitration was in Scotland, the English courts would have no jurisdiction to entertain an Application for leave to appeal. The contractor argued that the seat of the arbitration was Scotland whilst the employer argued that it was England. There were to be two contractors involved with the project.

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The material clauses of the EPC contract were:

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"1.4.1. The contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 (Dispute Resolution), the parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the contract.

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(a) ... any dispute or difference between the parties to this agreement arising out of or in connection with this agreement shall be referred to arbitration.

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(b) Any reference to arbitration shall be to a single arbitrator ... and conducted in accordance with the Construction Industry Model Arbitration Rules, February 1998 Edn., subject to this clause (Arbitration Procedure)....

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(c) This arbitration agreement is subject to English law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996 or any statutory re-enactment."

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103. The arbitration was to be conducted under the arbitration rules known colloquially as the "CIMAR Rules". Rule 1 of the aforesaid Rules provided that:

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"1.1. These Rules are to be read consistently with the Arbitration Act, 1996 (the Act), with common expressions having the same meaning."

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"1.6. (a) a single arbitrator is to be appointed, and  
(b) the seat of the arbitration is in England and Wales or Northern Ireland."

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The Court was informed by the parties in arguments that the Scottish Court's powers of control or intervention would be, at the very least, seriously circumscribed by the parties' agreement in terms as set out in para 6 of the judgment. It was further indicated by the counsel that the Scottish Court's powers of intervention might well be limited to cases involving such extreme circumstances as the dishonest procurement of an award. In construing the EPC, the Court relied upon the principles stated by the Court of Appeal in Naviera Amazonica Peruana S.A.

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104. Upon consideration of the entire material, the Court formed the view that it does have jurisdiction to entertain an Application by either party to the contract in question under Section 69 of the English Arbitration Act, 1996. The Court gave the following reasons for the decision:

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"(a) One needs to consider what, in substance, the parties agreed was the law of the country which would juridically control the arbitration.

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(b) I attach particular importance to Clause 1.4.1. The parties agreed that essentially the English (and Welsh) courts have 'exclusive jurisdiction' to settle disputes. Although this is 'subject to' arbitration, it must and does mean something other than being

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jurisdiction over disputes and not simply a court in which a foreign award may be enforced. If it is in arbitration alone that disputes are to be settled and the English courts have no residual involvement in that process, this part of Clause 1.4.1 is meaningless in practice. The use of the word 'jurisdiction' suggests some form of control.

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(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act, 1996 permits and requires the court to entertain applications under Section 69 for leave to appeal against awards which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the court will settle such disputes; even if the application is refused, the court will be applying its jurisdiction under the Arbitration Act, 1996 and providing resolution in relation to such disputes.

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(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2(c) which confirms that the arbitration agreement is subject to English law and that the 'reference' is 'deemed to be a reference to arbitration within the meaning of the Arbitration Act, 1996'. This latter expression is extremely odd unless the parties were agreeing that any reference to arbitration was to be treated as a reference to which the Arbitration Act, 1996 was to apply. There is no definition in the Arbitration Act, 1996 of a 'reference to arbitration', which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act, 1996 should apply to the reference without qualification.

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(e) Looked at in this light, the parties' express agreement

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A that the 'seat' of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings ... establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or 'lex fori' or 'lex arbitri' will be, [we] consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

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(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that the arbitral proceedings were to be conducted as an effectively 'delocalised' arbitration or in a 'transnational firmament', to borrow Kerr, L.J.'s words in *Naviera Amazonica*.

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(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the Arbitration Act, 1996 suggest that the parties at least envisaged the possibility that the courts of England and Wales might play some part in policing any arbitration. For instance, Rule 11.5 envisages something called 'the court' becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English court, in practice."

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105. In our opinion, Mr. Nariman has rightly relied upon the ratio in *Braes of Doune* case (supra). Learned senior counsel has rightly pointed out that unlike the situation in *Naviera Amazonica* (supra), in the present case all the three laws: (i) the law governing the substantive contract

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the agreement to arbitrate and the performance of that agreement (iii) the law governing the conduct of the arbitration are Indian. Learned senior counsel has rightly submitted that the curial law of England would become applicable only if there was clear designation of the seat in London. Since the parties have deliberately chosen London as a venue, as a neutral place to hold the meetings of arbitration only, it cannot be accepted that London is the seat of arbitration. We find merit in the submission of Mr. Nariman that businessmen do not intend absurd results. If seat is in London, then challenge to the award would also be in London. But the parties having chosen Indian Arbitration Act, 1996 - Chapter III, IV, V and VI; Section 11 would be applicable for appointment of arbitrator in case the machinery for appointment of arbitrators agreed between the parties breaks down. This would be so since the ratio laid down in Bhatia will apply, i.e., Part I of the Indian Arbitration Act, 1996 would apply even though seat of arbitration is not in India. This position has been reversed in *Balco*, but only prospectively. *Balco* would apply to the agreements on or after 6th September, 2012. Therefore, to interpret that London has been designated as the seat would lead to absurd results.

106. Learned senior counsel has rightly submitted that in fixing the seat in India, the court would not be faced with the complications which were faced by the English High Court in the *Braes of Doune* (supra). In that case, the court understood the designation of the seat to be in Glasgow as venue, on the strength of the other factors intimately connecting the arbitration to England. If one has regard to the factors connecting the dispute to India and the absence of any factors connecting it to England, the only reasonable conclusion is that the parties have chosen London, only as the venue of the arbitration. All the other connecting factors would place the seat firmly in India.

107. The submission made by Dr. Singhvi would only be worthy of acceptance on the assumption that London is the seat. That would be to put the cart before the horse. Surely,

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A jurisdiction of the courts can not be rested upon unsure or insecure foundations. If so, it will flounder with every gust of the wind from different directions. Given the connection to India of the entire dispute between the parties, it is difficult to accept that parties have agreed that the seat would be London and that venue is only a misnomer. The parties having chosen the Indian Arbitration Act, 1996 as the law governing the substantive contract, the agreement to arbitrate and the performance of the agreement and the law governing the conduct of the arbitration; it would, therefore, in our opinion, be vexatious and oppressive if Enercon GMBH is permitted to compel EIL to litigate in England. This would unnecessarily give rise to the undesirable consequences so pithily pointed by Lord Brandon and Lord Diplock in *Abidin Vs. Daver*.<sup>36</sup> It was to avoid such a situation that the High Court of England & Wales, in *Braes of Doune*, construed a provision designating Glasgow in Scotland as the seat of the arbitration as providing only for the venue of the arbitration.

108. At this stage, it would be appropriate to analyse the reasoning of the Court in *Braes of Doune* in support of construing the designated seat by the parties as making a reference only to the venue of arbitration. In that case, the Court held that there was no supplanting of the Scottish law by the English law, as both the seat under Section 2 and the "juridical seat" under Section 3, were held to be in England. It was further concluded, as observed earlier, that where in substance the parties agreed that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing law will be.

109. In *Braes of Doune*, detailed examination was undertaken by the court to discern the intention of the parties as to whether the place mentioned refers to venue or the seat of the arbitration. The factual situation in the present case is not as difficult or complex as the parties herein have only

H 36. [1984] AC 398.

designated London as a venue. Therefore, if one has to apply the reasoning and logic of Akenhead, J., the conclusion would be irresistible that the parties have designated India as the seat. This is even more so as the parties have not agreed that the courts in London will have exclusive jurisdiction to resolve any dispute arising out of or in connection with the contract, which was specifically provided in Clause 1.4.1 of the EPC Contract examined by Akenhead, J. in *Braes of Doune*. In the present case, except for London being chosen as a convenient place/venue for holding the meetings of the arbitration, there is no other factor connecting the arbitration proceedings to London.

110. We also do not find much substance in the submission of Dr. Singhvi that the agreement of the parties that the arbitration proceedings will be governed by the Indian Arbitration Act, 1996 would not be indicative of the intention of the parties that the seat of arbitration is India. An argument similar to the argument put forward before us by Dr. Singhvi was rejected in *C vs. D* by the Court of Appeal in England as well as by Akenhead, J. in *Braes of Doune*. Underlying reason for the conclusion in both the cases was that it would be rare for the law of the arbitration agreement to be different from the law of the seat of arbitration.

111. *C v. D*<sup>37</sup> the Court of Appeal in England was examining an appeal by the defendant insurer from the judgment of Cooke, J. granting an anti-suit injunction preventing it from challenging an arbitration award in the US courts. The insurance policy provided that "any dispute arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act, 1950 as amended". However, it was further provided that "this policy shall be governed by and construed in accordance with the internal laws of the State of New York...." A partial award was made in favour of the claimants. It was agreed that this partial

37. [2007] EWCA Civ 1282.

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A award is, in English law terms, final as to what it decides. The defendant sought the tribunal's withdrawal of its findings. The defendant also intimated its intention to apply to a Federal Court applying the US Federal Arbitration Law governing the enforcement of arbitral award, which was said to permit vacatur of an award where arbitrators have manifestly disregarded the law. It was in consequence of such an intimation that the claimant sought and obtained an interim anti-suit injunction. The Judge held that parties had agreed that any proceedings seeking to attack or set aside the partial award would only be those permitted by the English law. It was not, therefore, permissible for the defendant to bring any proceedings in New York or elsewhere to attack the partial award. The Judge rejected the arguments to the effect that the choice of the law of New York as the proper law of the contract amounted to an agreement that the law of England should not apply to proceedings post award. The Judge also rejected a further argument that the separate agreement to arbitrate contained in Condition V(o) of the policy was itself governed by New York Law so that proceedings could be instituted in New York. The Judge granted the claimant a final injunction.

112. The Court of Appeal noticed the submission on behalf of the defendant as follows:

F "14. The main submission of Mr Hirst for the defendant insurer was that the Judge had been wrong to hold that the arbitration agreement itself was governed by English law merely because the seat of the arbitration was London. He argued that the arbitration agreement itself was silent as to its proper law but that its proper law should follow the proper law of the contract as a whole, namely, New York law, rather than follow from the law of the seat of the arbitration, namely, England. The fact that the arbitration itself was governed by English procedural law did not mean that it followed that the arbitration agreement itself had to be governed by English law

arbitration agreement was that law with which the agreement had the most close and real connection; if the insurance policy was governed by New York law, the law with which the arbitration agreement had its closest and most real connection was the law of New York. It would then follow that, if New York law permitted a challenge for manifest disregard of the law, the court in England should not enjoin such a challenge."

113. Justice Longmore of Court of Appeal observed:

"16. I shall deal with Mr Hirst's arguments in due course but, in my judgment, they fail to grapple with the central point at issue which is whether or not, by choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. In my view they must be taken to have so agreed for the reasons given by the Judge. The whole purpose of the balance achieved by the Bermuda Form (English arbitration but applying New York law to issues arising under the policy) is that judicial remedies in respect of the award should be those permitted by English law and only those so permitted. Mr Hirst could not say (and did not say) that English judicial remedies for lack of jurisdiction on procedural irregularities under Sections 67 and 68 of the Arbitration Act, 1996 were not permitted; he was reduced to saying that New York judicial remedies were also permitted. That, however, would be a recipe for litigation and (what is worse) confusion which cannot have been intended by the parties. No doubt New York law has its own judicial remedies for want of jurisdiction and serious irregularity but it could scarcely be supposed that a party aggrieved by one part of an award could proceed in one jurisdiction and a party aggrieved by another part of an award could proceed in another jurisdiction. Similarly, in the case of a single complaint about an award, it could not be supposed that

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the aggrieved party could complain in one jurisdiction and the satisfied party be entitled to ask the other jurisdiction to declare its satisfaction with the award. There would be a serious risk of parties rushing to get the first judgment or of conflicting decisions which the parties cannot have contemplated.

17. It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award."

(emphasis supplied)

On the facts of the case, the Court held that the seat of the arbitration was in England and accordingly entertained the challenge to the award.

114. The cases relied upon by Dr. Singhvi relate to the phrase "arbitration in London" or expressions similar thereto. The same cannot be equated with the term "venue of arbitration proceedings shall be in London." Arbitration in London can be understood to include venue as well as seat; but it would be rather stretching the imagination if "venue of arbitration shall be in London" could be understood as "seat of arbitration shall be London," in the absence of any other factor connecting the arbitration to London. In spite of Dr. Singhvi's seemingly attractive submission to convince us, we decline to entertain the notion that India would not be the natural forum for all remedies in relation to the disputes, having such a close and intimate connection with India. In contrast, London is described only as a venue which Dr. Singhvi says would be the natural forum.

115. In *Shashoua*, such an expression was understood as seat instead of venue, as the parties had agreed that the ICC Rules would apply to the arbitration proceedings. In *Shashoua*, the ratio in *Naviera* and *Braes Doune* has been followed. In this case, the Court was concerned with

shareholders' agreement between the parties, which provided that "the venue of the arbitration shall be London, United Kingdom". It provided that the arbitration proceedings should be conducted in English in accordance with the ICC Rules and that the governing law of the shareholders' agreement itself would be the law of India. The claimants made an Application to the High Court in New Delhi seeking interim measures of protection under Section 9 of the Indian Arbitration Act, 1996, prior to the institution of arbitration proceedings. Following the commencement of the arbitration, the defendant and the joint venture company raised a challenge to the jurisdiction of the Arbitral Tribunal, which the panel heard as a preliminary issue. The Tribunal rejected the jurisdictional objection.

116. The Tribunal then made a costs award ordering the defendant to pay \$140,000 and £172,373.47. The English Court gave leave to the claimant to enforce the costs award as a judgment. The defendant applied to the High Court of Delhi under Section 34(2)(a)(iv) of the Arbitration Act, 1996 to set aside the costs award. The claimant had obtained a charging order, which had been made final, over the defendant's property in UK. The defendant applied to the Delhi High Court for an order directing the claimants not to take any action to execute the charging order, pending the final disposal of the Section 34 petition in Delhi seeking to set aside the costs award. The defendant had sought unsuccessfully to challenge the costs award in the Commercial Court under Section 68 and Section 69 of the English Arbitration Act, 1996 and to set aside the order giving leave to enforce the award.

117. Examining the fact situation in the case, the Court observed as follows:

"The basis for the court's grant of an anti-suit injunction of the kind sought depended upon the seat of the arbitration. *An agreement as to the seat of an arbitration brought in the law of that country as the curial law and was analogous to an exclusive jurisdiction clause.* Not only

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was there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, *the parties agreed that any challenge to an interim or final award was to be made only in the courts of the place designated as the seat of the arbitration.*

Although, 'venue' was not synonymous with 'seat', in an arbitration clause which provided for arbitration to be conducted in accordance with the Rules of the ICC in Paris (a supranational body of rules), a provision that 'the venue of arbitration shall be London, United Kingdom' did amount to the designation of a juridical *seat*...."

In para 54, it is further observed as follows:

"There was a little debate about the possibility of the issues relating to the alleged submission by the claimants to the jurisdiction of the High Court of Delhi being heard by that Court, because it was best fitted to determine such issues under the Indian law. Whilst I found this idea attractive initially, we are persuaded that it would be wrong in principle to allow this and that it would create undue practical problems in any event. On the basis of what I have already decided, England is the seat of the arbitration and since this carries with it something akin to an exclusive jurisdiction clause, as a matter of principle the foreign court should not decide matters which are for this Court to decide in the context of an anti-suit injunction."

(emphasis supplied)

If the aforesaid observations are applied to the facts of the present case, it would be apparent that the Indian Courts would have jurisdiction in the nature of exclusive jurisdiction over the disputes between the parties.

118. In *Shashoua* case (supra), Co London is the seat, since the phrase "ve

be London, U.K." was accompanied by the provision in the arbitration clause for arbitration to be conducted in accordance with the Rules of ICC in Paris (a supranational body of rules). It was also noted by Cooke, J. that "the parties have not simply provided for the location of hearings to be in London....." In the present case, parties have not chosen a supranational body of rules to govern the arbitration; Indian Arbitration Act, 1996 is the law applicable to the arbitration proceedings.

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119. Also, in Union of India v. McDonnell Douglas Corpn., the proposition laid down in Naviera Amazonica Peruana S.A. was reiterated. In this case, the agreement provided that:

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"The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any re-enactment or modification thereof. The arbitration shall be conducted in the English language. The award of the arbitrators shall be made by majority decision and shall be final and binding on the parties hereto. The seat of the arbitration proceedings shall be London, United Kingdom."

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120. Construing the aforesaid clause, the Court held as follows:

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"On the contrary, for the reasons given, it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law."

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121. The same question was again considered by the High Court of Justice, Queen's Bench Division, Commercial Court (England) in *SulameRica CIA Nacional De Seguros SA v. Enesa Engenharia SA - Enesa*. The Court noticed that the issue in this case depends upon the weight to be given to the provision in Condition 12 of the insurance policy that "the seat

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of the arbitration shall be London, England." It was observed that this necessarily carried with it the English Court's supervisory jurisdiction over the arbitration process. It was observed that "this follows from the express terms of the Arbitration Act, 1996 and, in particular, the provisions of Section 2 which provide that Part I of the Arbitration Act, 1996 applies where the seat of the arbitration is in England and Wales or Northern Ireland. This immediately establishes a strong connection between the arbitration agreement itself and the law of England. It is for this reason that recent authorities have laid stress upon the locations of the seat of the arbitration as an important factor in determining the proper law of the arbitration agreement." The Court thereafter makes a reference to the observations made in *C v. D* by the High Court as well as the Court of Appeal. The observations made in paragraph 12 have particular relevance which are as under:

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"In the Court of Appeal, Longmore, L.J., with whom the other two Lord Justices agreed, decided (again obiter) that, where there was no express choice of law for the arbitration agreement, the law with which that agreement had its closest and most real connection was more likely to be the law of the seat of arbitration than the law of the underlying contract. He referred to Mustill, J. (as he then was) in *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* as saying that it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of the arbitration. Longmore, L.J. also referred to the speech of Lord Mustill (as he had then become) in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* and concluded that the Law Lord was saying that, although it was exceptional for the proper law of the underlying contract to be different from the proper law of the arbitration agreement, it was less exceptional (or more common) for the proper law of that underlying contract to be different from the curial law, the law of the

A He was not expressing any view on the frequency or  
B otherwise of the law of the arbitration agreement differing  
C from the law of the seat of the arbitration. Longmore, L.J.  
D agreed with Mustill, J.'s earlier dictum that it would be rare  
E for the law of the separable arbitration agreement to be  
F different from the law of the seat of the arbitration. The  
G reason was

'that an agreement to arbitrate will normally have a  
closer and more real connection with the place  
where the parties have chosen to arbitrate, than  
with the place of the law of the underlying contract,  
in cases where the parties have deliberately chosen  
to arbitrate, in one place, disputes which have  
arisen under a contract governed by the law of  
another place'. (C case, Bus LR p. 854, para 26)"

D 122. Upon consideration of the entire matter, it was  
E observed in *SulameRica* supra that "In these circumstances it  
F is clear to me that the law with which the agreement to arbitrate  
G has its closest and most real connection is the law of the seat  
H of arbitration, namely, the law of England". It was thereafter  
concluded by the High Court that the English law is the proper  
law of the agreement to arbitrate.

F The aforesaid observations make it abundantly clear that  
G the submissions made by Dr. Singhvi cannot be supported  
H either in law or in facts. In the present case, all the chosen laws  
are of India, therefore, it cannot be said the laws of England  
would have any application.

G 123. We also do not find any merit in the submission of  
H Dr. Singhvi that the close and the most intimate connection test  
is wholly irrelevant in this case. It is true that the parties have  
specified all the three laws. But the Court in these proceedings  
is required to determine the seat of the arbitration, as the  
Respondents have taken the plea that the term "venue" in the  
arbitration clause actually makes a reference to the "seat" of

A the arbitration.

B 124. It is accepted by most of the experts in the law  
C relating to international arbitration that in almost all the national  
D laws, arbitrations are anchored to the seat/place/situs of  
E arbitration. Redfern and Hunter on International Arbitration (5th  
F Edn., Oxford University Press, Oxford/New York 2009), in para  
G 3.54 concludes that "the seat of the arbitration is thus intended  
H to be its centre of gravity." In *Balco*, it is further noticed that this  
does not mean that all proceedings of the arbitration are to be  
held at the seat of arbitration. The Arbitrators are at liberty to  
hold meetings at a place which is of convenience to all  
concerned. This may become necessary as Arbitrators often  
come from different countries. Therefore, it may be convenient  
to hold all or some of the meetings of the arbitration in a  
location other than where the seat of arbitration is located. In  
*Balco*, the relevant passage from Redfern and Hunter, has  
been quoted which is as under:

*"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-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... 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 from a witness in  
another country."*

A *circumstances each move of the Arbitral Tribunal does not of itself mean that the seat of arbitration changes. The seat of arbitration remains the place initially agreed by or on behalf of the parties."*

B These observations have also been noticed in *Union of India Vs. McDonald Douglas Corporation* (supra).

C 125. In the present case, even though the venue of arbitration proceedings has been fixed in London, it cannot be presumed that the parties have intended the seat to be also in London. In an International Commercial Arbitration, venue can often be different from the seat of arbitration. In such circumstances, the hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration. This is precisely the ratio in *Braes of Dounne*. Therefore, in the present case, the seat would remain in India. D

E 126. In *Naviera Amazonica Peruana S.A.* (supra), the Court of Appeal observed that it would always be open to the Arbitral Tribunal to hold the hearings in Lima if this were thought to be convenient, even though the seat or forum of the arbitration would remain in London.

**Issue No. VI/ Re: Concurrent Jurisdiction:**

F 127. Having held that the seat of arbitration is in India, in our opinion, the Bombay High Court committed an error in concluding that the Courts in England would have concurrent jurisdiction. Holding that the Courts in England and India will have concurrent jurisdiction, as observed on different occasions by Courts in different jurisdictions, would lead to unnecessary complications and inconvenience. This, in turn, would be contrary to underlying principle of the policy of dispute resolution through arbitration. The whole aim and objective of arbitration is to enable the parties to resolve the disputes speedily, economically and finally. The kind of difficulties that can be G H

A caused by Courts in two countries exercising concurrent jurisdiction over the same subject matter have been very succinctly set down by Lord Brandon in *Abdin Vs. Daveu* (supra)- as follows:-

B "In this connection it is right to point out that, if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or other of the two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned; or C secondly, there may be an ugly rush to get one action decided ahead of the other in order to create a situation of res judicata or issue estoppel in the latter."

D Lord Diplock said in the same case:

E "comity demands that such a situation should not be permitted to occur as between courts of two civilised and friendly states"; it would be, he said, "a recipe for confusion and injustice". As Bingham LJ said in *Dupont No 1* the policy of the law must be to favour the litigation of issues only once in the most appropriate forum. The interests of justice require that one should take into account as a factor the risks of injustice and oppression that arise from concurrent proceedings in different jurisdictions in relation to the same subject matter." F

G 128. Once the seat of arbitration has been fixed in India, it would be in the nature of exclusive jurisdiction to exercise the supervisory powers over the arbitration. This view of ours will find support from the judgment of the Court of Appeal in England in recognizing the difficulties that the parties will face in case the Courts in India and England have concurrent jurisdiction. Cooke J. in his judgment in (1) *Enercon GMBH* (2) *Wobben Properties GMBH Vs. Enercon (India) Ltd.*, dated 30th November, 2012, (2012) EWHC 3711(Comm). observed as under: H

"14. A lifting of the stay in this country and an appoint of a third arbitrator under s. 18 of the English Act would, if the Indian proceedings continue and the Supreme Court decides the matter differently from the Bombay High Court and this court, give rise to the possibility of conflicting judgments with all the chaos that might entail. In practice, therefore, the question of lifting the stay here and the grant of the anti-suit injunction against EIL are closely interconnected.

15. It cannot, in my judgment, be right that both English and Indian courts should be free to reach inconsistent judgments on the same subject matter, whether or not the current ultimate result in India, which allows for an English court to appoint an arbitrator by virtue of s.2(4) of the English Act, will or will not involve any inconsistent judgment, and whether there is or is not a current issue estoppels which would debar Enercon from contending that London is the seat of the arbitration, which is its primary case, giving rise, as it says, to the court's power to appoint an arbitrator under s.18 of the English Act by virtue of s.2(1) of that Act and by reference to s.3 of that Act.

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56. Comity and the avoidance of inconsistent judgments require that I should refrain from deciding matters which are possibly going to be decided further in India. It would be a recipe for confusion and injustice if I were not to do so. Issue estoppels is already said to arise on the question of the seat of arbitration and curial law, and that raises very difficult questions for the court to decide. If the stay was lifted, then I could decide the matter differently from Savant J. or from a later final decision on appeal in the Supreme Court of India, if that matter went ahead. The Indian courts are seised and should reach, in my

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judgment, a concluded decision, albeit on an expedited basis.

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60. If the Supreme Court in India were, in due course, to consider that the Bombay High Court was wrong in its conclusion as to the seat of the arbitration or that there was a prima facie valid arbitration or that the English court had concurrent supervisory jurisdiction, it would be a recipe for confusion and injustice if, in the meantime, the English court were to conclude that England was the seat of the putative arbitration, and to assume jurisdiction over EIL and the putative arbitration, and to conclude that there was a valid arbitration agreement, whether on the basis of a good arguable case or the balance of probabilities. Further, for it to exercise its powers, whether under s.2(1) or 2(4) or s.18 of the Arbitration Act in appointing a third arbitrator, would create real problems, should the Supreme Court decide differently.

61. These are the very circumstances which courts must strive to avoid in line with a multitude of decisions of high authority, from the *Abidin Daver* [1984] AC 398 onwards, including *E.I. Dupont de Nemours v. Agnew* [1987]2 Lloyd's Rep 585. The underlying rationale of *Eder J.*'s judgment leads inexorably, in my view, to the conclusion that the issues to be determined in India, which could otherwise fall to be determined here in England, must be decided first by the Indian courts and that, despite the delay and difficulties involved, the decision of the Indian Supreme Court should be awaited.

62. It is also fair to point out in this context that, even if I were to decide the seat issue here on the basis of full argument (which I have not heard) whether in the way that *Eder J.* did or otherwise, the possibility or likelihood of one side or another wishing to ap

*delay might then arise in the context of the English proceedings. But, if I did make such a decision, in line with Eder J., I would be making a determination which is directly contrary to that of Savant J. and it seems to me that that is inappropriate as a matter of comity, whether or not there is any issue estoppels.*

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*63. Moreover, it would be a recipe for confusion and injustice, and to back it up with an anti-suit injunction would merely fan the flames for a continued battle, which is contrary to the principles of comity when the position is unclear and the agreement itself is governed by Indian law."*

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129. In our opinion, these observations of Justice Cooke foresee the kind of intricate complexities that may arise in case the Courts of India and England were to exercise the concurrent jurisdiction in these matters.

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130. We are unable to agree with the conclusion reached by Justice Savant that the Courts in England would exercise concurrent jurisdiction in the matter. Having concluded that the seat of arbitration is in India, the conclusions reached by the Bombay High Court seem to be contrary in nature. In Paragraph 45, it is concluded that the law relating to arbitration agreement is the Indian Arbitration Act. Interpreting Clause 18.3, it is observed as follows:-

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"45. ....The said clause provides that the provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply. If the said clause is read in the ordinary and natural sense, the placement of the words that "the Indian Arbitration and Conciliation Act shall apply" in the last clause 18.3 indicates the specific intention of the parties to the application of the Indian Arbitration Act, not only to the Arbitration Agreement but also that the curial law or the Lex Arbitri would be the Indian Arbitration Act. The application of the Indian Arbitration Act therefore can

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be said to permeate clause-18 so that in the instant case laws (2) and (3) are same if the classification as made by the learned authors is to be applied. The reference to the Indian Arbitration Act is therefore not merely a clarification as to the proper law of the arbitration agreement as is sought to be contended on behalf of the Respondents. It has to be borne in mind that the parties are businessmen and would therefore not include words without any intent or object behind them. It is in the said context, probably that the parties have also used the word "venue" rather than the word "seat" which is usually the phrase which is used in the clauses encompassing an Arbitration Agreement. There is therefore a clear and unequivocal indication that the parties have agreed to abide by the Indian Arbitration Act at all the stages, and therefore, the logical consequence of the same would be that in choosing London as the venue the parties have chosen it only as a place of arbitration and not the seat of arbitration which is a juristic concept."

131. This conclusion is reiterated in Paragraph 46 in the following words:-

"46. The proposition that when a choice of a particular law is made, the said choice cannot be restricted to only a part of the Act or the substantive provision of that Act only. The choice is in respect of all the substantive and curial law provisions of the Act. The said proposition has been settled by judicial pronouncements in the recent past....."

132. Having said so, learned Judge further observes as follows:-

"49. Though in terms of interpretation of Clause 18.3, this Court has reached a conclusion that the lex arbitri would be the Indian Arbitration Act. The question would be, whether the Indian Courts would have exclusive jurisdiction. The nexus between the "seat" or th

vis-à-vis the procedural law i.e. the lex arbitri is well settled by the judicial pronouncements which have been referred to in the earlier part of this judgment. A useful reference could also be made to the learned authors Redfern and Hunter who have stated thus :-

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"the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated...."

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The choice of seat also has the effect of conferring exclusive jurisdiction to the Courts wherein the seat is situated."

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Here the Bombay High Court accepts that the seat carries with it, usually, the notion of exercising jurisdiction of the Courts where the seat is located.

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133. Having said so, the High Court examines the question whether the English Courts can exercise jurisdictions in support of arbitration between the parties, in view of London being the venue for the arbitration meetings. In answering the aforesaid question, the High Court proceeds on the basis that there is no agreement between the parties as regards the seat of the arbitration, having concluded in the earlier part of the judgment that the parties have intended the seat to be in India. This conclusion of the High Court is contrary to the observations made in *Shashoua* (supra) which have been approvingly quoted by this Court in *Balco* in (Paragraph 110). On the facts of the case, the Court held that the seat of the arbitration was in England and accordingly entertained the challenge to the award.

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134. In *A Vs. B*<sup>38</sup> again the Court of Appeal in England observed that:-

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38. [2007] 1 Lloyds Report 237.

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".....an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy.....as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of arbitration."

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(emphasis supplied)

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135. In our opinion, the conclusion reached by Justice Savant that the Courts in England would have concurrent jurisdiction runs counter to the settled position of law in India as well as in England and is, therefore, not sustainable. The Courts in England have time and again reiterated that an agreement as to the seat is analogous to an exclusive jurisdiction clause. This agreement of the parties would include the determination by the court as to the intention of the parties. In the present case, Savant, J. having fixed the seat in India erred in holding that the courts in India and England would exercise concurrent jurisdiction. The natural forum for all remedies, in the facts of the present case, is only India.

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**Issue (vii)/Re: Anti-Suit Injunction:**

136. Having held that the Courts in England would have concurrent jurisdiction, the Bombay High Court on the basis thereof concludes as follows:-

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"In view of the conclusion that this Court has reached, namely that the English Courts would have concurrent jurisdiction to act in support of arbitration, the case of the Appellants for an anti suit injunction does not stand to scrutiny. However, in so far as the aspect of forum non-conveniens is concerned, in my view, since the Appellants have agreed to London as the venue for arbitration, they cannot be heard to complain that the Courts at London are forum non-conveniens for them. The Appellants have appeared before the said Courts, and therefore, the case of forum non- conveniens is bereft

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137. The aforesaid conclusion again ignores the principle laid down by this Court in *Oil & Natural Gas Commission Vs. Western Company of North America* (supra), wherein it is held as follows:-

"As per the contract, while the parties are governed by the Indian Arbitration Act and the Indian Courts have the exclusive jurisdiction to affirm or set aside the award under the said Act, the Respondent is seeking to violate the very arbitration clause on the basis of which the award have been obtained by seeking confirmation of the award in the New York Court under the American Law. This amounts to an improper use of the forum in American (sic) in violation of the stipulation to be governed by the Indian law, which by necessary implication means a stipulation to exclude the USA Court to seek an affirmation and to seek it only under the Indian Arbitration Act from an Indian Court. If the restraint order is not granted, serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award has come into existence will have secured an order enforcing the order from a foreign court in violation of that very clause.."

138. Again in the case of *Modi Entertainment Network & Anr.* (supra), it was held that :-

"24(1). In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects: (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court; (b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and (c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind."

139. In Paragraph 24(2) of the same decision, this Court further observed that :-

"24(2). In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens."

140. Examining these aspects, Eder, J. in fact also came to the conclusion that the anti-suit injunction granted by the English Court needed at-least to be stayed during the pendency of proceedings in India. The reasons given by Eder, J. in support of the conclusions are as under:-

"48. Bearing these general principles in mind and recognising the permissive nature of CPR Part 62.5, the important point, in my view, is that the claimants did not pursue their applications in the original proceedings that they issued in this court in March 2008. On the contrary, they engaged fully (albeit perhaps reluctantly) in the Indian proceedings before the Daman court. When they lost at first instance before Judge Shinde, they appealed to the DCC with the result indicated above. That is the choice they made. Having made that choice and now some years down the line, it seems to me that the English court should at least be extremely cautious to intervene at this stage and, in Mr Edey QC's words, to "wrest" back the proceedings to England. To do so at this stage when those proceedings are, in effect, still pending would give rise to the "recipe for confusion and injustice" which Lord Diplock specifically warned against in *The Abidin Daver* as referred to in the passage of the judgment of Hobhouse J which I have quoted above. For that reason alone, I have decided somewhat reluctantly that I should follow the course suggested by Mr Edey QC ie that these proceedings should be stayed at least for the time being pending resolution of the Writ Petition.

BHC....."

141. It must be noticed that Respondent No. 1 was initially having 51 per cent shareholding of the Appellant No.1 company, which was subsequently increased to 56 per cent. This would be an indicator that the Respondent No. 1 is actively carrying on business at Daman. This Court considered the expression "carries on business" as it occurs in Section 20 of the Civil Procedure Code in the case of *Dhodha House Vs. S.K. Maingi*<sup>39</sup> and observed as follows:-

"46. The expression "carries on business" and the expression "personally works for gain" connote two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried on at a place through an agent or a manager or through a servant. The owner may not even visit that place. The phrase "carries on business" at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control thereover. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of Section 9 of the Code....."

142. The fact that Daman trial court has jurisdiction over the matter is supported by the judgment of this Court in *Harshad Chiman Lal Modi* (supra), which was relied upon by Mr. Nariman. The following excerpt makes it very clear:-

"16.....The proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant..... The principle on which the maxim was based was that the

39. (2006) 9 SCC 41.

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courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam i.e. by arrest of the defendant or by attachment of his property."

143. This apart, we have earlier noticed that the main contract, the IPLA is to be performed in India. The governing law of the contract is the law of India. Neither party is English. One party is Indian, the other is German. The enforcement of the award will be in India. Any interim measures which are to be sought against the assets of Appellant No. 1 ought to be in India as the assets are situated in India. We have also earlier noticed that Respondent No.1 has not only participated in the proceedings in the Daman courts and the Bombay High Court, but also filed independent proceedings under the Companies Act at Madras and Delhi. All these factors would indicate that Respondent No.1 does not even consider the Indian Courts as forum-non-conveniens. In view of the above, we are of the considered opinion that the objection raised by the Appellants to the continuance of the parallel proceedings in England is not wholly without justification. The only single factor which prompted Respondent No.1 to pursue the action in England was that the venue of the arbitration has been fixed in London. The considerations for designating a convenient venue for arbitration can not be understood as conferring concurrent jurisdiction on the English Courts over the arbitration proceedings or disputes in general. Keeping in view the aforesaid, we are inclined to restore the anti-suit injunction granted by the Daman Trial Court.

144. For the reasons recorded above, Civil Appeal No.2087 of 2014 @ SLP (C) No.10906 of 2013 is dismissed. The findings recorded by the Appellate Court that the parties can proceed to arbitration are affirmed. The findings recorded by the Trial Court dismissing the Application under Section 45 are set aside. In other words, the Application filed by the Respondents for reference of the dispute to arbitration under Section 45 has been correctly allowed

as well as by the High Court. The findings of the High Court are affirmed to that extent. All the disputes arising between the parties in relation to the following agreements viz. SHA, TKHA, SSHAs and STKHA, Agreed Principles and IPLA, including the controversy as to whether IPLA is a concluded contract are referred to the Arbitral Tribunal for adjudication.

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- a. The conclusion of the Bombay High Court that the seat of the arbitration is in India is upheld;
- b. The conclusion that the English Courts would have concurrent jurisdiction is overruled and consequently set aside;
- c. The conclusion of the Bombay High Court that the anti-suit injunction granted by the Daman Trial Court has been correctly vacated by Daman Appellate Court is overruled and hence set aside.

145. In the normal circumstances, we would have directed the parties to approach the two learned arbitrators, namely Mr. V.V. Veeder, QC and Mr. Justice B.P. Jeevan Reddy to appoint the third arbitrator who shall also act as the presiding arbitrator. However, keeping in view the peculiar facts and circumstances of this case and the inordinate delay which has been caused due to the extremely convoluted and complicated proceedings indulged in by the parties, we deem it appropriate to take it upon ourselves to name the third arbitrator. A perusal of the judgment of Eder, J. gives an indication that a list of three names was provided from which the third arbitrator could possibly be appointed. The three names are Lord Hoffmann, Sir Simon Tuckey and Sir Gordon Langley. We hereby appoint Lord Hoffmann as the third arbitrator who shall act as the Chairman of the Arbitral Tribunal.

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- d. Consequently, the Respondents are restrained from proceeding with any of the actions the details of which have been given in the judgment of Eder, J. dated 23rd March, 2012 and the order dated 27th March, 2012 as well as the judgment of Justice Cooke dated 30th November, 2012. These matters include:

All or any of the proceedings/ applications/ reliefs claimed by the Respondents in the Arbitration Claim 2011 Folio 1399, including but not limited to:

- (1) Application under Section 18 of the English Arbitration Act, 1996;
- (2) Injunctions pursuant to Section 44 of the English Arbitration Act, 1996 and /or Section 37 of the Senior Courts Act, 1981.

146. In view of the above, Regular Civil Suit No. 9 of 2008, pending before the Court of Civil Judge, Senior Division, Daman; and the Application under Section 45 of the Arbitration Act, 1996 filed in the Civil Suit No.2667 of 2007 and Contempt Petition in relation to Civil Suit No.2667 of 2007 pending before the Bombay High Court at the instance of the Appellants are stayed. Parties are at liberty to approach the Court for the appropriate orders, upon the final award being rendered by the Arbitral Tribunal. This will not preclude the parties from seeking interim measures under Section 9 of the Indian Arbitration Act, 1996.

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The Respondents are also restrained from approaching the English Courts for seeking any declaration/relief/clarification and/or to institute any proceedings that may result in delaying or otherwise affect the constitution of the arbitral tribunal and its proceedings thereafter.

147. Civil Appeal No.2086 of 2014 @ SLP (C) No.10924 of 2013 is partly allowed as follows:

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R.P.

HARI NANDAN PRASAD & ANR.

v.

EMPLOYER I/R TO MANGMT.OF FCI & ANR.  
(Civil Appeal Nos. 2417-2418 of 2014)

FEBRUARY 17, 2014

**[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]**

*INDUSTRIAL DISPUTES ACT, 1947:*

*s.25-F - Termination without any notice or pay in lieu of notice or retrenchment compensation - Terminated workers worked for more than 240 days continuously preceding their disengagement/termination - Held: Mandatory pre-condition of retrenchment in paying the dues in accordance with s.25-F having not been complied with, that is sufficient to render the termination as illegal.*

*s.25-F - Reinstatement - Entitlement - Held: Relief of reinstatement cannot be granted to the persons who were engaged as daily wagers and whose services were terminated in a distant past and where termination was held to be illegal only on a technical ground of not adhering to the provisions of s.25-F of the Act.*

*Power of Labour Court/Industrial Adjudicator - Scope of - Held: The powers of the industrial adjudicator under the Industrial Disputes Act are wide - By empowering the adjudicator authorities under the Act, to give reliefs such as a reinstatement of wrongfully dismissed or discharged workmen, which may not be permissible in common law or justified under the terms of the contract between the employer and such workmen, the legislature has attempted to frustrate the unfair labour practices and secure the policy of collective bargaining as a road to industrial peace - In order to achieve the said objectives, the Labour Courts/Industrial Tribunals are*

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*A given wide powers not only to enforce the rights but even to create new rights, with the underlying objective to achieve social justice - The said sweeping power conferred upon the Tribunal is not unbridled - It is, thus, this fine balancing which is required to be achieved while adjudicating a particular dispute, keeping in mind that the industrial disputes are settled by industrial adjudication on principle of fair play and justice.*

*B Regularization of daily wagers - Claim for - Held: When there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years - Further, if there are no posts available, such a direction for regularization would be impermissible - In these circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution - Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules - However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left out workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution - Constitution of India, 1950 - Article 14.*

*G Termination of daily wagers - Circular issued by the employer whereby any temporary worker employed for more than 90 days was entitled for regularization of his service and following the said circular, the company had regularized the services of 70-75 similarly situated cas*

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*regularization by appellants-daily wagers - Held: In the instant case, appellant no.1 was not in service on the date when the scheme was promulgated as his services were dispensed with, 4 years before that circular - Therefore, the relief of monetary compensation in lieu of reinstatement would be more appropriate in his case - However, in so far as appellant no.2 was concerned, when the Circular was issued, he was in service and within few months of the issuing of that Circular he had completed 240 days of service - Non-regularization of appellant No.2, while giving the benefit of that Circular to other similar situated employees and regularizing them would, therefore, be clearly discriminatory.*

**Appellant no. 1 was engaged on daily wages as labourer in the exigency of the situation. He was terminated from service after 3 years on the ground that his services were no more required. No notice or notice of pay or retrenchment compensation was given to him. Appellant no. 2 was engaged on daily wages as casual typist. He was terminated after 4 years Both the appellants raised industrial dispute. The Industrial Tribunal held in both the cases that the termination was in contravention of Section 25-F of the Industrial Disputes Act and ordered reinstatement and also regularization of services from the date of termination and 50% back wages. The direction for regularization was based on circular dated 6.5.1987 issued by the respondent whereby any temporary worker employed for more than 90 days was entitled for regularization of his service and following the said circular, the company had regularized the services of 70-75 similarly situated casual workers. The single judge of the High Court dismissed the writ petitions filed by the respondent company. The Division Bench of the High Court allowed the appeal of the respondent holding that as both the appellants did not render 10 or more years of service, their case did not come even in the exception carved out in Uma Devi's**

**A case. The Division Bench accepted that there was infraction of Section 25-F of the Industrial Disputes Act, however it held that the appellants were not entitled to reinstatement because of the reason that they were employed strictly as temporary workers without any stipulation or promise that they would be made permanent and, therefore, reinstatement of such workers was not warranted and they were entitled to get monetary compensation only. Regarding compensation, the High Court held that since both the appellants were paid the money equivalent to wages last drawn for number of years when the writ petitions were pending under section 17-B of the Act, they were duly compensated and no further amount was payable.**

**D In the instant appeals, the questions for consideration were: whether the termination of services of appellants was illegal; if yes, whether in facts and circumstances of the case, the appellants would be entitled to reinstatement of service or whether the monetary compensation in lieu of reinstatement would be justified; and whether the appellants were entitled to regularization of their services.**

**Partly allowing the appeals, the Court**

**F HELD: 1. Admitted facts are that both the appellant had worked for more than 240 days continuously preceding their disengagement/termination. At the time of their disengagement, even when they had continuous service for more than 240 days (in fact about 3 years) they were not given any notice or pay in lieu of notice as well as retrenchment compensation. Thus, mandatory pre-condition of retrenchment in paying the said dues in accordance with Section 25-F of the I.D. Act was not complied with. That is sufficient to render the termination as illegal. Even the High Court in the impugned judgment rightly accepted this position. It is to**

should be granted in such cases. Admittedly, both the workmen were engaged on daily wages basis. Their engagement was also in exigency of situation. Appellant No.1 was disengaged way back in the year 1983. The dispute in his case was referred for adjudication to Industrial Tribunal in 1992 only. There was a time lag of 9 years. Though no reasons were given for such an abnormal delay, he seemed to have raised the industrial dispute few years after his disengagement which can be inferred from the reading of the award of the Industrial Tribunal as that reveals that after his disengagement he kept on making representations only and he took recourse to judicial proceedings only after Circular dated 6.5.1997 was issued as per which the respondent had decided to regularize the services of all casual workmen who had completed more than 90 days before 1996. Appellant No.1 had worked on daily wages basis for barely 3 years and he was out of service for last 30 years. Even when the Tribunal rendered his award in 1996, 13 years had elapsed since his termination. On these facts, it would be difficult to give the relief of reinstatement to the persons who were engaged as daily wagers and whose services were terminated in a distant past. And, further where termination is held to be illegal only on a technical ground of not adhering to the provisions of Section 25-F of the Act. [Paras 16 and 17] [971-G-H; 972-A-G]

*BSNL vs. Bhurumal* 2013 (15) SCALE 131 - relied on.

2. A close scrutiny of U.P. Power Corporation and Bhonde case revealed that the law laid down in those cases was not contradictory to each other. In U.P. Power Corporation, the Court recognized the powers of the Labour Court and at the same time emphasized that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the

provisions of Art.14 of the Constitution, on which judgment in Umadevi is primarily founded. On the other hand, in Bhonde case, the Court has recognized the principle that having regard to statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in Umadevi's case. It is clear from the reading of this judgment that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up the permanent post even when available and continuing to engage workers on temporary/daily wage basis and taking the same work from them which were performed by the regular workers but paying them much less wages. It is only when a particular practice is found to be unfair labour practice as enumerated in Schedule IV of MRTP and PULP Act and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction. [Para 29] [984-H; 985-A-E]

*U.P. Power Corporation v. Bijli Mazdoor Sangh & Ors.* (2007) 5 SCC 755; 2007 (5) SCR 256; *State of Maharashtra v. R.S.Bhonde* (2005) 6 SCC 751; 2005 (2) Suppl. SCR 763; *Secretary, State of Karnataka v. Uma Devi & Ors.* (2006) 4 SCC 1; 2006 (3) SCR 953; *Maharashtra State Road Transport Corporation & Anr. vs. Casteribe Rajya Parivahan Karmchari Sanghatana* (2009) 8 SCC 556 - relied on.

3. The judgment in Bhonde case was rendered under MRTP and PULP Act and the specific provisions of that Act were considered to ascertain the powers conferred upon the Industrial Tribunal/Labour Court by the said Act. At the same time, the powers of the industrial adjudicator under the Industrial Disputes Act are equally wide. The Act deals with industrial disputes, provides for conciliation, adjudication and settlement.

A the rights of the parties and the enforcement of the  
awards and settlements. Thus, by empowering the  
adjudicator authorities under the Act, to give reliefs such  
as a reinstatement of wrongfully dismissed or discharged  
workmen, which may not be permissible in common law  
or justified under the terms of the contract between the  
employer and such workmen, the legislature has  
attempted to frustrate the unfair labour practices and  
secure the policy of collective bargaining as a road to  
industrial peace. In order to achieve the said objectives,  
the Labour Courts/Industrial Tribunals are given wide  
powers not only to enforce the rights but even to create  
new rights, with the underlying objective to achieve social  
justice. The aforesaid sweeping power conferred upon  
the Tribunal is not unbridled. It is, thus, this fine balancing  
which is required to be achieved while adjudicating a  
particular dispute, keeping in mind that the industrial  
disputes are settled by industrial adjudication on  
principle of fair play and justice. Harmonious reading of  
the said two judgments showed that when there are  
posts available, in the absence of any unfair labour  
practice the Labour Court would not give direction for  
regularization only because a worker has continued as  
daily wage worker/adhoc/temporary worker for number  
of years. Further, if there are no posts available, such a  
direction for regularization would be impermissible. In  
these circumstances giving of direction to regularize  
such a person, only on the basis of number of years put  
in by such a worker as daily wager etc. may amount to  
backdoor entry into the service which is an anathema to  
Art.14 of the Constitution. Further, such a direction would  
not be given when the concerned worker does not meet  
the eligibility requirement of the post in question as per  
the Recruitment Rules. However, wherever it is found that  
similarly situated workmen are regularized by the  
employer itself under some scheme or otherwise and the  
workmen in question who have approached Industrial/

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A Labour Court are at par with them, direction of  
regularization in such cases may be legally justified,  
otherwise, non-regularization of the left over workers  
itself would amount to invidious discrimination qua them  
in such cases and would be violative of Art.14 of the  
B Constitution. Thus, the Industrial adjudicator would be  
achieving the equality by upholding Art. 14, rather than  
violating this constitutional provision. [Paras 30 to 34]  
[985-F-H; 986-A, D-E; 987-A, D-H; 988-A-B]

C *Bharat Bank Ltd. V. Employees of Bharat Bank Ltd.*  
[1950] LLJ 921,948-49 (SC); *New Maneckchowk Spinning &*  
*Weaving Co.Ltd.v. Textile Labour Association* [1961] 1 LLJ  
521,526 (SC) - relied on.

D 4. Appellant No.1 was not in service on the date when  
Scheme was promulgated i.e. as on 6.5.1987 as his  
services were dispensed with 4 years before that Circular  
saw the light of the day. Therefore, the relief of monetary  
compensation in lieu of reinstatement would be more  
appropriate in his case and the conclusion in the  
impugned judgment qua him is unassailable, though for  
E the different reasons. However, in so far as appellant No.2  
was concerned, he was engaged on 5.9.1986 and  
continued till 15.9.1990 when his services were  
terminated. He even raised the Industrial dispute  
immediately thereafter. Thus, when the Circular was  
F issued, he was in service and within few months of the  
issuing of that Circular he had completed 240 days of  
service. Non-regularization of appellant No.2, while giving  
the benefit of that Circular dated 6.5.1987 to other similar  
situated employees and regularizing them would,  
G therefore, be clearly discriminatory. On these facts, the  
CGIT rightly held that he was entitled to the benefit of  
scheme contained in Circular dated 6.5.1987. The Division  
Bench in the impugned judgment has failed to notice this  
pertinent and material fact which turns the scales in  
H favour of appellant No.2. The High C

in reversing the direction given by the CGIT, which was rightly affirmed by the single judge as well, to reinstate appellant No.2 with 50% back wages and to regularize him in service. He was entitled to get his case considered in terms of that Circular. Had it been done, probably he would have been regularized. Instead, his services were wrongly and illegally terminated in the year 1990. While dismissing the appeal qua appellant No.1, the same is accepted in so far as appellant No.2 is concerned. In his case, the judgment of the Division Bench is set aside and the award of the CGIT is restored. [Paras 37, 38] [988-E-H; 989-A-D]

*Delhi Development Horticulture Employees Union vs. Delhi Administration AIR 1992 SC 789 : 1992 (1) SCR 565; Assistant Engineer, Rajasthan Development Corporation & Anr. vs. Gitam Singh (2013) 5 SCC 136: 2013 (1) SCR 679; Mahatma Phule Agricultural University vs. Nasik Zilla Sheth Kamgar Union (2001) 7 SCC 346: 2001 (3) SCR 1089 - referred to.*

**Case Law Reference:**

1992 (1) SCR 565	Referred to	Para 8
2006 (3) SCR 953	Relied on	Para 8
2007 (5) SCR 256	Relied on	Para 11
(2009) 8 SCC 556	Relied on	Para 13
2013 (1) SCR 679	Relied on	Para 14
2013 (15) SCALE 13	Relied on	Para 17
2001 (3) SCR 1089	Referred to	Para 26
2005 (2) Suppl. SCR 763	Referred to	Para 26
[1950] LLJ 921,948-49 (SC)	Relied on	Para 31
[1961] 1 LLJ 521,526 (SC)	Relied on	Para 32

CIVIL APPELLATE JURISDICTION : Civil Appeal No.

A 2417-2418 of 2014.

From the Judgment and Order dated 27.06.2008 of the High Court of Jharkhand at Ranchi in LPA in Nos. 482 and 483 of 2005.

B Lakshmi Raman Singh for the Appellants.

Ajit Pudussery, Joanne Pudussery for the Respondents.

The Judgment of the Court was delivered by

C **A.K. SIKRI, J.** 1. Leave granted.

2. The two appellants have filed one combined Special Leave Petition, which arises out of a common judgment dated 27.6.2008 passed by the Division Bench of the Jharkhand High Court in two LPAs which had been filed by the respondent herein viz. Food Corporation of India (FCI). The two appellants were working on casual basis with the FCI. After certain time, their services were dispensed with. Both of them raised industrial dispute alleging wrongful termination which was referred to the Central Government-cum- Industrial Tribunal (CGIT). These proceedings culminated in two awards dated 12.12.1996 and 18.12.1996 respectively passed by the CGIT. In both these awards, termination of both the appellants was held to be illegal and they were directed to be reinstated with 50% back wages. The CGIT also ordered their regularization in service. FCI filed Writ Petitions in both the cases challenging these awards which were initially admitted sometime in the year 1988 and the operation of the awards was stayed. However, orders were passed under Section 17-B of the Industrial Disputes Act (ID Act) directing payment of full wages as last wages drawn to the appellants from the date of the award in each case. These Writ Petitions were ultimately dismissed by the learned Single Judge vide common judgment and order dated 19.5.2005. As pointed out above, this judgment of the learned Single Judge was challenged by the appellants in the LPAs.

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These LPAs have been allowed by the Division Bench, thereby setting aside the orders of the learned Single Judge as well as awards passed by the CGIT. This is how two appellants are before us in this appeal.

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3. Before we proceed further, we deem it appropriate to give the details of nature of employment of each of the appellants with the FCI and tenure etc. as well as the gist of the tribunal's awards.

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**Hari Nandan.**

4. He was engaged on daily wages basis as Labourer-cum-Workman, in the exigency of the situation, at Food Storage Depot, Jasidih by the Depot In-charge, FCI, Jasidih on 1st June 1980. On the ground that services of appellant No.1 were no more required, he was disengaged w.e.f. 1.3.1983. While doing so, no notice or notice pay or retrenchment compensation was given to him. Appellant No.1 raised industrial dispute which was referred to the CGIT by the Central Government vide reference order dated 1.10.1992, with the following terms of reference:

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"Whether the action of the management of Food Corporation of India, in retrenching Shri Hari Nandan Prasad, Ex-Casual Workman, in contravention of Section 25-F of the I.D.Act, 1947 and denying reinstatement with full back wages and regularization of his service is legal and justified? If not to what relief the concerned workman is entitled to?"

5. The CGIT gave its award dated 12.12.1996 holding that the termination was in contravention of Section 25-F of the Industrial Disputes Act. The CGIT also, while ordering reinstatement of appellant No.1, held that he was also entitled to regularization of his services from the date of his stoppage from service dated 1.3.1983. Back wages to the extent of 50% were awarded. As far as direction for regularization is

A concerned, it was based on Circular issued by the FCI whereby any temporary worker employed for more than 90 days was entitled for regularization of his service. It was noted that as per the said Circular the Management had regularized the services of 70-75 similarly situated casual workers and therefore denying the same benefit to appellant No.1 amounted to discrimination.

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**Gobind Kumar Choudhary.**

6. Appellant No.2 was engaged on daily wages as casual Typist at the District Office, FCI, Darbhanga against a vacancy of Class-III post on 5.9.1986. He worked in the capacity till 15.9.1990 when his name was struck off the rolls. He also raised industrial dispute which was referred to CGIT with following terms of reference:

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"Whether the action of the Management of Food Corporation of India, Laaherisarai, Darbhanga is legal and justified in retrenching Shri Govind Kumar Chaudhary, who was working as Casual Typist, arbitrarily and in violation of Section 25-F of the I.D.Act, and denying reinstatement with full back wages and regularization of service is legal and justified? If not to what relief the concerned workman is entitled to?"

In his case, the award dated 18.12.1996 was made by the CGIT on almost identical premise, as in the case of appellant No.1, supported by similar reasons.

7. The learned Single Judge while dismissing both the Writ Petitions filed by the FCI concurred with the findings and reasons given by the CGIT.

8. In the LPAs before the Division Bench, the primary contention of the FCI was that there could not have been any direction of regularization of services even on the admitted case of both the workmen, viz. merely on the ground that they

A had worked for more than 240 days in a calendar year as casual employees. It was also submitted that though the District Manager of the FCI was authorized to employ persons as temporary workers, such an authority was given for employing them for 7 days only and no more, and in case of violation of this strict stipulation contained in the Circular issued by the FCI, the concerned officer could be proceeded against departmentally. It was further argued that even if such temporary employment was to continue beyond stipulated period of 7 days, since these two workmen had worked on daily wages basis, that too for a period of 3 years or so, there could not have been any regularization of these workmen in view of the judgments of this Court in the case of Delhi Development Horticulture Employees Union vs. Delhi Administration AIR 1992 SC 789 and Constitution Bench judgment in the case of *Secretary, State of Karnataka vs. Uma Devi & Ors.* (2006) 4 SCC 1. These contentions have impressed the Division Bench of the High Court, and accepted by it, giving the following reasons:

E "The Tribunal has apparently misconceived the principles of law laid down in this context. In the case of *Delhi Development Horticulture Employees Union vs. Delhi Administration* (AIR 1992) SC 789) the Supreme Court has categorically laid down that temporary employees, even if they have worked for more than 240 days, cannot claim any right or benefit for automatic regularization of their services. Similar view has been taken in the case of *Post Master General, Kolkata & Ors vs. Tutu Das (Dutta)*, reported in 2007 (5) SCC 317. More so, where no posts are created or no vacancies to sanctioned posts exists, only on the ground of working for more than 240 days, regularization cannot be directed. Even in cases where there are regular posts and vacancies, the procedure laid down for appointment has to be followed."

H 9. In so far as contention of the appellant predicated on

A Circular dated 6.5.1997 is concerned, on the basis of which they claimed that 70-75 persons had been regularized and discriminatory treatment could not be meted to them, this contention has been brushed aside by the High Court in the impugned judgment in the following manner:

B "The, contention of Mrs.Pal that there has been discrimination as several persons were regularized on the basis of the Circular of the Management dated 6.5.1987, cannot be accepted. Reliance for this purpose on the case of *U.P. State Electricity Board vs. Pooran Chandra Pandey* reported in (2007) 11 SCC 92, is also of no help to her. Firstly, there were several conditions and criteria in the said Circular for regularization, but there is no finding that the respondents workmen in these appeals fulfilled such criteria. Secondly, in the case of *U.P.State Electricity Board matter* (supra) the employees of the Co-operative Society who were taken over by the Electricity Board claimed that the decision of the Electricity Board dated 28.11.1996 permitting regularization of the employees working from before 4.5.1990, will also apply to them as they were also appointed prior to 4.5.1990 in the Society. It was held that since the taken over employees were appointed in the Society before 4.5.1990, they could not be denied the benefit of the said decision of the Electricity Board. There is nothing to show that the appointment of the taken over employees was made by the Society without following the procedure in that behalf, whereas in the present case, the respondents workmen were not appointed against vacant and sanctioned posts after following the procedure of appointment.

G Furthermore, in paragraph 6 of the judgment of the Constitution Bench in the case of *Secretary, State of Karnataka vs. Uma Devi* (2006) 4 SCC 1, it was held that no Government order, notification or circular can be substituted for the statutory rules fra

of law. In para 16 of the judgment in the case of *R.S.Garg vs. State of U.P.* (2006 (6) SCC 430), it has been held that even the Government cannot make rules or issue any executive instructions by way of regularization. Similar view has been taken in the case of the *Post Master General* (supra). Therefore, the respondent workmen cannot claim regularization on the basis of the said Circular of the Management dated 6.5.1987, nor the said judgment of the *U.P. Electricity Board* (supra) is of any help to them."

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10. Heavily relying upon the judgment in the case of *Uma Devi* (supra), the High Court has held that as both the appellants did not render 10 or more years of service, their cases do not come even in the exception carved out by the Constitution Bench in *Uma Devi's* case.

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11. Another contention raised by the appellants before the High Court was that the ratio of *Uma Devi's* case had no relevance in the cases of industrial adjudication by the Labour Courts/Industrial Tribunals. However, even this submission was found to be meritless by the High Court taking support of the judgment of this Court in *U.P. Power Corporation Vs. Bijli Mazdoor Sangh & Ors.* (2007) 5 SCC 755.

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12. We may record here that the Division Bench accepted that there was infraction of Section 25-F of the I.D.Act in both the cases. However, they were held not entitled to reinstatement because of the reason that they were employed strictly as temporary workers, without any stipulation or promise that they would be made permanent and therefore reinstatement of such workers was not warranted and they were entitled to get monetary compensation only. As far as compensation is concerned, since both the appellants were paid the money equivalent to wages last drawn, for number of years when the Writ Petitions were pending, under Section 17 -B of the I.D. Act, the High Court felt that the appellants were duly compensated and no further amount was payable.

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13. Challenging the validity of the approach of the High Court, the learned counsel for the appellants submitted that the entire thrust of the judgment of the High Court rests on the decision of this Court in *Uma Devi's* case which was impermissible as the said judgment is clarified by this Court subsequently in the case of *Maharashtra State Road Transport Corporation & Anr. vs. Casteribe Rajya Parivahan Karmchari Sanghatana* (2009) 8 SCC 556, wherein it is held, in categorical terms, that in so far as Industrial and Labour Courts are concerned, they enjoy wide powers under Section 30(1)(b) of the Industrial Disputes Act to take affirmative action in case of unfair labour practice and these powers include power to order regularization/permanency. The Court has, further, clarified that decision in *Uma Devi* limits the scope of powers of Supreme Court under Article 32 and High Courts under Article 226 of the Constitution to issue directions for regularization in the matter of public employment, but power to take affirmative action under section 30(1)(b) of the I.D.Act which rests with the Industrial/Labour Courts, remains intact. It was, thus, argued that entire edifice of the impugned judgment of the High Court erected on the foundation of *Uma Devi* (supra) crumbles.

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14. The learned counsel for the FCI, on the other hand, referred to the judgment in *U.P. Power Corporation* (supra) wherein this Court has taken unambiguous view that the law laid down in *Uma Devi* is applicable to Industrial Tribunals/Labour Courts as well. It was submitted that the judgment in *U.P. Power Corporation* (supra) was not taken note of in the subsequent judgment in *Maharashtra State Road Transport Corporation* (supra) and this Court should follow the earlier judgment rendered in *U.P. Power Corporation's* case. The learned counsel also relied upon the recent judgment of this Court in the case of *Assistant Engineer, Rajasthan Development Corporation & Anr. vs. Gitam Singh* (2013) 5 SCC 136 to contend that even when there is a wrongful termination of services of a daily wager because of

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A provisions of Section 25-F of the I.D.Act, such an employee is not entitled to reinstatement but only monetary compensation. On the aforesaid basis, the learned counsel pleaded for dismissal of the appeal.

B 15. We have given considerable thoughts to the submissions made by the learned counsel for the parties on either side. It is clear from the aforesaid narratives that this case has two facets, which are reflected even in the terms of references as well on which the disputes were referred to the CGIT. First refers to the validity of the termination and the other one pertains to the regularization. Twin issues, which have, thus, to be gone into, are: (1) whether termination of service of the appellants was illegal?

D Related issue here would be that if it is illegal, then whether in the facts and circumstances of this case, the appellants would be entitled to reinstatement in service or monetary compensation in lieu of reinstatement would be justified?

E (2) whether the appellants are entitled to regularization of their services?

F We would also record that both the issues, in the facts of this case, are somewhat overlapping which would become apparent, with the progression of our discussion on these issues.

**Reg.: Validity of termination.**

G 16. This issue hardly poses any problem. Admitted facts are that both the appellant had worked for more than 240 days continuously preceding their disengagement/termination. At the time of their disengagement, even when they had continuous service for more than 240 days (in fact about 3 years) they were not given any notice or pay in lieu of notice as well as retrenchment compensation. Thus, mandatory pre-condition of retrenchment in paying the aforesaid dues in accordance with

A Section 25-F of the I.D. Act was not complied with. That is sufficient to render the termination as illegal. Even the High Court in the impugned judgment has accepted this position and there was no quarrel on this aspect before us as well. With this, we advert to the issue of relief which should be granted in such cases, as that was the topic of hot debate before us as well.

C 17. Admittedly, both the workmen were engaged on daily wages basis. Their engagement was also in exigency of situation. In so far as appellant No.1 is concerned, he was disengaged way back in the year 1983. The dispute in his case was referred for adjudication to CGIT in 1992 only. There is a time lag of 9 years. Though no reasons are appearing on record for such an abnormal delay, it seems that he had raised the industrial dispute few years after his disengagement which can be inferred from the reading of the award of the CGIT as that reveals that after his disengagement he kept on making representations only and he took recourse to judicial proceedings only after Circular dated 6.5.1997 was issued as per which the FCI had decided to regularize the services of all casual workmen who had completed more than 90 days before 1996. Be that as it may, at this juncture what we are highlighting is that appellant No.1 had worked on daily wages basis for barely 3 years and he is out of service for last 30 years. Even when the Tribunal rendered his award in 1996, 13 years had elapsed since his termination. On these facts, it would be difficult to give the relief of reinstatement to the persons who were engaged as daily wagers and whose services were terminated in a distant past. And, further where termination is held to be illegal only on a technical ground of not adhering to the provisions of Section 25-F of the Act. Law on this aspect, as developed over a period of time by series of judgments makes the aforesaid legal position very eloquent. It is not necessary to traverse through all these judgments. Our purpose would be served by referring to a recent judgment rendered by this very Bench in the case of *BSNL vs. Bhurumal* 2013 (15) SCALE 131 which has taken note of

relevant to the issue. Following passage from the said judgment would reflect the earlier decisions of this Court on the question of reinstatement:

"The learned counsel for the appellant referred to two judgments wherein this Court granted compensation instead of reinstatement. In the case of *BSNL vs. Man Singh* (2012) 1 SCC 558, this Court has held that when the termination is set aside because of violation of Section 25-F of the Industrial Disputes Act, it is not necessary that relief of reinstatement be also given as a matter of right. In the case of *Incharge Officer & Anr. vs. Shankar Shetty* (2010) 9 SCC 126, it was held that those cases where the workman had worked on daily wage basis, and worked merely for a period of 240 days or 2-3 years and where the termination had taken place many years ago, the recent trend was to grant compensation in lieu of reinstatement. In this judgment of Shankar Shetty, this trend was reiterated by referring to various judgments, as is clear from the following discussion.

Should an order of reinstatement automatically follow in a case where the engagement of a daily wager has been brought to end in violation of Section 25-F of the Industrial Disputes Act, 1947 (for short "the ID Act")? The course of the decisions of this Court in recent years has been uniform on the above question.

In *Jagbir Singh vs. Haryana State Agriculture Mktd. Board* (2009) 15 SCC 327 delivering the judgment of this Court, one of us (R.M.Lodha,J.) noticed some of the recent decisions of this Court, namely, *U.P.State Brassware Corpn. Ltd. Vs. Uday Narain Pandey* (2006) 1 SCC 479, *Uttaranchal Forest Department Corpn. Vs. M.C.Joshi* (2007) 9 SCC 353, *State of M.P. vs. Lalit Kumar Verma* (2007) 1 SCC 575, *M.P.Admn. vs. Tribhuban* (2007) 9 SCC 748, *Sita Ram vs. Moti Lal Nehru Farmers Training Institute* (2008) 5 SCC 75, *Jaipur Development Authority*

*vs. Ramsahai* (2006) 11 SCC 684, *GDA vs. Ashok Kumar* (2008) 4 SCC 261 and *Mahboob Deepak vs. Nagar Panchayat, Gajraula* (2008) 1 SCC 575 and stated as follows: (Jagbir Singh case, SCC pp.330 & 335 paras 7 & 14).

It is true that the earlier view of this Court articulated in many decision reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.

It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

Jagbir Singh has been applied very recently in *Telegraph Deptt. Vs. Santosh Kumar Seal* (2010) 6 SCC 773, wherein this Court stated: (SCC p.777, para 11)

In view of the aforesaid legal position and the fact that the workmen were engaged as

years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice.

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Taking note of the judgments referred to in the aforesaid paragraphs and also few more cases in other portion of the said judgment, the legal position was summed up in the following manner:

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"It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied mechanically in all cases. While that may be a position where services of a regular/permanent workman are terminated illegally and/or malafide and/or by way of victimization, unfair labour practice etc. However, when it comes to the case of termination of a daily wage worker and where the termination is found illegal because of procedural defect, namely in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationale for shifting in this direction is obvious.

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Reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice pay as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily wage basis and even after he is reinstated, he has no right to seek regularization (See: *State of Karnataka vs. Uma Devi* (2006) 4 SCC 1).

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Thus when he cannot claim regularization and he has no right to continue even as a daily wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

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We would, however, like to add a caveat here. There may be cases where termination of a daily wage worker is found to be illegal on the ground it was resorted to as unfair labour practice or in violation of the principle of last come first go viz. while retrenching such a worker daily wage juniors to him were retained. There may also be a situation that persons junior to him were regularized under some policy but the concerned workman terminated. In such circumstances, the terminated worker should not be denied reinstatement unless there are some other weighty reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied".

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18. We make it clear that reference to Uma Devi, in the aforesaid discussion is in a situation where the dispute referred pertained to termination alone. Going by the principles carved out above, had it been a case where the issue is limited only to the validity of termination, appellant No.1 would not be entitled to reinstatement. This could be the position in respect of appellant No.2 as well. Though the factual matrix in his case is slightly different, that by itself would not have made much of a difference. However, the matter does not end here. In the present case, the reference of dispute to the CGIT was not limited to the validity of termination. The

contained the claim made by the appellants for their regularization of service. A

19. We have already pointed out that the two aspects viz. that of reinstatement and regularization are intermixed and overlapping in the present case. If the appellants were entitled to get their services regularized, in that case it would have been axiomatic to grant the relief of reinstatement as a natural corollary. Therefore, it becomes necessary, at this stage, to examine as to whether the order of CGIT, as affirmed by the learned Single Judge of the High Court directing regularization of their service, was justified or the approach of the Division Bench of the High Court in denying that relief is correct. B C

**Re: Relief of Regularization**

20. Before we advert to this question, it would be necessary to examine as to whether the Constitution Bench judgment in Uma Devi case have applicability in the matters concerning industrial adjudication. We have already pointed out above the contention of the counsel for the appellants in this behalf, relying upon Maharashtra State Road Transport case that the decision in Uma Devi would be binding the Industrial or Labour Courts. On the other hand, counsel for the FCI has referred to the judgment in U.P.Power Corporation for the submission that law laid down in Uma Devi equally applies to Industrial Tribunals/Labour Courts. It, thus, becomes imperative to examine the aforesaid two judgments at this juncture. D E F

21. A perusal of the judgment in U.P. Power Corporation would demonstrate that quite a few disputes were raised and referred to the industrial tribunal qua the alleged termination of respondent Nos.2 and 3 in that case. Without giving the details of those cases, it would be sufficient to mention that in one of the cases the tribunal held that after three years of their joining in service both respondents 2 and 3 were deemed to have been regularized. The appellants filed the Writ Petition which was also dismissed. Challenging the order of the High Court, G H

A the appellants had approached this Court. It was argued that there could not have been any regularization order passed by the Industrial Court in view of the decision in Uma Devi. Counsel for the workmen had taken a specific plea that the powers of the industrial adjudicator were not under consideration in Uma Devi's case and that there was a difference between a claim raised in a civil suit or a Writ Petition on the one hand and one adjudicated by the industrial adjudicator. It was also argued that the labour court can create terms existing in the contract to maintain industrial peace and therefore it had the power to vary the terms of the contract. While accepting the submission of the appellant therein viz. U.P. Power Corporation, the Court gave the following reasons: C

"It is true as contended by learned counsel for the respondent that the question as regards the effect of the industrial adjudicators' powers was not directly in issue in Umadevi case. But the foundation logic in Umadevi case is based on Article 14 of the Constitution of India. Though the industrial adjudicator can vary the terms of the contract of the employment, it cannot do something which is violative of Article 14. If the case is one which is covered by the concept of regularization, the same cannot be viewed differently. D E

The plea of learned counsel for the respondent that at the time the High Court decided the matter, decision in Umadevi case was not rendered is really of no consequence. There cannot be a case of regularization without there being employee-employer relationship. As noted above the concept of regularization is clearly linked with Article 14 of the Constitution. However, if in a case the fact situation is covered by what is stated in para 45 of Umadevi case the industrial adjudicator can modify the relief, but that does not dilute the observations made by this Court in Umadevi case about the regularization. F G

On facts, it is submitted by learned counsel for the appellants that Respondent No.2 himself admitted that he never worked as a pump operator, but was engaged as daily wage basis. He also did not possess the requisite qualification. Looked at from any angle, the direction for regularization, as given, could not have been given in view of what has been stated in Umadevi case."

22. It is clear from the above that the Court emphasized the underline message contained in Umadevi's case to the effect that regularization of a daily wager, which has not been appointed after undergoing the proper selection procedure etc. is impermissible as it was violative of Art.14 of the Constitution of India and this principle predicated on Art.14 would apply to the industrial tribunal as well inasmuch as there cannot be any direction to regularize the services of a workman in violation of Art.14 of the Constitution. As we would explain hereinafter, this would mean that the industrial court would not issue a direction for regularizing the service of a daily wage worker in those cases where such regularization would tantamount to infringing the provisions of Art.14 of the Constitution. But for that, it would not deter the Industrial Tribunals/Labour Courts from issuing such direction, which the industrial adjudicators otherwise possess, having regard to the provisions of Industrial Disputes Act specifically conferring such powers. This is recognized by the Court even in the aforesaid judgment.

23. For detailed discussion on this aspect, we proceed to discuss the ratio in the case of *Maharashtra State Road Transport Corporation* (supra). In that case the respondent Karamchari Union had filed two complaints before the Industrial Court, Bombay alleging that the appellant-Corporation had indulged in unfair labour practice qua certain employees who were engaged by the appellant as casual labourers for cleaning the buses between the years 1980-1985. It was stated in the complaints that these employees were made to work every day at least for 8 hours at the depot concerned of the Corporation;

A the work done by them was of permanent nature but they were being paid a paltry amount; and even when the post of sweepers/cleaners were available in the Corporation, these employees had been kept on casual and temporary basis for years together denying them the benefit of permanency. After adjudication, the Industrial Court held that the Corporation had committed unfair labour practice under items 5 and 9 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 (MRTU and PULP Act). As a consequence, it directed the Corporation to pay equal wages to the employees concerned which was being paid to Swachhaks and also pay arrears of wages to them. In the second complaint, the Industrial Court returned the finding that the Corporation was indulging in unfair labour practice under Item 6 of Schedule IV, by continuing these employees on temporary/casual/daily wage basis for years together and thereby depriving them the benefits of permanency. The direction in this complaint was to cease and desist from the unfair labour practice by giving them the status, wages and all other benefits of permanency applicable to the post of cleaners, w.e.f. 3.8.1982. The Corporation challenged these two orders of the Industrial Court before the High Court of Judicature at Bombay in five separate Writ Petitions. These were disposed of by the learned Single Judge vide common judgment dated 2.8.2001 holding that complaints were maintainable and the finding of the Industrial Court that the Corporation had indulged in unfair labour practice was also correct. The Corporation challenged the decision of the learned Single Judge by filing LPAs which were dismissed by the Division Bench on 6.5.2005. This is how the matter came before the Supreme Court. One of the contentions raised by the appellants before this Court was that there could not have been a direction by the Industrial Court to give these employees status, wages and other benefits of permanency applicable to the post of cleaners as this direction was contrary to the ratio laid down by the Constitution Bench of this Court in *Umadevi* (supra). The Court while considering this argument went i

A MRTU and PULP Act. It was, inter-alia, noticed that complaints relating to unfair labour practice could be filed before the Industrial Court. The Court noted that Section 28 of that Act provides for the procedure for dealing with such complaints and Section 30 enumerates the powers given to the Industrial and Labour Courts to decide the matters before it including those relating to unfair labour practice. On the reading of this section, the Court held that it gives specific power to the Industrial/Labour Courts to declare that an unfair labour practice has been engaged and to direct those persons not only to cease and desist from such unfair labour practice but also to take affirmative action. Section 30(1) conferring such powers is reproduced below:

"30. Powers of Industrial and Labour Courts.-  
(1)Where a court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order-

(a)declare that an unfair labour practice has been engaged in or is being engaged in by that person, and specify any other person who has engaged in, or is engaging in the unfair labour practice;

(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act;

(c) where a recognized union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all or any of its rights under sub-section(1) of Section 20 or its right under Section 23 shall be suspended."

A 24. It was further noticed that Section 32 of the Act provides that the Court shall have the power to decide all connected matters arising out of any application or a complaint referred to it for decision under any of the provisions of this Act. The Court then extensively quoted from the judgment in Uma Devi in order to demonstrate the exact ratio laid down in the said judgment and thereafter proceeded to formulate the following question and answer thereto:

C "The question that arises for consideration is: have the provisions of the MRTU and PULP Act been denuded of the statutory status by the Constitution Bench decision in Umadevi? In our judgment, it is not."

D 25. Detailed reasons are given in support of the conclusion stating that the MRTU and PULP Act provides for and empowers the Industrial/Labour Courts to decide about the unfair labour practice committed/being committed by any person and to declare a particular practice to be unfair labour practice if it so found and also to direct such person ceased and desist from unfair labour practice. The provisions contained in Section 30 giving such a power to the Industrial and Labour Courts vis-à-vis the ratio of Uma Devi are explained by the Court in the following terms:

F "The power given to the Industrial and Labour Courts under Section 30 is very wide and the affirmative action mentioned therein is inclusive and not exhaustive. Employing badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees is an unfair labour practice on the part of the employer under Item 6 of Schedule IV. Once such unfair labour practice on the part of the employer is established in the complaint, the Industrial and Labour Courts are empowered to issue preventive as well as positive direction to an erring employer.

A The provisions of the MRTU and PULP Act and the powers of the Industrial and Labour Courts provided therein were not at all under consideration in Umadevi. As a matter of fact, the issue like the present one pertaining to unfair labour practice was not at all referred to, considered or decided in Umadevi. Unfair labour practice on the part of the employer in engaging employees as badlis, casuals or temporaries and to continue them as such for years with the object of depriving them of the status and privileges of permanent employees as provided in Item 6 of Schedule IV and the power of the Industrial and Labour Courts under Section 30 of the Act did not fall for adjudication or consideration before the Constitution Bench.

D Umadevi does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."

G 26. The Court also accepted the legal proposition that Courts cannot direct creation of posts, as held in *Mahatma Phule Agricultural University vs. Nasik Zilla Sheth Kamgar Union* (2001) 7 SCC 346. Referring to this judgment, the Court made it clear that inaction on the part of the State Government to create posts would not mean an unfair labour practice had been committed by the employer (University in that case) and as there were no posts, the direction of the High Court to accord the status of permanency was set aside. The Court also noticed

A that this legal position had been affirmed in *State of Maharashtra vs. R.S.Bhonde* (2005) 6 SCC 751. The Court also reiterated that creation and abolition of post and regularization are purely Executive functions, as held in number of judgments and it was not for the Court to arrogate the power of the Executive or the Legislature by directing creation of post and absorbing the workers or continue them in service or pay salary of regular employees. This legal position is summed up in para 41 which reads as under:

C "Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts."

E 27. However, the Court found that factual position was different in the case before it. Here the post of cleaners in the establishment were in existence. Further, there was a finding of fact recorded that the Corporation had indulged in unfair labour practice by engaging these workers on temporary/causal/daily wage basis and paying them paltry amount even when they were discharging duties of eight hours a day and performing the same duties as that of regular employees.

F 28. In this backdrop, the Court was of the opinion that direction of the Industrial Court to accord permanency to these employees against the posts which were available, was clearly permissible and with the powers, statutorily conferred upon the Industrial/Labour Courts under Section 30 (1)(b) of the said Act which enables the Industrial adjudicator to take affirmative action against the erring employees and as those powers are of wide amplitude abrogating within its fold a direction to accord permanency.

H 29. A close scrutiny of the two cas

A that the law laid down in those cases is not contradictory to each other. In U.P. Power Corporation, this Court has recognized the powers of the Labour Court and at the same time emphasized that the Labour Court is to keep in mind that there should not be any direction of regularization if this offends the provisions of Art.14 of the Constitution, on which judgment in Umadevi is primarily founded. On the other hand, in Bhonde case, the Court has recognized the principle that having regard to statutory powers conferred upon the Labour Court/Industrial Court to grant certain reliefs to the workmen, which includes the relief of giving the status of permanency to the contract employees, such statutory power does not get denuded by the judgment in Umadevi's case. It is clear from the reading of this judgment that such a power is to be exercised when the employer has indulged in unfair labour practice by not filling up the permanent post even when available and continuing to workers on temporary/daily wage basis and taking the same work from them and making them some purpose which were performed by the regular workers but paying them much less wages. It is only when a particular practice is found to be unfair labour practice as enumerated in Schedule IV of MRTP and PULP Act and it necessitates giving direction under Section 30 of the said Act, that the Court would give such a direction.

30. We are conscious of the fact that the aforesaid judgment is rendered under MRTP and PULP Act and the specific provisions of that Act were considered to ascertain the powers conferred upon the Industrial Tribunal/Labour Court by the said Act. At the same time, it also hardly needs to be emphasized the powers of the industrial adjudicator under the Industrial Disputes Act are equally wide. The Act deals with industrial disputes, provides for conciliation, adjudication and settlements, and regulates the rights of the parties and the enforcement of the awards and settlements. Thus, by empowering the adjudicator authorities under the Act, to give reliefs such as a reinstatement of wrongfully dismissed or discharged workmen, which may not be permissible in common

A law or justified under the terms of the contract between the employer and such workmen, the legislature has attempted to frustrate the unfair labour practices and secure the policy of collective bargaining as a road to industrial peace.

B 31. In the language of Krishna Iyer, J:

C The Industrial Disputes Act is a benign measure, which seeks to pre-empt industrial tensions, provide for the mechanics of dispute-resolutions and set up the necessary infrastructure, so that the energies of the partners in production may not be dissipated in counter-productive battles and the assurance of industrial justice may create a climate of goodwill." (Life Insurance Corpn. Of India v. D.J.Bahadur 1980 Lab IC 1218, 1226(SC), per Krishna Iyer,J.).

D In order to achieve the aforesaid objectives, the Labour Courts/Industrial Tribunals are given wide powers not only to enforce the rights but even to create new rights, with the underlying objective to achieve social justice. Way back in the year 1950 i.e. immediately after the enactment of Industrial Disputes Act, in one of its first and celebrated judgment in the case of *Bharat Bank Ltd. V. Employees of Bharat Bank Ltd.* [1950] LLJ 921,948-49 (SC) this aspect was highlighted by the Court observing as under:

F "In settling the disputes between the employers and the workmen, the function of the tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

32. At the same time, the aforesaid sweeping power conferred upon the Tribunal is not unbridled and is circumscribed by this Court in the case of *New Maneckchowk Spinning & Weaving Co.Ltd.v. Textile Labour Association* [1961] 1 LLJ 521,526 (SC) in the following words:

"This, however, does not mean that an industrial court can do anything and everything when dealing with an industrial dispute. This power is conditioned by the subject matter with which it is dealing and also by the existing industrial law and it would not be open to it while dealing with a particular matter before it to overlook the industrial law relating to the matter as laid down by the legislature or by this Court."

33. It is, thus, this fine balancing which is required to be achieved while adjudicating a particular dispute, keeping in mind that the industrial disputes are settled by industrial adjudication on principle of fair play and justice.

34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wagger etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them,

A direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision.

35. The aforesaid examples are only illustrated. It would depend on the facts of each case as to whether order of regularization is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights

36. In the aforesaid backdrop, we revert the facts of the present case. The grievance of the appellants was that under the Scheme contained in Circular dated 6.5.1997 many similarly placed workmen have been regularized and, therefore, they were also entitled to this benefit. It is argued that those who had rendered 240 days service were regularized as per the provision in that Scheme/Circular dated 6.5.1987.

37. On consideration of the cases before us we find that appellant No.1 was not in service on the date when Scheme was promulgated i.e. as on 6.5.1987 as his services were dispensed with 4 years before that Circular saw the light of the day. Therefore, in our view, the relief of monetary compensation in lieu of reinstatement would be more appropriate in his case and the conclusion in the impugned judgment qua him is unassailable, though for the difficult reasons (as recorded by us above) than those advanced by the High Court. However, in so far as appellant No.2 is concerned, he was engaged on 5.9.1986 and continued till 15.9.1990 when his services were terminated. He even raised the Industrial dispute immediately thereafter. Thus, when the Circular dated 5.9.1987 was issued, he was in service and within few months of the issuing of that Circular he had completed 240 days of service.

38. Non-regularization of appellant No.2, while giving the benefit of that Circular dated 6.5.1987 to other similar situated employees and regularizing them would, therefore, be clearly discriminatory. On these facts, the CGIT rightly held that he was entitled to the benefit of scheme contained in Circular dated 6.5.1987. The Division Bench in the impugned judgment has failed to notice this pertinent and material fact which turns the scales in favour of appellant No.2. High Court committed error in reversing the direction given by the CGIT, which was rightly affirmed by the learned Single Judge as well, to reinstate appellant No.2 with 50% back wages and to regularize him in service. He was entitled to get his case considered in terms of that Circular. Had it been done, probably he would have been regularized. Instead, his services were wrongly and illegally terminated in the year 1990. As an upshot of the aforesaid discussion, we allow these appeals partly. While dismissing the appeal qua appellant No.1, the same is accepted in so far as appellant No.2 is concerned. In his case, the judgment of the Division Bench is set aside and the award of the CGIT is restored. There shall, however, be no order as to costs.

D.G. Appeals partly allowed.

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BHASKAR LAL SHARMA & ANR.  
v.  
MONICA & ORS.  
(Criminal Appeal Nos. 435-436 of 2014)

FEBRUARY 18, 2014

**[P. SATHASIVAM, CJI., RANJAN GOGOI AND SHIVA  
KIRTI SINGH, JJ.]**

*Code of Criminal Procedure, 1973:*

*s.482 - Quashing of proceedings - Complaint filed u/ ss.498A, 406 IPC - Quashed on the ground that while no offence u/s.498A, IPC was made out against either of the appellants, the offence u/s.406, as alleged, was prima facie made out against the appellant No. 2 alone - Held: The complaint should not have been rejected at the threshold - The facts, as alleged, have to be proved which can only be done in the course of a regular trial - Appreciation, even in a summary manner, of averments made in a complaint petition or FIR would not be permissible at the stage of quashing and the facts stated will have to be accepted as they appear on the very face of it - This is the core test that has to be applied before summoning the accused - Once the said stage is overcome, the facts alleged have to be proved by the complainant/prosecution on the basis of legal evidence in order to establish the penal liability of the person charged with the offence - In the instant case, in the face of the averments made in complaint petition regarding mental cruelty for bringing dowry and retention of cash and other gifts received by the respondent-complainant at the time of her marriage by the accused-appellant No. 2, it cannot be said that the complaint filed by respondent was shorn of the necessary allegations to prima facie sustain the case of commission of the offence u/s.498A and s.406 - Therefore, complaint petition pending in the trial court cannot be interdicted but has to be*

finally concluded by the trial court - Trial court directed to complete trial expeditiously. A

s.125 - Maintenance granted u/s.125 by trial court - Writ petition u/Article 32 for service of notice on the husband (respondent) and for payment of the arrears of maintenance as also the current monthly maintenance - Maintainability of - Held: Order of maintenance u/s.125 can be executed by following the provisions of sub-section (3) of s.125 - When the enforcement and execution of an order passed under a statute is contemplated by the statute itself, normally, an aggrieved litigant has to take recourse to the remedy provided under the statute - In fact, petitioner wife has already initiated a proceeding for execution of the order of maintenance granted in her favour - The fact that the husband against whom the order of maintenance is required to be enforced lives outside the territory of India cannot be a reasonable basis for invoking the extraordinary remedy under Article 32 of the Constitution inasmuch as the provisions of the Code i.e. s.105 makes elaborate provisions for service of summons in case the person summoned by the court resides outside the territory of India - In view of the remedy that is available to the petitioner under the Cr.P.C. and having regard to the fact that resort to such remedy has already been made, jurisdiction under Article 32 of the Constitution in facts of the present case cannot be invoked - Instead, the Family Court is directed to pass appropriate final orders as expeditiously as possible - Constitution of India, 1950 - Article 32. B C D E F

The respondent had filed a complaint under sections 498, 406 IPC against the appellants-parents-in-law and subsequently also impleaded husband-respondent no.2. The trial court took cognizance of offence and issued summons. The appellants sought quashing of complaint before the High Court. The High Court dismissed the application. The appellants filed appeals, which were disposed of by the Supreme Court holding that while no G

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A offence under Section 498A, IPC was made out against either of the appellants, the offence under Section 406, as alleged, was prima facie made out against the appellant No. 2 alone. Against this, the respondent filed the review petition which was dismissed. Thereafter, the National Commission for Women as well as respondent herself filed Curative Petitions which were allowed by the Supreme Court on 14.03.2013. In the said order, it was observed that as far as the question regarding making out of a case under Section 498A I.P.C. was concerned, the appeals were against the initial order summoning the accused to stand trial and therefore, it was too early a stage to take a stand as to whether any of the allegations were established or not. Pursuant to the said order, the instant appeals were placed for re-hearing. The respondent also filed instant writ petition for maintenance. D

Disposing of the appeals and the writ petition, the Court

E HELD: 1.1. In the instant appeals, the only question was whether on the allegations made in the complaint petition filed by the respondent a prima facie case of commission of offences under Sections 498A and 406, IPC was made out against the appellants. The statement made by the complainant (respondent) in the complaint petition, particularly those in paragraphs 16, 17, 18, 19, 24 and 29 thereof was to the effect that the appellants and respondent No. 2 had allegedly ill-treated the respondent-complainant after her marriage and had withheld different items of her stridhan property as was set out by the respondent-complainant. [paras 6, 7] [997-H; 998-A-B, D-E] F G

H 1.2. The contention for the appellants was that there was no averment in the complaint petition with regard to any demand for dowry by the appellants or of any ill-treatment of the respondent by

commission of any act in connection with any such demand which could amount to 'cruelty' within the meaning of Section 498A, IPC and that no where in the complaint petition entrustment within the meaning of Section 405, IPC was alleged against the appellants so as to even prima facie make the appellants liable for the offence under Section 406, IPC. The contention is not accepted. 'Cruelty' as defined in the Explanation to Section 498A, IPC has a twofold meaning. The contentions of the appellants do not deal with the Explanation (a) and is exclusively confined to the meaning dealt with by Explanation (b). Under Explanation (a) conduct which is likely to cause injury or danger to life, limb or health (mental or physical) would come within the meaning of the expression "cruelty". While instances of physical torture would be plainly evident from the pleadings, conduct which has caused or is likely to cause mental injury would be far more subtle. The statements made in the relevant paragraphs of the complaint can be understood as containing allegations of mental cruelty to the complainant. The complaint, therefore, cannot be rejected at the threshold. The facts, as alleged, therefore will have to be proved which only be done in the course of a regular trial. It is wholly unnecessary to embark upon a discourse as regards the scope and ambit of the Court's power to quash a criminal proceeding. Appreciation, even in a summary manner, of the averments made in a complaint petition or FIR would not be permissible at the stage of quashing and the facts stated will have to be accepted as they appear on the very face of it. This is the core test that has to be applied before summoning the accused. Once the said stage is overcome, the facts alleged have to be proved by the complainant/prosecution on the basis of legal evidence in order to establish the penal liability of the person charged with the offence. Insofar as the offence under Section 406, IPC is concerned, it is clear from the

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averments made in the complaint petition that it has been alleged that the appellants were entrusted or had exercised dominion over the property belonging to the respondent and further that the appellants had unlawfully retained the same. The statements made in para 6 of the complaint also alleged retention of cash and other gifts received by the respondent-complainant at the time of her marriage to the accused-appellant No. 2. In the face of the said averments made in the complaint petition, it cannot be said that the complaint filed by the respondent is shorn of the necessary allegations to prima facie sustain the case of commission of the offence under Section 406 by the appellants. The complaint petition pending in the Court of Metropolitan Magistrate cannot be interdicted but has to be finally concluded by the trial court. The trial court is directed that the trial be completed expeditiously and in any case within a period of one year from the date of receipt of a copy of this order by the trial court. [paras 8 to 12] [998-G-H; 999-A-H; 1000-A-E]

2. By an order passed by ACMM under Section 125, Cr.P.C., maintenance was granted to the wife-petitioner at the rate of Rs. 50,000/- per month with effect from 4.9.2004. An application filed by the writ petitioner before the Family Court for payment of the arrears of maintenance as also the current monthly maintenance is pending. The order passed under Section 125 of the Code granting maintenance to the writ petitioner has attained finality in law. Such an order can be executed by following the provisions of sub-Section (3) of Section 125, Cr.P.C. The scope and ambit of the said provision of the Code was recently dealt with in \*Poongodi wherein reference was made to several earlier decisions on the issue. When the enforcement and execution of an order passed under a statute is contemplated by the statute itself, normally, an aggrieved litigant has to take recourse to the remedy provided under the

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petitioner has initiated a proceeding for execution of the order of maintenance granted in her favour. The fact that the husband (respondent) against whom the order of maintenance is required to be enforced lives outside the territory of India cannot be a reasonable basis for invoking the extraordinary remedy under Article 32 of the Constitution inasmuch as the provisions of the Code i.e. Section 105 makes elaborate provisions for service of summons in case the person summoned by the court resides outside the territory of India. Comprehensive guidelines have been laid down by the Government of India with regard to service of summons/notices/judicial process on persons residing abroad. In view of the remedy that is available to the petitioner under the Cr.P.C. and having regard to the fact that resort to such remedy has already been made, jurisdiction under Article 32 of the Constitution in facts of the present case cannot be invoked. Instead, the Family Court is directed to pass appropriate final orders as expeditiously as possible. In the event it is found so necessary the Family Court may transfer the case to the competent criminal court whereafter the concerned criminal court will make all endeavour to bring the proceeding to a early conclusion. [paras 14, 15] [1001-C-H; 1002-A-D]

*\*Poongodi and Another vs. Thangavel (2013) 10 SCC 618: 2014 AIR 24 - Referred to.*

**Case Law Reference:**

**2014 AIR 24 Referred to Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 435-436 of 2014.

From the Judgment and Order dated 21.01.2008 of the High Court of Delhi at New Delhi in CRLMC No. 4742 and 4743 of 2005.

WITH  
W.P. (Criminal) No. 101 of 2013.

Mohan Jain, ASG, Amarendra Sharan, Anand Grover, Rishi Malhotra, Jyotika Kalra, Kiran Bhardwaj, Surya Kant, S.N. Terdal, Sushma Suri, Saurabh Chauhan, Varun Jain, Mihir Samson, Sumit Attri for the appearing parties and Respondent-in-person.

The Judgment of the Court was delivered by

**LANJAN GOGOI, J.** 1. As ordered earlier, both the cases were heard together and are being disposed of by this common Order.

**SLP (Crl.) No. 4125-4126/2008**

2. Leave granted.

3. The essential facts may be noticed at the outset.

The respondent, herein, Monica, had filed a complaint under Sections 498A, 406 read with Section 34 of the Indian Penal Code (hereinafter referred to as the "Penal Code") against the appellants and one Vikas Sharma (respondent No.2). The appellants are the father and mother-in-law of the respondent-Monica whereas the subsequently impleaded respondent No. 2 is her husband.

On 21.3.2005 the learned Metropolitan Magistrate, Patiala House, New Delhi took cognizance of the offences alleged by the respondent in the complaint petition which was numbered as 287/1A and issued summons to the appellants and the second respondent herein. Aggrieved, the appellants moved the High Court of Delhi under Section 482 of the Code of Criminal Procedure Code, 1973 (hereinafter referred to as the "Code") for quashing the complaint. By judgment and order dated 21.1.2008 the High Court dismissed the application filed by the appellants. Against the said order

A this Court by means of two special leave petitions. By order  
dated 27.07.2009 leave was granted and the appeals  
registered as Criminal Appeal Nos. 1325-1326 of 2009 were  
disposed of by this Court holding that while no offence under  
Section 498A of the Penal Code was made out against either  
of the appellants, the offence under Section 406, as alleged,  
was prima facie made out against the appellant No. 2 alone. B

C 4. Aggrieved by the said judgment and order dated  
27.07.2009 of this Court, the respondent filed Review Petition  
Nos. 384-385 of 2009 which were dismissed by this Court by  
order dated 01.09.2009. Thereafter, the National Commission  
for Women as well as respondent herself filed Curative Petition  
(Crl.) Nos. 24-25 of 2010 and Curative Petition (Crl.) No. D  
10575 of 2010 respectively which were allowed by this Court  
by order dated 14.03.2013. It is pursuant to the aforesaid order  
dated 14.03.2013 passed in the Curative Petitions that the  
present appeals were re-heard by us. D

E 5. In the order dated 14.03.2013 passed in the Curative  
Petitions it has been observed that,

**"As far as the question regarding making out of a  
case under Section 498A I.P.C. is concerned, it has  
to be kept in mind that the appeals were against the  
initial order summoning the accused to stand trial.  
Accordingly, it was too early a stage, in our view, to  
take a stand as to whether any of the allegations had  
been established or not."** F

G 6. However, as in the very same order dated 14.03.2013  
it was made clear that "the observations made in this order is  
for the purposes of the hearing of the curative petitions and  
should not, in any way, prejudice the outcome of the appeals,  
when they are heard afresh", we have proceeded to re-hear the  
appeals on its own merit.

H We would also like to observe, at this stage, that in the

A present appeals the only question that would require to be  
decided is whether on the allegations made in the complaint  
petition filed by the respondent a prima facie case of  
commission of offences under Sections 498A and 406 of the  
Penal Code is made out against the appellants. We will not be  
concerned with such allegations made against the second  
respondent who, though named as accused No. 1 in the  
complaint, had chosen not to question the same. In fact, the  
said accused has been brought on the record of the present  
proceedings as respondent No. 2 on the basis of an application  
filed by the respondent Monica claiming that the addition of her  
husband as a respondent is necessary for the purposes of  
facilitating a reconciliation which, however, did not materialise  
though was attempted. C

D 7. We have read and considered the statements made by  
the complainant (respondent herein) in the complaint petition,  
particularly those in paragraphs 16, 17, 18, 19, 24 and 29  
thereof. The said paragraphs have also been noticed by the  
High Court in its order dated 21.01.2008. A detailed recital of  
the manner in which the present appellants and the respondent  
No. 2 had allegedly ill-treated the respondent-complainant after  
her marriage and had withheld different items of her stridhan  
property has been set out by the respondent-complainant in the  
aforesaid paragraphs of her complaint. E

F 8. Shri Amarendra Sharan, learned senior counsel for the  
appellants has urged that the statements/averments made in  
the complaint petition, even if taken to be correct, do not make  
out any offence against any of the accused appellants either  
under Sections 498A or 406 of the Penal Code, as alleged.  
Shri Sharan has laid stress on the fact that there is no averment  
in the complaint petition with regard to any demand for dowry  
by the appellants; or of any ill-treatment of the respondent by  
the appellants or commission of any act in connection with any  
such demand which could amount to 'cruelty' within the meaning  
of Section 498A IPC. Shri Sharan has al H

in the complaint petition entrustment within the meaning of Section 405 of the Penal Code has been alleged against the appellants so as to even prima facie make the appellants liable for the offence under Section 406 of the Penal Code.

9. We disagree. 'Cruelty' as defined in the Explanation to Section 498A of the Penal Code has a twofold meaning. The contentions of Shri Sharan do not deal with the Explanation (a) and is exclusively confined to the meaning dealt with by Explanation (b). Under Explanation (a) conduct which is likely to cause injury or danger to life, limb or health (mental or physical) would come within the meaning of the expression "cruelty". While instances of physical torture would be plainly evident from the pleadings, conduct which has caused or is likely to cause mental injury would be far more subtle. Having given our anxious consideration to the averments made in the complaint petition, we are of the view that the statements made in the relevant paragraphs of the complaint can be understood as containing allegations of mental cruelty to the complainant. The complaint, therefore, cannot be rejected at the threshold.

10. The facts, as alleged, therefore will have to be proved which only be done in the course of a regular trial. It is wholly unnecessary for us to embark upon a discourse as regards the scope and ambit of the Court's power to quash a criminal proceeding. Appreciation, even in a summary manner, of the averments made in a complaint petition or FIR would not be permissible at the stage of quashing and the facts stated will have to be accepted as they appear on the very face of it. This is the core test that has to be applied before summoning the accused. Once the aforesaid stage is overcome, the facts alleged have to be proved by the complainant/prosecution on the basis of legal evidence in order to establish the penal liability of the person charged with the offence.

11. Insofar as the offence under Section 406 of the Penal Code is concerned, it is clear from the averments made in paragraphs 16, 18, 24 and 29 of the complaint petition that it

A has been alleged that the appellants were entrusted or had exercised dominion over the property belonging to the respondent and further that the appellants had unlawfully retained the same. The statements made in para 6 of the complaint also alleges retention of cash and other gifts received by the respondent-complainant at the time of her marriage to the accused-appellant No. 2. In the face of the said averments made in the complaint petition, it cannot be said that the complaint filed by the respondent is shorn of the necessary allegations to prima facie sustain the case of commission of the offence under Section 406 by the appellants.

12. In view of the above, we unhesitatingly come to the conclusion that the complaint petition registered as Complaint No. 287/1A (*Monica Vs. Vikas Sharma and Others*) presently pending in the Court of Metropolitan Magistrate, Patiala House, New Delhi cannot be interdicted but has to be finally concluded by the learned Trial Court. We, therefore, dismiss the appeals filed by the accused and in view of the time that has elapsed, we direct that the trial be completed expeditiously and in any case within a period of one year from the date of receipt of a copy of this order by the learned Trial Court.

**Writ Petition (Crl.) No. 101/2013**

13. Monica, the respondent in the Criminal Appeals dealt with by this order, has instituted this writ petition under Article 32 of the Constitution seeking the following reliefs :

- "(A) To serve notice to the Respondent No.1 Sh. Vikas Sharma through his mother Smt. Vimla Sharma who is being represented by Id. Counsel/AOR Shri Sumit Attri in SLP(Crl.) No. 4125-4126/2008.
- (B) To tag the instant writ petition with SLP (Crl.) No. 4125-4126/2008 entitled Bhaskar Lal Sharma & Anr. Versus Monica & Ors.

(C) To direct the Respondent No.1 to immediately pay the maintenance arrears to the tune of Rs.55,65,000(Sept 2004-June 2013 to the petitioner-wife alongwith 50% penalty amount of Rs. 27,82,500.

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(D) To direct the Respondent No.1 to pay Rs. 93,500 per month to the petitioner from July 2013 onwards."

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14. It appears that by an order dated 03.07.2007 passed under Section 125 of the Code by the learned A.C.M.M., New Delhi in Complaint Case No. 176/1/1006 maintenance has been granted to the writ petitioner at the rate of Rs. 50,000/- per month with effect from 4.9.2004. An application dated 30.11.2011 had been filed by the writ petitioner before the Family Court No. 2, Saket, New Delhi for payment of the arrears of maintenance as also the current monthly maintenance. The said petition numbered as Petition No. M-298/2011 is presently pending.

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15. The order passed under Section 125 of the Code granting maintenance to the writ petitioner appears to have attained finality in law. Such an order can be executed by following the provisions of sub-Section (3) of Section 125 of the Code. The scope and ambit of the said provision of the Code has recently been dealt with in Poongodi and Another Vs. Thangavel wherein reference has been made to several earlier decisions on the issue. When the enforcement and execution of an order passed under a statute is contemplated by the statute itself, normally, an aggrieved litigant has to take recourse to the remedy provided under the statute. In fact the petitioner has initiated a proceeding for execution of the order of maintenance granted in her favour. The fact that the husband (respondent herein) against whom the order of maintenance is required to be enforced lives outside the territory of India, in our considered view, cannot be a reasonable basis for invoking the extraordinary remedy under Article 32 of the Constitution

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A inasmuch as the provisions of the Code i.e. Section 105 makes elaborate provisions for service of summons in case the person summoned by the court resides outside the territory of India. Comprehensive guidelines have been laid down by the Government of India with regard to service of summons/notices/ judicial process on persons residing abroad. In view of the remedy that is available to the petitioner under the Code and having regard to the fact that resort to such remedy has already been made, we decline to invoke our jurisdiction under Article 32 of the Constitution in facts of the present case. Instead, we direct the Family Court No. 2, Saket, New Delhi to pass appropriate final orders in Petition No.M-298/2011 as expeditiously as possible.

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We would also like to make it clear that in the event it is found so necessary the learned Family Court may transfer the case to the competent criminal court whereafter the concerned criminal court will make all endeavour to bring the proceeding to a early conclusion.

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16. We, therefore, dispose of the writ petition in the above terms.

D.G. Appeals & Writ Petition disposed of.

STATE OF SIKKIM AND OTHERS

v.

ADUP TSHERING BHUTIA AND OTHERS

(Civil Appeal No. 2446 of 2014)

FEBRUARY 18, 2014

**[H L. GOKHALE AND KURIAN JOSEPH, JJ.]**

*Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000: r.9(iv) - Integration of services - Three different services viz. Police Force, Armed Police and Vigilance Police in the State of Sikkim - In Vigilance Police and Armed Police, though the members therein got accelerated promotion to the post of inspector, there was no further promotion available to them - Promotion to the post of Deputy Superintendent of Police (DSP) available only to members of the Police Force - This inequality sought to be remedied by integration of three services - The feeder category for promotion to the post of DSP is inspector - Date of promotion/direct recruitment to the post of sub-inspector taken as determining factor for fixation of seniority for the purpose of promotion to the post of DSP and grant of deemed/notional promotion to the members of the Police Force from the date their compeers in the other two services got promotion to the post of inspector - Writ petition by respondent alleging that on account of the retrospective promotion granted to the members of the Police Force based on the date of appointment/promotion as sub-inspector in the case of the other two services, the respondent became junior to them, affecting his chances of promotion to the post of DSP - High Court allowed writ petition - Held: High Court patently erred in holding that the acquired or accrued rights of the writ petitioner had been affected by the fixation of seniority at the level of sub-inspector of Police - The very purpose of integration was to remove the inequality and provide them with*

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A *the opportunity for promotion to the post of DSP - If length of continuous service in the highest cadre of some similar services is taken as basis of fixing seniority and for further promotion that would certainly result in deeper injustice to the members of the other services - r.9(iv) is just, fair and equitable in the given circumstances without which the integration of services would have resulted in graver inequality and injustice to the members of the major service - The impugned judgment is set aside - However, for doing complete justice, being a solitary case, the benefits granted by the High Court in the impugned Judgment to the writ petitioner shall not be disturbed - Service law.*

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**Prior to the constitution of integrated Sikkim Police Force w.e.f. 11.09.2000, there were three different services viz. Sikkim Police Force, Sikkim Armed Police and Sikkim Vigilance Police in the State of Sikkim. All the three forces were governed by separate service rules. There was entry level of constable in all the three forces. The Sikkim Vigilance and Sikkim Armed Forces ended with the cadre of inspector. In the case of Sikkim Armed Police there was also 50% direct recruitment at the level of sub-inspector. Promotion to the post of Deputy Superintendent of Police was available only to the Sikkim Police Force. The posts of Deputy Superintendent of Police in Sikkim Vigilance Police and Sikkim Armed Police were filled up only by deputation. The personnel belonging to the Sikkim Vigilance Police and Sikkim Armed Police had been raising their grievances with regard to lack of promotion beyond inspector of police at various levels. The State Government framed the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000 under Article 309 of the Constitution of India consisting of posts upto inspector in all the three forces whereby seniority and retrospective promotion was granted notionally to the members of pre-integrated Sikkim Police Force.**

The respondent had joined Sikkim Police as a Constable on 12.08.1974. He was absorbed in the Sikkim Vigilance Police on 12.09.1978. He was promoted as sub-inspector on 22.12.1986 and was further promoted as inspector on 26.09.1995. On account of the retrospective promotion granted to the members of the Sikkim Police Force based on the date of appointment/promotion as sub-inspector in the case of the other two services, the respondent became junior to them, affecting his chances of promotion to the post of Deputy Superintendent of Police. He filed a writ petition before the High Court.

The High Court allowed the writ petition quashing the retrospective promotion granted to the private respondents and striking down Rule 9(iv) holding also that the seniority in the integrated cadre of inspectors shall be decided only on the basis of their substantive promotion to that post, and not based on the date of promotion/appointment to the post of sub-inspector. The Court, however, protected the promotions granted to the private respondents. Even the respondent was also promoted as Deputy Superintendent of Police on 23.02.2012 and he retired from service on 31.08.2012. The direction by the High Court was to grant promotion w.e.f. the date the first promotion was granted to any other private respondent with all the consequential including monetary benefits. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. Integration of three services was necessitated for balancing the inequality to the extent that the members of two of the services were denied promotion to the post of Deputy Superintendent of Police. Such promotion was available only to the members of the erstwhile Sikkim Police Force and was denied to Sikkim Vigilance Police and Sikkim Armed

Police. Accepting the recommendation of the Commission for a unified Police Force, the State Government integrated three services and promulgated the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000. The members of Sikkim Vigilance Police and Sikkim Armed Police had obtained accelerated promotion to various posts up to the position of inspector of police. However, their compeers in the erstwhile Sikkim Police Force could not get such promotions to the higher post of inspector for want of vacancy. There was entry level direct recruitment in one of the services, viz., Sikkim Vigilance Police to the extent of 50%. No doubt one of the main principles of integration is equation of posts. But the question is whether such integration based only on equation of posts will result in inequality or injustice to the members of any other service. Promotion to the post of Deputy Superintendent of Police was available only to members of the Sikkim Police Force. In the other two services, viz., Sikkim Vigilance Police and Sikkim Armed Police, though the members therein got accelerated promotion to the post of inspector, there was no further promotion available to them and they had to retire from service in that cadre. It was this inequality that was sought to be remedied by integration. The feeder category for promotion to the post of Deputy Superintendent of Police is inspector. If the seniority is fixed in that cadre of inspector, it would virtually amount to denial of promotion to the post of Deputy Superintendent of Police for quite some time to the members of the Sikkim Police Force. It was this discrimination and resultant injustice that was sought to be remedied by referring the matter to the Committee which recommended that for the purpose of promotion to the post of Deputy Superintendent of Police and preparation of seniority list in that regard, the date of promotion to the post of sub-inspector should form the basis. That date was taken, since

recruitment to the post of sub-inspector in Sikkim Armed Police. What has been done by the Government is to base the date of promotion/direct recruitment to the post of sub-inspector as the determining factor for fixation of seniority for the purpose of promotion to the post of Deputy Superintendent of Police and grant deemed/notional promotion to the members of the Sikkim Police Force from the date their compeers in the other two services got promotion to the post of inspector. Appointment to the post of inspector is by promotion. Therefore, the entry level appointment to the cadre of sub-inspector becomes relevant. The sub-inspector of Sikkim Vigilance and Sikkim Armed Forces, by chance, got accelerated promotion to the post of inspector. It was this injustice that was sought to be remedied by the retrospective promotion without monitory benefits and the amendment in the Rules. Merely because there is equation of post in a cadre on integration that does not necessarily mean that the common seniority list should be prepared in that cadre for promotion to the next higher cadre. If that method would result in injustice and graver inequality, another fair and just mode can be adopted. [Para 12 to 16] [1018-C-D; 1019-B-H; 1020-A-F]

*State of Gujarat and Anr. v. Raman Lal Keshav Lal Soni and Ors.* (1983) 2 SCC 33: 1983 (2) SCR 287; *B.S. Yadav and Ors. v. State of Haryana* (1980) Suppl. SCC 524: 1981 SCR 1024 - referred to.

2. True, many officers who were working as sub-inspectors, while the writ petitioner had been working as inspector, have gone above him in the process but the hard fact which caused the heartburn to his compeers in the Sikkim Police Force is that at the level of sub-inspectors, all of them were either travelling together with the writ petitioner or had gone much earlier to him in that cadre. No doubt, after integration, the promotion chances

A of members of Sikkim Police have been reduced considerably, since originally it was their exclusive domain. [paras 17, 18] [1020-G-H; 1021-A]

3. The High Court patently erred in holding that the acquired or accrued rights of the writ petitioner had been affected by the fixation of seniority at the level of sub-inspector of Police. It has to be noted that, but for merger, neither the writ petitioner nor the members of the two other police forces, viz., Sikkim Vigilance Police and Sikkim Armed Force, could have got any promotion at all to the post of Deputy Superintendent of Police. The very purpose of integration was to remove the inequality and provide them with the opportunity for promotion to the post of Deputy Superintendent of Police. If length of continuous service in the highest cadre of some similar services is taken as the basis of fixing the seniority and for further promotion to higher posts that would certainly result in deeper injustice to the members of the other services. It was hence the State, after due deliberations and based also on report of an expert Committee consisting of the top level offices in the State, took an equitable decision to make the post of sub-inspector of Police, where there is direct level entry in one of the services, as the determining factor for fixation of seniority. The writ petitioner did not suffer any demotion in the process. He continued in the post of inspector. The only thing is that his compeers in Sikkim Police Force who could not get accelerated promotion to the post of inspector, but who are admittedly senior to him if the date of appointment to the post of sub-inspector is taken, were given the deemed date of promotion to the post of inspector based on the seniority at the level of sub-inspector. The amended rule certainly has thus a nexus to the injustice sought to be removed so as to balance the equity. It is neither irrational nor arbitrary. In the whole State of Sikkim, the writ petitioner is

challenged the amendment which by itself would show that it was a case of a solitary instance, assuming there is basis for his grievance. The writ petitioner was senior to some of the private respondents if his date of entry in service as Sikkim Police Constable is taken. But when the Sikkim Vigilance Police was formed, he opted for that and he was absorbed in that Police wherein he got accelerated promotions to the various posts of head constable, assistant sub-inspector, sub-inspector and inspector. But such a ground with regard to his original date of entry as a police constable in 1974 was not taken anywhere. The principle of fixation of seniority as introduced by the amendment was already there in Rule 9(1). It is already provided therein that the relative seniority of the members recruited directly will be fixed based on the date of induction to the cadre. In other words, date of induction to a cadre where there is direct recruitment is the basis of fixation of seniority in the instant case at the level of sub-inspector. Thus, the amendment is merely clarificatory in nature and, therefore, it is deemed to exist from the original date of commencement of the Rule in 2000. Be that as it may, the High Court has already protected the promotions granted to the private respondents but the High Court has struck down the Rule and has quashed the seniority list. The High Court has unfortunately missed the crucial consideration with regard to the principles set by the State with regard to fixation of seniority, the purpose sought to be achieved in the process, the relevant considerations which led to the decision and the materials including the report of the expert committee which were relied on by the State in the process of making and taking of the decision. The State has only acted within its authority under Article 309 of the Constitution of India in bringing about the clarificatory amendment with regard to the fixation of seniority in the cadre of sub-inspectors. The retrospectivity given to the private respondents by giving the deemed date of

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A promotion is neither arbitrary nor unreasonable. On the contrary, it is perfectly just, fair and equitable in the given circumstances without which the integration of services would have resulted in graver inequality and injustice to the members of the major service. The impugned judgment is set aside. The first respondent-writ petitioner was also promoted as Deputy Superintendent of Police and he has retired from service. Rule 17 of the 2000 Rules has provided for power of relaxation to the State. Since the first respondent-writ petitioner had actually entered in service in 1974, prior to some of the private respondents, this could have been probably a case for the State Government to exercise that power. For doing complete justice, being a solitary case, the benefits granted by the High Court in the impugned Judgment to the writ petitioner shall not be disturbed. [paras 26 to 30] [1028-E-H; 1029-A-H; 1030-A-G]

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*Tamil Nadu Education Department Ministerial and General Subordinate Services Association and Ors. v. State of Tamil Nadu and Ors. (1980) 3 SCC 97: 1980 (1) SCR 1026; Indian Airlines Officers' Association v. Indian Airlines Limited and Ors. (2007) 10 SCC 684: 2007 (8) SCR 655; Kerala Magistrates' (Judicial) Association and others v. State of Kerala and Ors. (2001) 3 SCC 521: 2001 (2) SCR 222; Life Indian Corporation of India and Ors.v. S. S. Srivastava and Ors. 1988 Supp SCC 1: 1987 SCR 180; New Bank of India Employees' Union and Anr. v. Union of India and Ors. (1996) 8 SCC 407: 1996 (3)SCR 322; K.S. Vora and Ors. v. State of Gujarat and Ors. (1988) 1 SCC 311: 1988 (1) SCR 611; Reserve Bank of India v. N.C. Paliwal and Ors. (1976) 4 SCC 838: 1977 (1) SCR 377; R.S. Makashi and Ors. v. I. M. Menon and Ors. (1982) 1 SCC 379: 1982 (2) SCR 69; Prafulla Kumar Das and Ors. v. State of Orissa and Ors. (1976) 4 SCC 838: 2003 (4) Suppl. SCR 301; S.S. Bola and others v. B.D. Sardana and Ors. (1997) 8 SCC 522:1997 (2) Suppl. SCR 507 - relied on.*

**Case Law Reference:**

<b>1983 (2) SCR 287</b>	<b>referred to</b>	<b>Para 11</b>
<b>1981 SCR 1024</b>	<b>referred to</b>	<b>Para 11</b>
<b>1980 (1) SCR 1026</b>	<b>relied on</b>	<b>Para 19</b>
<b>2007 (8) SCR 655</b>	<b>relied on</b>	<b>Para 19</b>
<b>2001 (2) SCR 222</b>	<b>relied on</b>	<b>Para 19</b>
<b>1987 SCR 180</b>	<b>relied on</b>	<b>Para 19</b>
<b>1996 (3) SCR 322</b>	<b>relied on</b>	<b>Para 19</b>
<b>1988 (1) SCR 611</b>	<b>relied on</b>	<b>Para 20</b>
<b>1977 (1) SCR 377</b>	<b>relied on</b>	<b>Para 22</b>
<b>1982 (2) SCR 69</b>	<b>relied on</b>	<b>Para 23</b>

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2446 of 2014.

From the Judgment and Order dated 10.10.2012 of the High Court of Sikkim, Gangtok in WPC No. 33 of 2010.

A Mariarputham, AG, A.K. Gaguli, Aruna Mathur, Yusuf Khan (for Arputham, Aruna & Co.) for the Appellants.

Bhaskar Raj Pradhan, Arunabh Chowdhury, Anupam Lal Das, Karma Dorjee, G. Panmei, Vaibhav Tomar, Dipesh Sinha, Anirudh Singh, Annam D.N. Rao for the Respondents.

The Judgment of the Court was delivered by

**KURIAN, J.** 1. Leave granted.

2. Integration of services means the creation of a homogenous service by the amalgamation or merger of service personnel belonging to separate services. Integration is a policy matter as far as the State is concerned. In evolving a proper

A coalescence of the services, there are various steps:

(i) Decide the principles on the basis of which integration of services has to be effected;

B (ii) Examine the facts relating to each category and class of post with reference to the principle of equivalence;

(iii) Fix the equitable basis for the preparation of common seniority list of personnel holding posts which are merged into one category.

C The State is bound to ensure a fair and equitable treatment to officers in various categories/cadres of services while preparing the common seniority list. Being a complicated process, integration is likely to result in individual bruises which are required to be minimised and if not possible, to be ignored. D These first principles on integration are to be borne in mind whenever a dispute on integration is addressed.

**SHORT HISTORY**

E 3. Prior to the constitution of integrated Sikkim Police Force w.e.f. 11.09.2000 as per the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000, there were three different services, viz., (1) Sikkim Police Force, (2) Sikkim Armed Police Force and (3) Sikkim Vigilance Police. All the three forces were governed by separate service rules. There is entry level of constable in all the three forces. The Sikkim Vigilance and Sikkim Armed Forces ended with the cadre of inspector. In the case of Sikkim Armed Police there was also 50% direct recruitment at the level of sub-inspector. Promotion to the post of Deputy Superintendent of Police was available only to the Sikkim Police Force. The posts of Deputy Superintendent of Police in Sikkim Vigilance Police and Sikkim Armed Police were filled up only by deputation. The personnel belonging to the Sikkim Vigilance Police and Sikkim Armed Police had been raising their grievance on account of lack of promotion beyond inspector of p

The matter reached the High Court in Writ Petition (C) No. 513 of 1998. Realising the heartburn, the State Government appointed Justice N. G. Das, a former Judge of the High Court of Sikkim as one man Commission for examining the scope of integration of different services. Implementing the recommendations of the Commission, the State Government framed the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000 under Article 309 of the Constitution of India consisting of posts upto inspector in all the three forces. For the purpose of ready reference, we shall extract Rule 4 of 2000 Rules on constitution of the forces:

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"4. Constitution of the Force:

The Force shall consist of the following, namely:-

- (a) Persons holding the posts upto and including Inspectors under Schedule I of the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 1981.
- (b) Persons holding the posts of Constable, Head Constable, Assistant sub-Inspector, Sub-Inspector and Inspector under the Sikkim Vigilance Police Force (Recruitment, Promotion and Seniority) Rules, 1981.
- (c) Persons holding the posts of Sub-Inspector and Inspector under the Sikkim Armed Police (Recruitment, Promotion and Seniority) Rules, 1989.
- (d) Persons recruited to the Force in accordance with the provisions of these rules."

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4. On seniority, Rule 9 provided that the same would be determined by the order of merit in which they are selected for recruitment. To quote:

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"9. Seniority

- (i) The relative seniority of the members of the force recruited directly, shall be determined by the order of merit in which they are selected for such recruitment. Members as a result of an earlier selection shall be senior to those recruited as a result of a subsequent selection.
- (ii) The relative seniority of persons promoted from a lower post shall be on the basis of seniority-cum-merit subject to successfully passing the prescribed exam.
- (iii) The relative seniority inter-se of members recruited directly and through promotion shall be determined according to the rotation of vacancies between direct recruits and promotes which shall be based on the quota of vacancies reserved for direct recruitment and promotion, respectively, in these rules."

(Emphasis supplied)

5. On inter se seniority at the level of two cadres, viz., sub-inspector and inspector, it appears, there was a back reference to Justice N. G. Das Commission. However, it is seen from the records that there was no further recommendation from Justice N. G. Das Commission. With regard to the method and modalities of fixing of seniority of the sub-inspectors and inspectors, the matter was hence referred to a committee of senior police officers constituted by the Director General of Police. It was recommended that the inter se seniority at the level of sub-inspectors be the determining criterion for fixing the inter se seniority of inspectors in the integrated cadre. The proposal was approved by the Government on 11.04.2008 but the same was not implemented due to the pendency of a Writ Petition filed by the first respondent he

of the Writ Petition on 27.08.2009 as withdrawn, the government again constituted a high level committee headed by the Chief Secretary as Chairman with Director General of Police, Home Secretary and Secretary DoP as members and Joint Secretary DoP as member secretary. The committee submitted its report on 31.10.2009. It was recommended that the inter se seniority of police inspectors should be fixed based on the seniority at the entry level of sub-inspectors. It was also recommended that inspectors of Sikkim Police be deemed to have been promoted as inspectors w.e.f. the date their colleague officers at the entry level of sub-inspectors in Sikkim Armed Police and Sikkim Vigilance Police first got promoted as inspectors. The recommendation was approved by the State Government on 10.11.2009, and on 19.01.2010 a Notification was issued granting retrospective promotion to 52 members of the Sikkim Police Force with the condition that the officers will not be entitled to arrears of pay.

6. The State Government also amended the integrated Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000 as per Notification dated 20.01.2010 with retrospective effect from 11.09.2000. The amendment was mainly in Rule No. 9 on seniority wherein a new sub-clause (iv) was inserted. The amended Rule 9 (iv) reads as follows:

"9(iv)(a) The inter-se-seniority of police personnel up to the rank of Assistant Sub-inspector in the Sikkim Police and Sikkim Vigilance Police on the date of amalgamation of the cadres for the purpose of their promotion to the next rank shall be determined on the basis of their date of appointment to the entry level post of Constable.

(b) The inter-se-seniority of Police Inspectors of Sikkim Police, Sikkim Vigilance Police, Sikkim Armed Police and Indian Reserve Battalion on the date of amalgamation of the cadres for the purpose of their promotion to the rank of Deputy Superintendent of

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Police shall be determined on the basis of their date of appointment to the entry level of Sub-Inspector."

(Emphasis supplied)

7. The Rules also provided for a residuary power to the Government for relaxation. The relevant Rule reads as under:

"17. Power to relax: Where the Government of Sikkim is of the opinion that it is necessary or expedient to do so, it may, by order, for reasons to be recorded in writing, relax and of the provisions of these rules with respect to any class or category of persons or post."

#### SHORT FACTS

8. Seniority, the retrospective promotion granted notionally to the members of the pre-integrated Sikkim Police Force and the amendment was challenged by respondent no.1 before the High Court in Writ Petition (C) No. 33 of 2010 mainly with the following two prayers:

"(a) A writ in the nature of certiorari or any other writ, order or directions striking down/quashing Rule 9(iv)(b) of the Sikkim Police Force (Recruitment, Promotion & Seniority) Rules, 2000 as inserted by Rule 2 of the Sikkim Police Force (Recruitment, Promotion and Seniority) Amendment Rules, 2009 brought into force vide Notification No. 222/GEN/DOP dated 20.01.2010 with retrospective effect from 11.09.2000.

(b) A writ in the nature of certiorari or any other writ, order or directions striking down/quashing the Notification No. 02/PHQ/2010 dated 19.01.2010 to the extent it gives retrospective promotion to over 6 years to the private Respondent Nos. 7 to 28 except Respondent No. 21

irrespective of their actual date of confirmation with effect from the dates mentioned in the said impugned notification against the names of each of the said private Respondents."

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9. For a proper understanding of the factual disputes, we shall refer to the grievance of the writ petitioner. He joined Sikkim Police as a Constable on 12.08.1974. He was absorbed in the Sikkim Vigilance Police on 12.09.1978. He was promoted as sub-inspector on 22.12.1986 and was further promoted as inspector on 26.09.1995. On account of the retrospective promotion granted to the members of the Sikkim Police Force based on the date of appointment/promotion as sub-inspector in the case of the other two services, the writ petitioner became junior to them, affecting his chances of promotion to the post of Deputy Superintendent of Police.

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10. The High Court by Judgment dated 10.10.2012 allowed the Writ Petition quashing the retrospective promotion granted to the private respondents and striking down Rule 9(iv) holding also that the seniority in the integrated cadre of inspectors shall be decided only on the basis of their substantive promotion to that post, and not based on the date of promotion/appointment to the post of sub-inspector. The Court, however, protected the promotions granted to the private respondents. It is significant to note that even the writ petitioner was also promoted as Deputy Superintendent of Police on 23.02.2012 and he retired from service on 31.08.2012. The direction by the High Court is to grant promotion with effect from the date the first promotion was granted to any other private respondent with all the consequential including monetary benefits. Thus aggrieved, the State is before this Court.

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11. The High Court has placed reliance on the Constitution Bench decision of this Court in *State of Gujarat and Another v. Raman Lal Keshav Lal Soni and Others*<sup>1</sup> regarding

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1. (1983) 2 SCC 33.

A retrospective operation of law. Reliance is also placed on another Constitution Bench decision in *B.S. Yadav and Others v. State of Haryana*<sup>2</sup>. In *B. S. Yadav's* case (supra), this Court dealt with the legislative power of the State under Article 309 of the Constitution of India. It was clearly held in both the decisions that the State is competent to enact laws with retrospective effect. The only rider is that the date of retrospective operation should have relevance and nexus with the object sought to be achieved and the same shall not affect the accrued rights.

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12. The short question is whether the amended Rule on fixation of seniority satisfied the test of reasonableness. Integration of three services was necessitated for balancing the inequality to the extent that the members of two of the services were denied promotion to the post of Deputy Superintendent of Police. Such promotion was available only to the members of the erstwhile Sikkim Police Force and was denied to Sikkim Vigilance Police and Sikkim Armed Police. In this context, it would be useful to refer to the terms of reference to Justice N. G. Das Commission:

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"(1) To comprehensively review the existing Recruitment Rules of all the different wings of Sikkim Police so as to arrive at an appropriate solution, which would meet promotional aspirations of the entire Police Force.

(2) To examine the necessity for integration of the different Recruitment Rules particularly (a) Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 1988, (b) Sikkim Armed Force (Recruitment, Promotion and other Conditions of Service) Rules, 1989 and (c) the Sikkim Vigilance Police (Recruitment, Seniority and Promotion) Rules, 1981, so as to bring about long term solution

2. (1980) Suppl. SCC 524.

to meet the promotional aspirations of the entire Police Force. The Commission shall submit its report on or before 31.12.99."

(Emphasis supplied)

13. Accepting the recommendation of the Commission for a unified Police Force, the State Government integrated three services and promulgated the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000. It is to be specifically noted that the members of Sikkim Vigilance Police and Sikkim Armed Police had obtained accelerated promotion to various posts up to the position of inspector of police. However, their compeers in the erstwhile Sikkim Police Force could not get such promotions to the higher post of inspector for want of vacancy. It is crucially significant to note that there was entry level direct recruitment in one of the services, viz., Sikkim Vigilance Police to the extent of 50%.

14. No doubt one of the main principles of integration is equation of posts. But the question is whether such integration based only on equation of posts will result in inequality or injustice to the members of any other service.

15. As we have already noted above, promotion to the post of Deputy Superintendent of Police was available only to members of the Sikkim Police Force. In the other two services, viz., Sikkim Vigilance Police and Sikkim Armed Police, though the members therein got accelerated promotion to the post of inspector, there was no further promotion available to them and they had to retire from service in that cadre. It was this inequality that was sought to be remedied by integration.

16. The feeder category for promotion to the post of Deputy Superintendent of Police is inspector. If the seniority is fixed in that cadre of inspector, it would virtually amount to denial of promotion to the post of Deputy Superintendent of Police for quite some time to the members of the Sikkim Police Force. It

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A was this discrimination and resultant injustice that was sought to be remedied by referring the matter to the Committee which recommended that for the purpose of promotion to the post of Deputy Superintendent of Police and preparation of seniority list in that regard, the date of promotion to the post of sub-inspector should form the basis. That date was taken, as we have already noted above, since there was direct recruitment to the post of sub-inspector in Sikkim Armed Police. What has been done by the Government is to base the date of promotion/ direct recruitment to the post of sub-inspector as the determining factor for fixation of seniority for the purpose of promotion to the post of Deputy Superintendent of Police and grant deemed/notional promotion to the members of the Sikkim Police Force from the date their compeers in the other two services got promotion to the post of inspector. Appointment to the post of inspector is by promotion. Therefore, the entry level appointment to the cadre of sub-inspector becomes relevant. The sub-inspector of Sikkim Vigilance and Sikkim Armed Forces, by chance, got accelerated promotion to the post of inspector. It was this injustice that was sought to be remedied by the retrospective promotion without monitory benefits and the amendment in the Rules. Merely because there is equation of post in a cadre on integration that does not necessarily mean that the common seniority list should be prepared in that cadre for promotion to the next higher cadre. If that method would result in injustice and graver inequality, another fair and just mode can be adopted.

17. True, many officers who were working as sub-inspectors, while the writ petitioner had been working as inspector, have gone above him in the process but the hard fact which caused the heartburn to his compeers in the Sikkim Police Force is that at the level of sub-inspectors, all of them were either travelling together with the writ petitioner or had gone much earlier to him in that cadre.

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18. One cannot also lose sight of the fact that, after integration, the promotion chances of members of Sikkim Police have been reduced considerably, since originally it was their exclusive domain.

19. The Apex Court in *Tamil Nadu Education Department Ministerial and General Subordinate Services Association and Others v. State of Tamil Nadu and Others*<sup>3</sup> held that integration is a complicated administrative process and it is likely to affect certain individuals. To quote:

"7. In service jurisprudence integration is a complicated administrative problem where, in doing broad justice to many, some bruise to a few cannot be ruled out. Some play in the joints, even some wobbling, must be left to government without fussy forensic monitoring, since the administration has been entrusted by the Constitution to the executive, not to the court. All life, including administrative life, involves experiment, trial and error, but within the leading strings of fundamental rights, and, absent unconstitutional "excesses", judicial correction is not right. Under Article 32, this Court is the constitutional sentinel, not the national ombudsman. We need an ombudsman but the court cannot make-do.

8. ... Maybe, a better formula could be evolved, but the court cannot substitute its wisdom for Government's, save to see that unreasonable perversity, mala fide manipulation, indefensible arbitrariness and like infirmities do not defile the equation for integration. We decline to demolish the order on this ground. Curial therapeutics can heal only the pathology of unconstitutionality, not every injury."

(Emphasis supplied)

The same view has been followed in *Indian Airlines*

3. (1980) 3 SCC 97.

A *Officers' Association v. Indian Airlines Limited and others*<sup>4</sup>, *Kerala Magistrates' (Judicial) Association and others v. State of Kerala and others*<sup>5</sup>, *Life Indian Corporation of India and Others v. S. S. Srivastava and Others*<sup>6</sup> and *New Bank of India Employees' Union and Another v. Union of India and Others*<sup>7</sup>.

B 20. It has also been held by this Court in *K.S. Vora and others v. State of Gujarat and others*<sup>8</sup> that integration affecting the larger public interest would necessarily affect the seniority of some members of some of the services. To quote:

C "5. As we have already pointed out in the instant case the State decided at stages to switch over to the common cadre in respect of all the four grades of the Subordinate Service. Before common grades had been formed promotion was granted departmentwise. When ultimately a common cadre came into existence - and all that was done by 1974 - it was realised that if seniority as given in the respective departments were taken as final for all purposes there would be prejudice. Undoubtedly the common cadre was for the purpose of increasing the efficiency by introducing a spirit of total competition by enlarging the field of choice for filling up the promotional posts and in the interest of discipline too. After a common cadre was formed, the general feeling of dissatisfaction on account of disparity of seniority became apparent. The 1977 Rules were introduced in this background to ease the situation. The scheme of this rule protected the rank then held by every member of the service notwithstanding alteration of seniority on the new basis. This, therefore, made it clear that accrued benefits were not to be interfered with. To that extent the 1977 Rules were not

4. (2007) 10 SCC 684.

5. (2001) 3 SCC 521.

6. 1988 Supp SCC 1.

7. (1196) 8 SCC 407.

8. (1988) 1 SCC 311.

retroactive. In spite of the protection of rule regarding the post then held, the Rules brought about a change in the inter se seniority by adopting the date of initial recruitment and the length of service became the basis for refixing seniority. Total length of service for such purpose is a well known concept and could not said to be arbitrary. Undoubtedly one of the consequences of the change in the basis was likely to affect prospects of promotion - a matter in future. Two aspects have to be borne in mind while considering the challenge of the appellants to this situation. It was a historical necessity and the peculiar situation that arose out of government's decision to create a common cadre with four grades in the entire Secretariat. We would like to point out with appropriate emphasis that there was no challenge to creation of the common cadre and certainly government was competent to do so. The second aspect to be borne in mind is that rules of seniority are a matter for the employer to frame and even though prospects of promotion in future were likely to be prejudiced by introduction of a new set of rules to regulate seniority, if the rules were made bona fide and to meet exigencies of the service, no entertainable grievance could be made. If these are the tests to apply, we do not think the appellants have indeed any grievance to make. In our view, therefore, the High Court rightly dismissed the contention and found that appellants were not entitled to relief."

(Emphasis supplied)

21. In *Kerala Magistrates' (Judicial) Association* case (supra), this Court held:

"5. We have examined the relevant records containing the deliberations made in the full court meetings of the High Court on the topic of integration of the two wings. It appears that on the criminal side the entry post was Magistrate Second Class and the highest post, a Magistrate Second Class could reach was Chief Judicial Magistrate. On the

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civil side the entry post was Munsif and the highest post was the District Judge. The association of the Criminal Magistrates had all along been clamouring that the post of District and Sessions Judge should also be separated and the Chief Judicial Magistrates on the criminal side should also be promoted to the post of District and Sessions Judge. ... .. the number of posts of Judicial Magistrates Second Class, which existed on the date of the full court meeting. The Court took notice of the fact that on the date of integration, 42 Magistrates Second Class will be absorbed in the category of Munsif Magistrates and all of them will be duly benefited in their scale of pay. The Court also considered that in view of the number of posts available, while Munsifs could expect promotion to 49 posts of Subordinate Judge but the Judicial Magistrates could expect promotion only to 18 posts of Chief Judicial Magistrates, as it existed. But by reason of integration, the chances of promotion of the Magistrates will be much more enhanced, compared to the chances of promotion to the Munsifs. The Court also considered the normal rate of promotion and found that for Munsifs, the rate being 1.25, for a Magistrate rate was only 0.30 and on account of integration, the ratio would come to 0.84, which indicates that overall chances of promotion to the Munsifs would get reduced from 1.25 to 0.84, whereas the chances of promotion of the Magistrates get increased from 0.30 to 0.84. The High Court, therefore, suggested that the ratio of 3:1 should be fixed both in the integrated cadre of the Subordinate Judges and Chief Judicial Magistrates for promotion to the post of District Judge as well as in the cadre of Munsifs and Magistrates First Class for the promotion to the post of Subordinate Judges. The High Court also was of the opinion that the effect of integration will be that while Munsifs would lose chances of promotion the Magistrates will improve their chances of promotion, although some Senior Magistrates, individually will sustain some loss. But such loss is the usu

integration process. Notwithstanding the aforesaid recommendations of the High Court, the State Government on receipt of representation from the Magistrates' Association, made further correspondence with the High Court and suggested that the ratio for promotion from the Munsifs and Magistrates to the Subordinate Judges should be fixed at 5:2. The High Court initially had some reservations, but ultimately accepted the same and communicated its acceptance to the Government, whereafter the Rules were promulgated and Rule 3(4) of the Rules embodies the aforesaid principle. ... .. We see no legal infirmity with the conclusions arrived at by the High Court, requiring interference by this Court, even though we agree that some individual Magistrates might have suffered some loss. ..."

(Emphasis supplied)

22. All that apart, integration is a policy matter for the State. This Court had occasion to consider this aspect of the matter in *Reserve Bank of India v. N.C. Paliwal and others*<sup>9</sup>. To quote:

"15. Now, the first question which arises for consideration is whether Reserve Bank violated the constitutional principle of equality in bringing about integration of non-clerical with clerical services. We fail to see how integration of different cadres into one cadre can be said to involve any violation of the equality clause. It is now well settled, as a result of the decision of this Court in *Kishori Mohanlal Bakshi v. Union of India*<sup>2</sup> that Article 16 and a fortiori also Article 14 do not forbid the creation of different cadres for government service. And if that be so, equally these two articles cannot stand in the way of the State integrating different cadres into one cadre. It is entirely a matter for the State to decide whether to have several different cadres or one integrated cadre in its services.

9. (1976) 4 SCC 838.

A That is a matter of policy which does not attract the applicability of the equality clause. The integration of non-clerical with clerical services sought to be effectuated by the combined seniority scheme cannot in the circumstances be assailed as violative of the constitutional principle of equality."

(Emphasis supplied)

23. In *R.S. Makashi and others v. I. M. Menon and others*<sup>10</sup>, this Court held that :

"34. When personnel drawn from different sources are being absorbed and integrated in a new department, it is primarily for the Government or the executive authority concerned to decide as a matter of policy how the equation of posts should be effected. The courts will not interfere with such a decision unless it is shown to be arbitrary, unreasonable or unfair, and if no manifest unfairness or unreasonableness is made out, the court will not sit in appeal and examine the propriety or wisdom of the principle of equation of posts adopted by the Government. In the instant case, we have already indicated our opinion that in equating the post of Supply Inspector in the CFD with that of Clerk with two years' regular service in other government departments, no arbitrary or unreasonable treatment was involved."

(Emphasis supplied)

24. In *Prafulla Kumar Das and others v. State of Orissa and others*<sup>11</sup>, it was held that :

"33. Under Article 309 of the Constitution of India, it is open to the Governor of the Sate to make rules regulating the recruitment, and the conditions of service of persons appointed to such services and posts until provision in that

10. (1982) 1 SCC 379.

11. (2003) 11 SCC 614.

behalf is made by or under an Act of the legislature. As has been rightly pointed out by the Court in *Nityananda Kar case*<sup>2</sup>, the legislature, or the Governor of the State, as the case may be, may, in its discretion, bestow or divest a right of seniority. This is essentially a matter of policy, and the question of a vested right would not arise, as the State may alter or deny any such ostensible right, even by way of retrospective effect, if it so chooses (sic) in public interest."

(Emphasis supplied)

25. In *S. S. Bola and others v. B.D. Sardana and others*<sup>12</sup> also, this Court held that seniority of a government servant is not a vested right and that an Act of State Legislature or a Rule under Article 309 of the Constitution of India can retrospectively affect the seniority of a government servant. To quote:

"153. xxx xxx xxx

AB. A distinction between right to be considered for promotion and an interest to be considered for promotion has always been maintained. Seniority is a facet of interest. The rules prescribe the method of recruitment/selection. Seniority is governed by the rules existing as on the date of consideration for promotion. Seniority is required to be worked out according to the existing rules. No one has a vested right to promotion or seniority. But an officer has an interest to seniority acquired by working out the rules. The seniority should be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects chances of promotion of a person relates to conditions of service. The rule/provision in an Act merely affecting the chances of promotion would not be regarded as varying the conditions of service. The chances of promotion are not conditions of service. A rule which

12. (1997) 8 SCC 522.

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merely affects the chances of promotion does not amount to change in the conditions of service. However, once a declaration of law, on the basis of existing rules, is made by a constitutional court and a mandamus is issued or direction given for its enforcement by preparing the seniority list, operation of the declaration of law and the mandamus and directions issued by the Court is the result of the declaration of law but not the operation of the rules per se.

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200. Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion get delayed thereby."

26. The High Court patently erred in holding that the acquired or accrued rights of the writ petitioner had been affected by the fixation of seniority at the level of sub-inspector of Police. It has to be noted that, but for merger, neither the writ petitioner nor the members of the two other police forces, viz., Sikkim Vigilance Police and Sikkim Armed Force, could have got any promotion at all to the post of Deputy Superintendent of Police. The very purpose of integration was to remove the inequality and provide them with the opportunity for promotion to the post of Deputy Superintendent of Police. If length of continuous service in the highest cadre of some similar services is taken as the basis of fixing the seniority and for further promotion to higher posts that would certainly result in deeper injustice to the members of the other services. It was hence the State, after due deliberations and based also on report of an expert Committee consisting of the top level offices in the State, took an equitable decision to make the post of sub-inspector of Police, where there is direct level entry in one of the services, as the determining factor for fixation



petitioner did not suffer any demotion in the process. He continued in the post of inspector. The only thing is that his compeers in Sikkim Police Force who could not get accelerated promotion to the post of inspector, but who are admittedly senior to him if the date of appointment to the post of sub-inspector is taken, were given the deemed date of promotion to the post of inspector based on the seniority at the level of sub-inspector. The amended rule certainly has thus a nexus to the injustice sought to be removed so as to balance the equity. It is neither irrational nor arbitrary.

27. It is significant also to note that in the whole State of Sikkim, the writ petitioner is the only person who challenged the amendment which by itself would show that it was a case of a solitary instance, assuming there is basis for his grievance. We may, however, take note of a factual position that the writ petitioner was senior to some of the private respondents if his date of entry in service as Sikkim Police Constable is taken. But when the Sikkim Vigilance Police was formed, he opted for that and he was absorbed in that Police wherein he got accelerated promotions to the various posts of head constable, assistant sub-inspector, sub-inspector and inspector. But it appears that such a ground with regard to his original date of entry as a police constable in 1974 is not taken anywhere.

28. All that apart, if we closely analyse Rule 9(1), it can be seen that the principle of fixation of seniority as introduced by the amendment was already there. It is already provided therein that the relative seniority of the members recruited directly will be fixed based on the date of induction to the cadre. In other words, date of induction to a cadre where there is direct recruitment is the basis of fixation of seniority in the instant case at the level of sub-inspector. Thus, the amendment is merely clarificatory in nature and, therefore, it is deemed to exist from the original date of commencement of the Rule in 2000.

29. Be that as it may, the High Court has already protected the promotions granted to the private respondents but the High

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A Court has struck down the Rule and has quashed the seniority list. As we have already noted above, the High Court has unfortunately missed the crucial consideration with regard to the principles set by the State with regard to fixation of seniority, the purpose sought to be achieved in the process, the relevant considerations which lead to the decision and the materials including the report of the expert committee which were relied on by the State in the process of making and taking of the decision. The State has only acted within its authority under Article 309 of the Constitution of India in bringing about the clarificatory amendment with regard to the fixation of seniority in the cadre of sub-inspectors. The retrospectivity given to the private respondents by giving the deemed date of promotion is neither arbitrary nor unreasonable. On the contrary, it is perfectly just, fair and equitable in the given circumstances without which the integration of services would have resulted in graver inequality and injustice to the members of the major service. In the result, the appeal is allowed. The impugned judgment is set aside. Writ Petition filed by the private respondent in High Court is dismissed.

E 30. We have already noted above that the first respondent-writ petitioner was also promoted as Deputy Superintendent of Police and he has retired from service. Rule 17 of the 2000 Rules has provided for power of relaxation to the State. Since the first respondent-writ petitioner had actually entered in service in 1974, prior to some of the private respondents, this could have been probably a case for the State Government to exercise that power. We do not propose to relegate the first respondent-writ petitioner at this stage for that remedy. For doing complete justice, being a solitary case, we hold that the benefits granted by the High Court in the impugned Judgment to the writ petitioner, shall not be disturbed.

31. The appeal is allowed as above. There is no order as to costs.

H D.G.

AMARENDRA KUMAR MOHAPATRA & ORS.

v.

STATE OF ORISSA & ORS.  
(Civil Appeal No. 8322 of 2009)

FEBRUARY 19, 2014

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

ORISSA SERVICE OF ENGINEERS (VALIDATION OF APPOINTMENT) ACT, 2002:

*Nature and purpose of the Act - Held: The Act cannot be said to be a validating enactment - The enactment in the case at hand deals with the law relating to regularisation of incumbents holding public office on ad hoc or temporary basis, much in the same way as regularisation of such temporary appointments is ordered in terms of a scheme for that purpose - Legislation under challenge was not a Validation Act as it purported to be but an enactment that regularised the appointments of graduate Stipendiary Engineers working as ad hoc Assistant Engineers as Assistant Engineers - Interpretation of statutes - Title of enactment.*

*Act granting regularisation of ad hoc Stipendiary Engineers - Constitutional validity of - Held: Legislation under challenge does not suffer from any constitutional infirmity and High Court was in error in having struck it down - Impugned judgment of High Court set aside.*

*Regularisation of ad hoc Stipendiary Engineers - Held : The appointment process of unemployed degree holders started with the resolution passed by State Government - The resolution further envisaged their absorption in service after a period of two years --Further, their appointments were made on the basis of a selection process and on the basis of merit*

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A - *Appointment of Stipendiary Engineers on ad hoc basis came pursuant to the direction from High Court -- Their appointment were made pursuant to a notification by which everyone who was unemployed and held an Engineering degree in any discipline was free to make an application - The process of appointment was at no stage questioned before the court - It cannot be said that there was complete arbitrariness in the manner of such appointments so as to violate Arts. 14 and 16 of the Constitution - Constitution of India, 1950 - Arts. 14 and 16.*

C *Regularization of ad hoc Stipendiary Engineers -- Degree holder Junior Engineers -- Held: They were qualified for appointment as Assistant Engineers as they possessed degrees from recognised institutions, they were appointed against the sanctioned posts - Each one of them has worked for more than 10 years ever since his appointment as ad hoc Assistant Engineer - Therefore, these appointments of Stipendiary Engineers on ad hoc basis cannot be said to be illegal so as to fall beyond the purview of the scheme envisaged in Umadevi's case, which permitted regularisation of irregular appointments and not illegal appointments - Entry of degree holder Junior Engineers as Stipendiary Engineers and later as Assistant Engineers cannot be said to be through "the backdoor" -- Legislative enactment granting such regularisation does not call for interference at this late stage when those appointed or regularised have already started retiring having served their respective departments, in some cases for as long as 22 years.*

G *Regularisation of degree holder Junior Engineers - Held : The writ petitioners cannot be said to be similarly situated as the Stipendiaries only because they were also working as ad hoc Assistant Engineers - A challenge based on "under inclusion" is not readily accepted by courts - However, degree holder Junior Engineers currently working as ad hoc Assistant Engineers are entitled to the relief of re*

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having regard to the fact that they have rendered long years of service as Assistant Engineers on ad hoc basis for 17 to 18 years in some cases.

*ss.3(2) and 3(3) - Seniority - Granted to Stipendiary Assistant Engineers from the date of their ad hoc appointment as such - Held : To this extent the Court can suitably mould the relief - In the circumstances, the degree holder Junior Engineers currently working as Assistant Engineers on ad hoc basis i.e. writ petitioners in High Court, are entitled to the relief of regularisation with effect from the same date as the Validation Act granted such regularisation to Stipendiary Engineers - There is no illegality or constitutional infirmity in the provisions of s. 3(2) or s. 3(3) of the impugned legislation - Similarly, degree holder Junior Engineers promoted as Assistant Engineers on ad hoc basis, who have been held to be entitled to regularisation on account of their length of service should also be given a similar benefit - But all such regularised Assistant Engineers from Stipendiary Stream and from Junior Engineers category would together rank below the promotee Assistant Engineers.*

**The Government of Orissa, in order to address the problem of 2000 unemployed degree holders in various branches of Engineering, invited applications for empanelment as Stipendiary Engineers for placement in different Government departments, projects, public sector undertakings, co-operative societies and industries etc. The applications received were considered by the Committee constituted for the purpose, and appointments of the candidates found suitable were made between 1991 to 1994. On 12.3.1996, the Government passed a resolution stating that the Stipendiary Engineers could be appointed as Assistant Engineers on ad hoc basis in the pay scale of Rs.2000-3500/- or any similar post against regular vacancies. This resolution was given effect to consequent upon the**

**A orders dated 18-12-1996 passed by the High Court in Jayanta Kumar Dey and Ors. v. State of Orissa and Ors. Accordingly, the Stipendiary Engineers were appointed as Assistant Engineers on ad hoc basis between the years 1997 and 2001. Further, 86 degree holder Junior Engineers were promoted on ad hoc basis as Assistant Engineers against 5% vacancies. The State Legislature enacted Orissa Service of Engineers (Validation of Appointment) Act, 2002 regularising the services of 881 ad hoc Assistant Engineers from the date of commencement of the Act. The Act further made provisions for their inter se seniority and counting of their service for the purpose of pension, leave and increment.**

**Several writ petitions were filed, challenging the validity of the 2002 Act. The Division Bench of the High Court by its order dated 15-10-2008 struck down the impugned Legislation.**

**In the instant appeals, the following questions of law arose for consideration:**

- E "1. What is the true nature and purport of the impugned legislation? More particularly is the impugned legislation a validation enactment or is it an enactment that grants regularisation to those appointed on ad hoc basis?"**
- F 2. If the impugned enactment simply grants regularisation, does it suffer from any constitutional infirmity?"**
- G 3. Does Section 3(2) of the impugned legislation suffer from any unconstitutionality, insofar as the same purports to grant Stipendiary Assistant Engineers seniority with effect from the date they were appointed on ad hoc basis?"**

Allowing the appeals, the Court

HELD:

Re. Question No.1

1.1 Two essentials identified by this Court for any legislation that purports to validate any Act, rule, action or proceedings are: (a) The legislature enacting the Validation Act should be competent to enact the law and; (b) the cause for ineffectiveness or invalidity of the Act or the proceedings needs to be removed. [para 23] [1062-C-D]

*Shri Prithvi Cotton Mills Ltd. and Ann v. Broach Borough Municipality and Ors.* 1970 (1) SCR 388 = (1969) 2 SCC 283; *Hari Singh & Others v. The Military Estate Officer and Anr.* 1973 (1) SCR 515 = (1972) 2 SCC 239; and *ITW Signode India Ltd. v. Collector of Central Excise* 2003 (5) Suppl. SCR 751 = (2004) 3 SCC 48 - relied on.

*Black's Law Dictionary (9th Edition, Page No.1545)* - referred to

1.2 Judicial pronouncements regarding validation laws generally deal with situations in which an act, rule, action or proceedings has been found by a court of competent jurisdiction to be invalid and the legislature has stepped in to validate the same. [para 25] [1063-D]

*Madan Mohan Pathak v. Union of India* 1978 (3) SCR 334 = (1978) 2 SCC 50, *Indian Aluminium Co. etc. v. State of Kerala and Ors.* 1996 (2) SCR 23 = (1996) 7 SCC 637, *Meerut Development Authority etc. v. Satbir Singh and Ors. etc.* 1996 (6) Suppl. SCR 529 = (1996) 11 SCC 462, *I.N. Saksena v. State of Madhya Pradesh* 1976 (3) SCR 237 = (1976) 4 SCC 750, *Virender Singh Hooda and Ors. v. State of Haryana and Anr.* 2004 (5) Suppl. SCR 720 = (2004) 12 SCC 588 and *State of Bihar and Ors. v. Bihar Pensioners*

A *Samaj (2006) 5 SCC 65; M.P.V. Sundararamier & Co. v. State of A.P. & Anr.* AIR 1958 SC 468- referred to.

*Vacher and Sons Ltd. v. London Society of Compositors* [1913] AC 107- referred to.

B 1.3 In the case at hand, the State Government had not suffered any adverse judicial pronouncement to necessitate a Validation Act. The title of the impugned Legislation all the same describes the legislation as a Validation Act. The title of a statute is no doubt an important part of an enactment and can be referred to for determining the general scope of the legislation. But the true nature of any such enactment has always to be determined not on the basis of the label given to it but on the basis of its substance. [para 26] [1064-D-F]

D *Maxwell on Interpretation of Statutes* (12th Edn., page 6), referred to.

1.4 The impugned legislation regularises the appointment of Stipendiary Engineers as Assistant Engineers. However, there is no rationale behind the Legislature considering it necessary to validate the ad hoc appointments, especially when such appointments had been made by the Government pursuant to the directions issued by the High Court in the writ petitions filed by the Stipendiary Engineers. It is quite evident that the legislation was in substance aimed at regularising the services of such persons as had worked in the capacity of Assistant Engineers. Existence of an illegal act, proceedings or rule or legislation is the sine qua non for any validating legislation to validate the same. There can be no validation of what has yet to be done, suffered or enacted. A legislation that did not validate any such non-existent Act, but simply appointed the ad hoc Assistant Engineers as substantive employees of the State by resort to a fiction, could not be described as a validating law. [para 29-32] [1066-B-C, F; 1067

1.5 The enactment in the case at hand deals with the law relating to regularisation of incumbents holding public office on ad hoc or temporary basis, much in the same way as regularisation of such temporary appointments is ordered in terms of a scheme for that purpose. It is trite that what could be achieved by the Government by exercise of its executive power could certainly be achieved by legislation, as indeed it has been achieved in the case at hand. Thus the legislation under challenge was not a Validation Act as it purported to be but an enactment that regularised the appointment of graduate Stipendiary Engineers working as ad hoc Assistant Engineers as Assistant Engineers. [para 33] [1068-C, G; 1069-A]

*Satchindananda Mishra vs. State of Orissa and Ors.* (2004) 8 SCC 599 - held inapplicable.

Re. Question No.2

2.1 In *Umadevi's* case, the Constitution Bench has ruled that regularisation of illegal or irregularly appointed persons could never be an alternative mode of recruitment to public service. Such recruitments were, in the opinion of this Court, in complete negation of the guarantees contained in Arts. 14 and 16 of the Constitution. However, this Court did not upset the regularisations that had already taken place. The ratio of the decision in that sense was prospective in its application. Further, this Court in para 53 of the decision permitted a one-time exception for regularising services of such employees as had been irregularly appointed and had served for ten years or more. [para 34-35] [1069-C-D, G-H]

*Secretary, State of Karnataka and Ors. v. Umadevi* (3) and Ors. 2006 (3) SCR 953 = (2006) 4 SCC 1 - referred to.

2.2 In the instant case, Diploma holder Junior

A Engineers were not eligible to be appointed as Assistant Engineers in the direct recruitment quota. They could not make a grievance against regularisation simply because of the fact that those regularised may figure above them in seniority. Seniority is an incident of appointment to the cadre which must be regulated by the relevant rules. Any possible prejudice to diploma holders in terms of seniority would not, therefore, make the regularisation unconstitutional or illegal and beyond the purview of para 53 in *Umadevi's* case. [para 38] [1072-F-H; 1073-A]

C 2.3 The decision in *Umadevi's* case permitted regularisation of irregular appointments and not illegal appointments. The decision in *Umadevi's* case summed up the following three essentials for regularisation (1) the employees worked for ten years or more, (2) that they have so worked in a duly sanctioned post without the benefit or protection of the interim order of any court or tribunal and (3) they should have possessed the minimum qualification stipulated for the appointment. Subject to these three requirements being satisfied, even if the appointment process did not involve open competitive selection, the appointment would be treated irregular and not illegal and thereby qualify for regularisation. [para 40-41] [1073-F; 1074-B-D]

F *State of Karnataka v. M.L. Kesari and Ors.* 2010 (9) SCR 543 = (2010) 9 SCC 247 - referred to.

G 2.4 As regards the degree holder Junior Engineers, they were qualified for appointment as Assistant Engineers as they possessed degrees from recognised institutions, they were appointed against the sanctioned posts. The information provided by the State Government, in fact, suggests that each one of them has worked for more than 10 years ever since his appointment as ad hoc Assistant Engineer. Therefore, these appointments of the Stipendiary Engineers on ad hoc basis cannot be said to be illegal.

the purview of the scheme envisaged in *Umadevi's* case. A  
[para 42] [1075-B-E]

2.5 Thus, not only because in *Umadevi's* case this B  
Court did not disturb the appointments already made or  
regularisation granted, but also because the decision  
itself permitted regularisation in case of irregular  
appointments, the legislative enactment granting such  
regularisation does not call for interference at this late  
stage when those appointed or regularised have already  
started retiring having served their respective  
departments, in some cases for as long as 22 years. [para  
43] [1075-F-G] C

2.6 The appointment process of unemployed degree D  
holders started with the resolution passed by the State  
Government. The resolution further envisaged their  
absorption in service after a period of two years. Further,  
their appointments were made on the basis of a selection  
process and on the basis of merit. A reference to the  
Public Service Commission was no doubt considered  
unnecessary but the fact remains that their appointment  
were made pursuant to a notification by which everyone  
who was unemployed and held an Engineering degree  
in any discipline was free to make an application. What  
is significant is that the empanelment of the unemployed  
degree holders and the process of their appointment was  
at no stage questioned before the court. It is not,  
therefore, wholly correct to suggest that the entry of the  
degree holder Junior Engineers as Stipendiary Engineers  
and later as Assistant Engineers was through "the  
backdoor". The process of selection and appointments  
may not have been as per the relevant rules as the same  
ought to have been, but it is far from saying that there was  
complete arbitrariness in the manner of such  
appointments so as to violate Arts. 14 and 16 of the  
Constitution. [para 44] [1075-H; 1076-A-H] E  
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2.7 Besides, the appointment of Stipendiary  
Engineers was at the level of Junior Engineers. In the  
absence of any finding from the High Court on the  
subject and in the absence of any cogent material on  
record, it cannot be held that the appointment of the  
Stipendiary Engineers was from the beginning itself as  
Assistant Engineers. It is also noteworthy that the  
appointment of the Stipendiary Engineers on ad hoc  
basis came pursuant to the direction from the High Court  
which is yet another reason why it is not open to the  
Stipendiary Engineers to claim that they were at all points  
of time working as Assistant Engineers. However, the  
appointment of graduate engineers as Stipendiaries was  
on a clear representation, as is evident from the  
Government resolution and its counter affidavit before  
the High Court, that they would be eventually absorbed  
in service as Assistant Engineers. [para 45-46] [1077-A-  
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2.8 As regards the claim of degree holder Junior  
Engineers that they were discriminated in regularisation,  
trite it is to say at the outset that a piece of legislation  
carries with it a presumption of constitutional validity.  
Also settled is the principle that Art. 14 does not forbid  
reasonable classification. In the instant case, the  
beneficiaries of the impugned legislation constitute a  
class by themselves inasmuch as they were un-employed  
degree holders appointed as Stipendiary Engineers on  
a consolidated pay. The method of their employment was  
also different inasmuch as although they were selected  
on the basis of inter-se merit, the process of selection  
itself was not conducted by the Public Service  
Commission. Their appointment as ad hoc Assistant  
Engineers also came pursuant to a direction issued by  
the High Court no matter the direction itself was based  
on a resolution passed by the State Government that  
provided for such appointments. H

satisfactory performance. The object underlying the legislation evidently being to ensure continued utilisation of the services of such Stipendaries appointed on ad hoc basis as Assistant Engineers, there was a reasonable nexus between the classification and the object sought to be achieved. [para 49 and 52] [1079-C; 1082-E-H]

*State of West Bengal v. Anwar Ali Sarkar* 1952 SCR 284 = AIR 1952 SC 75; *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.* 1959 SCR 279 = AIR 1958 SC 538); *Re: The Special Courts Bill, 1979* (2) SCR 476 = (1979) 1 SCC 380 - referred to.

2.9 The writ petitioners cannot be said to similarly situated as the Stipendiaries only because they were also working as ad hoc Assistant Engineers. The legislation does not aim at regularising all ad hoc Assistant Engineers regardless of the circumstances in which such appointments came about. The impugned legislation, however, has limited its beneficence to ad hoc Assistant Engineers who came in as Stipendiary Engineers pursuant to a policy decision of the State Government that aimed at utilising their services and dealing with the unemployment problem in the State. That being the object, ad hoc Assistant Engineers appointed by other modes or in circumstances other than those in which Stipendiaries entered the service, cannot cry foul or invite the wrath of Art. 14 upon the legislation. [para 52] [1083-C-F]

2.10 A challenge based on "under inclusion" is not readily accepted by courts. Therefore, the legislation under challenge does not suffer from any constitutional infirmity and that the High Court was in error in having struck it down. [para 53 and 56] [1084-B; 1087-B]

*State of Gujarat and Anr. v. Shri Ambica Mills Ltd., Ahmedabad and Anr.* 1974 (3) SCR 760 = (1974) 4 SCC 656; *The Superintendent and Remembrancer of Legal Affairs,*

A *West Bengal v. Girish Kumar Navalakha and Ors.* 1975 (3) SCR 802 = (1975) 4 SCC 754; *Ajoy Kumar Banerjee and Ors. v. Union of India and Ors.* 1984 (3) SCR 252 = (1984) 3 SCC 127 - relied on.

B 2.11 However, the degree holder Junior Engineers currently working as ad hoc Assistant Engineers are entitled to the relief of regularisation in service, having regard to the fact that they have rendered long years of service as Assistant Engineers on ad hoc basis for 17 to 18 years in some cases. They have served for almost a lifetime and held substantive vacancies no matter on ad hoc basis. To revert them at this distant point of time would work hardship to them. Besides, one cannot ignore the march of events especially the fact that stipendiaries appointed at a later point of time with the same qualifications and pursuant to the very same Government policy as took shape for both the categories, have been regularised by the Government through the medium of a legislation. To this extent this Court can suitably mould the relief. In the circumstances, this Court holds the degree holder Junior Engineers currently working as Assistant Engineers on ad hoc basis i.e. writ petitioners in the High Court, entitled to the relief of regularisation with effect from the same date as the Validation Act granted such regularisation to the Stipendiary Engineers. [para 57] [1087-C-D; 1088-C-E]

### Re. Question No.3

G 3.1 Though the initial appointment of ad hoc Assistant Engineers in the instant case was not made by following the procedure laid down by the Rules, the appointees had continued in the posts uninterruptedly till the Validation Act regularised their services. There is no room for holding that grant of seniority and other benefits referred to in s. 3(3) of the impugned Act was legally impermissible or it violated any ve

**service Assistant Engineers appointed from any other source. There is no illegality or constitutional infirmity in the provisions of s. 3(2) or s. 3(3) of the impugned legislation. [para 65 and 70] [1092-B-D; 1097-B]**

*Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors. 1990 (2) SCR 900 = (1990) 2 SCC 715; Union of India and Anr. etc. etc. v. Lalita S. Rao and Ors. etc. etc. 2001 (2) SCR 1059 = (2001) 5 SCC 384; State of Andhra Pradesh & Anr. V. K.S. Muralidhar & Ors. 1992 (1) SCR 295 = (1992) 2 SCC 241; and Narender Chadha & Ors. v. Union of India & Ors. 1986 (1) SCR 211 = (1986) 2 SCC 157 - relied on.*

**3.2 However, there is no reason why a similar direction regarding the writ-petitioners degree holder Junior Engineers promoted as Assistant Engineers on ad hoc basis, who have been held to be entitled to regularisation on account of their length of service should also not be given a similar benefit. But all such regularised Assistant Engineers from Stipendiary Stream and from Junior Engineers category would together rank below the promotee Assistant Engineers. [para 71] [1097-B-C, E-F]**

**4. In the result this Court passes the following order:**

- (1) The impugned judgment and order dated 15-10-2008 passed by the High Court is set aside.**
- (2) The services of the writ-petitioners degree holders Junior Engineers working as Assistant Engineers on ad hoc basis and all those who are similarly situated and promoted as ad hoc Assistant Engineers against the proposed 5% quota reserved for in-service Junior Engineers degree holder shall stand regularized w.e.f. the date Orissa Service of**

**Engineers (Validation of Appointment) Act, 2002 came into force. It is further directed that such in-service degree holder Junior Engineers promoted as Assistant Engineers on ad hoc basis shall be placed below the promotees and above the Stipendiary Engineers regularized in terms of the impugned Notification. The inter se seniority of the Stipendiary Engineers regularized as Assistant Engineers under the impugned Legislation and Junior Engineer degree holders regularized in terms of this order shall be determined on the basis of their date of first appointment as Assistant Engineers on ad hoc basis. [para 75] [1099-C-H; 1100-A]**

**Case Law Reference:**

1973 (1) SCR 515	relied on	para 22
2003 (5) Suppl. SCR 751	relied on	para 22
1970 (1) SCR 388	relied on	para 23
1978 (3) SCR 334	referred to	para 25
1996 (2) SCR 23	referred to	para 25
1996 (6) Suppl. SCR 529	referred to	para 25
1976 (3) SCR 237	referred to	para 25
2004 (5) Suppl. SCR 720	referred to	para 25
(2006) 5 SCC 65	referred to	para 25
AIR 1958 SC 468	referred to	para 27
[1913] AC 107	referred to	para 28
2004 (8) SCC 599	held inapplicable	para 33
2006 (3) SCR 953	referre	

2010 (9) SCR 543	referred to	para 41	A	A	Civil Appeal No. 8331 of 2009.
1952 SCR 284	referred to	para 49			Civil Appeal No. 1768 of 2006.
1959 SCR 279	referred to	para 49			Civil Appeal No. 1940 of 2010.
1979 ( 2 ) SCR 476	referred to	para 49	B	B	L. Nageshwar Rao, ASG, Rajiv Dhavan, P.S. Narasimha, Pallav Shishodia, Ashok Kumar Pande, J.N. Dubey, Manish Goswami (for Map & Co.), Radha Shyam Jena, Rajneesh Bhaskar, Aishwarya Bhati, Gp. Capt. Karan Singh Bhati, Shibashish Misra, Suvinay Dash, D. Abhinav Rao, Shivraj Gaonkar, Lingaraj Sarangi, S.R. Setia, C.K. Sucharita, Y. Prabhakara Rao for the Appellants.
1974 ( 3 ) SCR 760	relied on	para 53			
1975 ( 3 ) SCR 802	relied on	para 54			
1984 ( 3 ) SCR 252	relied on	para 55	C	C	S.K. Dholakia, Jayant Das, Ashok Kumar Pande, J.N. Dubey, P.N. Misra, P.S. Patwalia, Fakhruddin, M.K. Das, N. Ramachandran, Lingaraj Sarangi, Rajneesh Bhaskar, S.R. Setia, Abhith Kumar, U.C. Mohanty, P.K. Pattanaik, Nikilesh Ramachandran, Raj Kikshor Choudhary, S. Kamal Mishra, Ritesh Agrawal, R. Bhaskar, Sadaf Rehman, Umesh Chandra Mohanty, A.P. Mohanty, Sibor Sankar Mishra, Kumar Gaurav, P.K. Pattanaik, S.K. Patni, Kumar Gourab, B.N. Dubey, Debasis Misra, Sanjeeb Panigraaphi, Siddhartha Chowdhary, L. Nidhram Sharma, Kirti Renu Mishra, Apurva Upmanyu, C.K. Sucharita, Brij Bhusan, Manoj K. Das, M.C. Dhingra, Jitendra Kumar for the Respondents.
1990 ( 2 ) SCR 900	relied on	para 62			
2001 ( 2 ) SCR 1059	relied on	para 66			
1992 ( 1 ) SCR 295	relied on	para 67			
1986 ( 1 ) SCR 211	relied on	para 68	D	D	
CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8322 of 2009.					
From the Judgment and Order dated 15.10.2008 of the High Court of Orissa at Cuttack in WPC No. 11093 of 2006.				E	E
WITH					
Civil Appeal No. 8323 of 2009.					
Civil Appeal No. 8324 of 2009.				F	F
Civil Appeal No. 8325 of 2009.					
Civil Appeal No. 8326 of 2009.					
Civil Appeal No. 8327 of 2009.				G	G
Civil Appeal No. 8328 of 2009.					
Civil Appeal No. 8329 of 2009.					
Civil Appeal No. 8330 of 2009.				H	H

The Judgment of the Court was delivered by

**T.S. THAKUR, J.** 1. Common questions of law arise for consideration in these appeals which were heard together and shall stand disposed of by this common order. The primary issue that falls for determination touches the Constitutional validity of what is described as the Orissa Service of Engineers (Validation of Appointment) Act, 2002 by which appointment of 881 ad hoc Assistant Engineers belonging to Civil, Mechanical and Electrical Engineering Wings of the State Engineering Service have been validated.

A appointments were in breach of the Orissa Service of Engineers' Rules, 1941. The High Court of Orissa has in a batch of writ petitions filed before it struck down the impugned Legislation on the ground that the same violates the fundamental rights guaranteed to the writ petitioners under Articles 14 and 16 of the Constitution. We shall presently formulate the questions that arise for determination more specifically but before we do so, we consider it necessary to set out the factual matrix in which the entire controversy arises.

C 2. In a note submitted to the State Cabinet on 15th May 1990 the problem of over 2000 unemployed degree-holders in various branches of Engineering who had passed out from several Engineering colleges since the year 1984 was highlighted and a proposal for utilizing the manpower so available for the benefit of the State economy mooted. The proposal envisaged a twofold action plan for absorbing the unemployed graduate Engineers. The first part of the action plan provided for withdrawal of 127 posts of Assistant Engineers that had been referred to the Public Service Commission and advertised by it to be filled up by appointing unemployed degree holder Engineers in a non-class II rank. The second part of the proposal envisaged creation of 614 posts of Junior Engineers in different Departments to accommodate the unemployed degree holders. These 614 posts comprised 314 new posts proposed to be created, one for each block in the State. Similarly, 100 posts were to be created in the Irrigation Department for survey and investigation to accelerate the pace of investigation. Yet another 200 posts were to be created for initial infrastructure work in connection with Paradip Steel Plant.

G 3. The note submitted to the Cabinet suggested that degree-holder Engineers could be recruited against all the 741 (127 + 614) posts mentioned above to be designated as Junior Engineers or Stipendiary Engineers in the first phase on a consolidated stipend of Rs.2,000/- per month. The proposal

A further envisaged absorption of Engineers so appointed on regular basis after two years, after assessing their performance.

B 4. The Council of Ministers considered the proposal mooted before it and approved the same. Decision taken in the 2nd Meeting of the Council of Ministers held on 15th May, 1990 with regard to 'Problems of Un-employed Degree Engineers' was forwarded to the Secretaries to the Government in terms of a memo dated 21st May 1990, the relevant portion whereof reads as under:

C *"Item No.5: Problems of Un-employed Degree Engineers.*

*The problems were discussed at length and the following decisions were taken.*

- D i) *All posts of Assistant Engineers referred to the Orissa Public Service Commission and advertised by them may be withdrawn.*
- E ii) *314 posts of Stipendiary Engineers may be created one in each Block.*
- F iii) *100 posts of Stipendiary Engineers may be created in the Irrigation Department for survey and investigation.*
- F iv) *200 posts of Stipendiary Engineers may be created for the initial infrastructure work of Paradip Port-based Steel Plant.*
- G v) *In all, 741 posts of Stipendiary Engineers will be available, for recruiting from the unemployed Degree Engineers. A Stipendiary Engineer may be paid a consolidated stipend of Rs.2,000/- per month. Absorption into regular posts may be considered after t*

*of their performance.*

vi) *The criteria for selection are to be worked out separately, so that Stipendiary Engineers are recruited on merit basis batch by batch.*

vii) *The rest of the unemployed Degree Engineers are proposed to be engaged in various construction works by formation of Groups Companies and Cooperatives, which will get preference in award of work by the Department/Corporations."*

5. As a sequel to the above decision, the Government invited applications from unemployed graduate Engineers of all disciplines for empanelment as Stipendiary Engineers for placement in different Government departments, projects, public sector undertakings, co-operative societies and industries etc. By another resolution dated 22nd September 1990, the Government stipulated the procedure to be adopted for discipline-wise empanelment of the unemployed graduate Engineers for appointment as Stipendiary Engineers against the vacancies in different departments and undertakings. The procedure evolved was to the following effect :

*"2. Government have since decided that the following procedure should be adopted for discipline wise empanelment of the unemployed Graduate Engineers for appointment as Stipendiary Engineers against the vacancies in different government Department and undertakings:*

(1) *25 percent of the posts shall be filled up on merit basis and for this purpose equal number will be taken from each batch starting from the batch of 1984 up to the batch of 1989.*

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(2) *A point system will be adopted for empanelment on merit basis, for which out of a total 100 marks the performance in HSC will be given 15 marks, the performance in I. Sc. and Diploma will be given 25 marks and the performance at the final Engineering Degree Examination will be given 60 marks.*

(3) *After the empanelment on merit basis is done for 25% of the vacancies, empanelment will be done batch-wise starting from 1984 for the remaining vacancies. The Inter se position of candidates in the batch wise panel will again be on the basis of merit computed as in (2) above.*

(4) *There shall also be separate empanelment on merit basis for SC/ST, Physically handicapped and ex-servicemen covering all the batches to facilitate filling up of reserved vacancies. The rules regarding reservation of vacancies will apply to these appointments.*

(5) *Applications received on or before 10.7.1990 will alone be considered for empanelment. Similarly graduate Engineers who have passed out before 1984 or those who have obtained degree after 1989 will not be eligible for empanelment.*

(6) *The following committee will undertake the work of scrutiny and empanelment of the unemployed graduate Engineers.*

d. *Secretary Steel & Mines* Chairman of the Committee

di. *Engineer-in-Chief and Secretary, Works* Member

- dii. *Engineer-in-Chief (Irrigation) Member* A
- diii. *Chief Engineer Electricity and electrical Projects Member* B
- div. *Chief Engineer, PHD Member* B
- dv. *Chief Engineer, RLEGP Member* B
- dvi. *Managing Director, IPICOL Convenor* C
- (7) *The panels from the Scrutiny Committee will be maintained in the Department of Planning and Coordination who will sponsor candidates to various Government Departments and Undertakings according to the requirement as indicated by them. The undertakings will send indents through the concerned Administrative Departments.* C
- (8) *As regards Civil & Mechanical Engineers, the Government Departments will intimate the requirement to Irrigation Department who will the panel names from P & C Department to fill up the vacancies. In case of these Engineers, the appointment orders will be issued by the Department of Irrigation and when required they will be sent on deputation to the other Departments.* D
- (9) *If there is no candidate to be recommended against reserve vacancies for the reason that the panels of such candidates are exhausted, the Department of P & C will give a non-availability certificate to the indenting organizations so that they can take steps to de-reserve the vacancies and give appointment to general candidates in their place.* E

- A (10) *The normal requirement for new appointment under Government viz. production of original certificates, Medical Certificate, Schedule Caste/ Scheduled Tribe Certificate etc. shall be applicable to these appointments and the verification of these documents shall be the responsibility of the Employing Departments/ Undertakings.*
- B
- C (11) *In some cases relaxation of age limit for entry into Government service may have to be done and this will be attended to by the Employing Departments/Undertakings as a matter of course.*

ORDER

Ordered that the Resolution be published in the Orissa Gazette for general information.

Ordered also that copies of the Resolution be forwarded to all Departments of Government, Member, Board of Revenue, All Heads of Departments, All District Collectors, Secretary to Governor, Registrar, Orissa High Court Secretary, OPSC, Principal Secretary to the Chief Minister and Director of Printing, Stationary and Publication, Orissa Cuttack and 50 copies of Planning & Coordination Department.

BY ORDER OF THE GOVERNOR  
S.SUNDARARANJAN  
ADDITIONAL DEVELOPMENT COMMISSIONER  
AND  
SECRETARY TO GOVERNMENT"

6. Applications received from unemployed graduate Engineers for appointment as Stipendiary Engineers were in terms of the above resolution and considered by the Committee constituted for the purpose and ap

candidates found suitable for such appointments made between 1991 to 1994. Appointment orders issued to the candidates made it clear that degree holder Engineers were being engaged as Stipendiary Engineers in the concerned Department and shall be paid a consolidated stipend of Rs.2000/- only. It further stated that the engagement was purely temporary and terminable at any time and without any notice.

7. In August 1992, Minister for Irrigation, Government of Orissa mooted a further proposal to the following effect:

- (a) *The promotion quota may continue at 33% of annual vacancy.*
- (b) *In addition, there should be a selection quota of 30%. This quota will have two components - 5% for Junior Engineers who have acquired an Engineering Degree or equivalent qualification and 25% which will be earmarked exclusively for Stipendiary Engineers.*
- (c) *Direct recruitment quota will be 37%. Stipendiary Engineers can also compete against this quota. They may be allowed age relaxation up to five years. This will ensure that Stipendiary Engineers have the facility of recruitment, both against the selection quota and direct recruitment quota.*
- (d) *Departments may not fill up vacancies in the post of Stipendiary Engineers caused by appointment of the incumbents as Assistant Engineers, if they want to do so, they may obtain candidates from the panel of the P & C Department.*
- (e) *This will be a transitional provision because appointment of Stipendiary Engineers may not be a permanent feature. After such time as, Government may decide the present quotas of*

- recruitment will be restored.*
- (f) *Public Sector Undertakings should frame their own recruitment rules which should broadly correspond to Government's policy of promotion of Junior Engineers and appointment of Stipendiary Engineers through selection. If there are no Stipendiary Engineers or Junior Engineers with Degree or equivalent qualification quotas for these categories will be added to direct recruitment quota."*

8. It is evident from the above that while the Government did not propose to reduce the 33% quota reserved for promotees, out of the remaining 67% meant for direct recruitment, it proposed to carve out what was described as selection quota of 30% for absorption of the Stipendiary Engineers to the extent of 25% of the vacancies and degree holder Junior Engineers against the remaining 5% of the vacancies. The balance of 37% of the vacancies was, however, left to be filled up by direct recruitment from the open market.

9. Based on the above, the Government appears to have made a reference to the Orissa Public Service Commission on 5th June 1996 for approval of the draft Orissa Engineering Service (Recruitment & Condition of Service) Rules, 1994 which were already approved by the State Council of Ministers on 3rd December 1994. The Orissa Public Service Commission, however, struck a discordant note. In its opinion, since the Stipendiary Engineers did not constitute a cadre in the formal sense it was not desirable to treat it as a feeder grade for Assistant Engineers. So also the proposal to reserve 5% of the vacancies in the grade of Assistant Engineers to be filled by degree holder Junior Engineers from the Subordinate Service was also considered to be inadvisable. The Commission opined that since persons with higher qualifications serve practically in all fields of administration including technical services such as Me

A it was neither necessary nor desirable to provide for them a route for promotion to the higher level except the one available to all those serving in the feeder grade. In the opinion of the Commission, the correct way of rewarding those with higher qualification was to give them advance increments at the time of entry. The Commission also suggested that if in the opinion of the Government the quota for promotion of Junior Engineers to the level of Assistant Engineers required to be higher than 33% in consideration of the larger body of Junior Engineers some of whom were degree holders, it could increase the same to 40%, but the fragmentation of the Junior Engineers into degree holders and non-degree holders was not advisable. The Commission suggested that the remainder of the 60% vacancies for direct recruitment could be utilized by recruiting degree holder Engineers from the open market including Stipendiary Engineers and that candidates could be given suitable weightage while judging their inter se relevant merit.

10. The Government had, in the meantime, passed a resolution on 12th March, 1996 stating that the Stipendiary Engineers could be appointed as Assistant Engineers on ad hoc basis in the pay scale of Rs.2000-3500/- or any similar post on ad hoc basis against regular vacancies. It also resolved to regularize the service of such ad hoc Assistant Engineers through a Validation Act. Some Stipendiary Engineers who were working in different State Governments and statutory bodies were also proposed to be appointed to the post of Assistant Engineer or equivalent posts carrying the same scale, subject to their suitability and satisfactory performance. The relevant portion reads as under:

*"In consideration of the above decision of the Government, the appointing authority of Departments of Government will appoint the Stipendiary Engineers of different disciplines as Assistant Engineers against existing vacancies of Assistant Engineers on ad hoc basis for a period of one year, except Civil & Mechanical,*

A *to be appointed on ad hoc basis by the Department of Water Resources.*

XXX XXX XXX

B *Stipendiary Engineers who are already working in different State Government Undertakings, Corporations,, Semi-Government Organizations & Statutory Boards may also be appointed as Assistant Engineers or in equivalent posts carrying the same scale, subject to their suitability and satisfactory performance."*

C 11. The resolution notwithstanding, the Government does not appear to have appointed any Stipendiary Engineers as Assistant Engineers on ad hoc basis. Aggrieved, the Stipendiary Engineers filed O.J.C. Case No.8373 of 1995 *Jayanta Kumar Dey and Ors. v. State of Orissa and Ors.* for a writ of mandamus directing the Government to comply with the resolution and the order issued by it. This petition was allowed by the Division Bench of the High Court of Orissa at Cuttack by an order dated 18th December 1996. The High Court directed the Government to take expeditious steps to implement resolution dated 12th March 1996, preferably within a period of four months. It further directed the State Government to appoint Stipendiary Engineers as Assistant Engineers in the scale of Rs.2000-3500 on ad hoc basis. In compliance with the directions aforementioned, the Stipendiary Engineers were appointed as Assistant Engineers on ad hoc basis between the years 1997 and 2001. What is important is that pursuant to its initial proposal of allocating 5% vacancies for those working as degree holder Junior Engineers in different departments, the Government had between 1996 and 1997 promoted 86 degree holder Junior Engineers on an ad hoc basis as Assistant Engineers.

H 12. Five Stipendiary Engineers working in the Water Resources Department whose names had been recommended along with others for appointment as A

A ad hoc basis by the Screening Committee set up for the  
purpose in the meantime filed O.J.C. No.1563 of 1998 before  
the Orissa High Court making a grievance that despite the  
recommendations made in their favour, the Government had not  
appointed them as Assistant Engineers. That petition was  
allowed and disposed of by an order dated 6th May, 1998  
directing the State Government to consider the case of the writ-  
petitioners in the light of its earlier order passed in *Jayant  
Kumar's* case (supra). Since the said directions were not  
carried out by the Government, two of the Stipendiary Engineers  
filed O.J.C. Nos.6354 and 6355 of 1999 in which they  
complained about the non-implementation of the directions  
issued by the High Court earlier and prayed for their  
regularisation. This petition was disposed of by the High Court  
by a common order dated 2nd July, 2002 in which the High  
Court noted that the petitioners had been appointed as  
Assistant Engineers on ad hoc basis in the pay scale of  
Rs.2000-3500/- by the Water Resources Department  
Notification dated 11th December, 1998. The High Court further  
held that since the Government was on principle committed to  
regularising the appointments of Stipendiary Engineers there  
was no reason why the Government should not treat them as  
direct recruits since the year 1991, in which they were  
appointed, and compute their service from that year for the  
purpose of in-service promotion, pension and other service  
benefits except financial benefits and to absorb them on regular  
basis according to law.

13. It was in the above backdrop that the Government  
finally came up with a proposal for validation of the appointment  
of Stipendiary Engineers as Assistant Engineers. Memorandum dated 28th November, 2002 referred to  
appointment of 846 Stipendiary Engineers in Civil, 61  
Stipendiary Engineers in Mechanical and 25 Engineers in  
Electrical wings making a total of 932 Stipendiary Engineers  
in different Departments. We are informed at the Bar that the  
present number of such Stipendiary Engineers is limited to 881

A only as the rest have either resigned, retired or died. The  
proposal made in the Memorandum also took note of the  
information given by the Orissa Public Service Commission  
and the repeated demands of ad hoc Assistant Engineers  
engaged from Stipendiary Engineers for regularization. The  
proposal stated that no regular appointments were made by the  
Orissa Public Service Commission and that the validation of  
appointments of Stipendiary Engineers as Assistant Engineers  
will immensely benefit the State in execution of several ongoing  
development works. The proposal further stated that having  
rendered more than 10 years of service, these Stipendiary  
Engineers currently working as Assistant Engineers on ad hoc  
basis will have no avenues for employment as they had already  
gone beyond the upper age limit prescribed for direct  
recruitment.

D 14. It is in the above backdrop that the State Legislature  
eventually enacted Orissa Service of Engineers (Validation of  
Appointment) Act, 2002 which comprises no more than three  
sections. Section 3 of the legislation reads as under:

E *"3(1) Notwithstanding anything contained in the  
Recruitment Rules, seven hundred ninety-nine Assistant  
Engineers belonging to the discipline of Civil, fifty-seven  
Assistant Engineers belonging to the discipline of  
Mechanical and twenty-five Assistant Engineers  
belonging to the discipline of Electrical as specified in  
the Schedule with their names, dates of birth, dates of  
appointment and the names of the Departments under  
which they are working on ad hoc basis since the date of  
such appointment shall be deemed to be validly and  
regularly appointed under their respective Department of  
the Government against the direct recruitment quota of  
the service with effect from the date of commencement  
of this Act and, accordingly, no such appointment shall  
be challenged in any court of law merely on the ground  
that such appointments were made on ad hoc basis."*

*accordance with the procedure laid down in the Recruitment Rules.* A

*(2) The inter-se-seniority of the Assistant Engineers whose appointments are so validated shall be determined according to their dates of appointment on ad hoc basis as mentioned in the Schedule and they shall be enblock junior to the Assistant Engineers of that year appointed to the service in the respective discipline in their cadre in accordance with the provisions of the Recruitment Rules.* B C

*(3) The services rendered by the Assistant Engineers whose appointments are so validated, prior to the commencement of this Act shall, subject to the provisions in sub-section (2), count for the purpose of their pension, leave and increment and for no other purpose."* D

15. A batch of writ petitions being Writ Petitions No.9514 of 2003, 12495 of 2005, 12495 of 2005, 12627 of 2005, 12706 of 2006 and 8630 of 2006, were then filed by the Degree holder Junior Engineers appointed as Assistant Engineers on ad hoc basis between 1996 and 1997 challenging the validity of the above legislation, inter alia, on the ground that the same suffered from the vice of discrimination inasmuch as while ad hoc Assistant Engineers, who were earlier appointed on stipendiary basis, had been regularised under the Validation Act, those appointed against 5% quota reserved for Junior Engineers holding a degree qualification were left out. E F

16. Writ Petition No.11093 of 2006 was similarly filed by Junior Engineers who had not been appointed as Assistant Engineers claiming parity with Degree holder Junior Engineers already appointed as Assistant Engineers on ad hoc basis against 5% quota disapproved by the Public Service Commission for such Engineers. G

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A 17. Writ Petition No.16742 of 2006 was filed by Junior Engineers promoted as Assistant Engineers against 33% quota reserved for such Engineers whose grievance primarily was that regularisation/validation of the appointments of Stipendiary Engineers in the cadre of Assistant Engineers was illegal and unconstitutional and adversely affected them in terms of their seniority. B

C 18. The above writ petitions were heard by a Division Bench of the High Court of Orissa who allowed the same by its order dated 15th October, 2008 striking down the impugned Legislation primarily on the ground that the same brought about discrimination between Assistant Engineers similarly situate and, therefore, fell foul of Articles 14 and 16 of the Constitution. The High Court observed: C

D *"There is no reason as to why appointments of a few persons working as Assistant Engineers on ad hoc basis have been validated ignoring the other similarly situated persons working on ad hoc basis as Assistant Engineers. There cannot be discrimination or classification amongst the persons working on ad hoc basis or the post of Assistant Engineers. Once unequal became equal, the State has no authority to discriminate them and make equals as unequal."* D E

F 19. The present appeals assail the correctness of the above judgment and order of the High Court. While Civil Appeals No.8324 to 8331 of 2009 have been filed by the State of Orissa, Civil Appeals No.8322, 8323 of 2009 and 1940 of 2010 have been preferred by Stipendiary Engineers who are adversely affected by the judgment of the High Court on account of striking down of the Validation Act under which they were regularized as Assistant Engineers. Civil Appeal No.1768 of 2006 has, however, been filed by the Degree holder Junior Engineers who have already been promoted as Assistant Engineers against 33% quota reserved for them to challenge the judgment of the High Court in OJC F G H

1999 directing the State Government to regularise the services of the writ-petitioners in those petitions as Assistant Engineers from the date of their appointment as Stipendiary Engineers with all consequential benefits except financial benefits.

20. Several intervention applications have been filed in these appeals including intervention application filed by the SC/ST candidates who were directly recruited as Assistant Engineers in the year 2004 onwards.

21. We have heard learned counsel for the parties as also those appearing for the interveners. The following three questions of law arise for consideration:

1. *What is the true nature and purport of the impugned legislation? More particularly is the impugned legislation a validation enactment or is it an enactment that grants regularisation to those appointed on ad hoc basis?*
2. *If the impugned enactment simply grants regularisation, does it suffer from any constitutional infirmity?*
3. *Does Section 3(2) of the impugned legislation suffer from any unconstitutionality, insofar as the same purports to grant Stipendiary Assistant Engineers seniority with effect from the date they were appointed on ad hoc basis?*

**Re. Question No.1**

22. Black's Law Dictionary (9th Edition, Page No.1545) defines a Validation Act as "a law that is amended either to remove errors or to add provisions to conform to constitutional requirements". To the same effect is the view expressed by this Court in *Hari Singh & Others v. The Military Estate Officer and Anr.* (1972) 2 SCC 239, where this Court said "The meaning of a Validating Act is to remove the causes for ineffectiveness

or invalidating of actions or proceedings, which are validated by a legislative measure". In *ITW Signode India Ltd. v. Collector of Central Excise* (2004) 3 SCC 48, this Court described Validation Act to be an Act that "removes actual or possible voidness, disability or other defect by confirming the validity of anything which is or may be invalid".

23. The pre-requisite of a piece of legislation that purports to validate any act, rule, action or proceedings were considered by this Court in *Shri Prithvi Cotton Mills Ltd. and Ann v. Broach Borough Municipality and Ors.* (1969) 2 SCC 283. Two essentials were identified by this Court for any such legislation to be valid. These are:

- (a) The legislature enacting the Validation Act should be competent to enact the law and;
- (b) the cause for ineffectiveness or invalidity of the Act or the proceedings needs to be removed.

24. The Court went on to enumerate certain ways in which the objective referred to in (b) above could be achieved by the legislation and observed :

*"..... Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and*

*to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax.*

(emphasis supplied)

25. Judicial pronouncements regarding validation laws generally deal with situations in which an act, rule, action or proceedings has been found by a Court of competent jurisdiction to be invalid and the legislature has stepped in to validate the same. Decisions of this Court which are a legion take the view that while adjudication of rights is essentially a judicial function, the power to validate an invalid law or to legalise an illegal action is within the exclusive province of the legislature. Exercise of that power by the legislature is not, therefore, an encroachment on the judicial power of the Court. But, when the validity of any such Validation Act is called in question, the Court would have to carefully examine the law and determine whether (i) the vice of invalidity that rendered the act, rule, proceedings or action invalid has been cured by the validating legislation (ii) whether the legislature was competent to validate the act, action, proceedings or rule declared invalid in the previous judgments and (iii) whether such validation is consistent with the rights guaranteed by Part III of the Constitution. It is only when the answer to all these three questions is in the affirmative that the Validation Act can be held to be effective and the consequences flowing from the adverse pronouncement of the Court held to have been neutralised. Decisions of this Court in *Shri Prithvi Cotton Mills*

*Ltd. and Anr. V. Broach Borough Municipality and Ors.* (1969) 2 SCC 283, *Hari Singh v. Military Estate Officer* (1972) 2 SCC 239, *Madan Mohan Pathak v. Union of India* (1978) 2 SCC 50, *Indian Aluminium Co. etc. v. State of Kerala and Ors.* (1996) 7 SCC 637, *Meerut Development Authority etc. v. Satbir Singh and Ors. etc.* (1996) 11 SCC 462, and *ITW Signode India Ltd. v. Collector of Central Excise* (2004) 3 SCC 48 fall in that category. Even in the realm of service law, validation enactments have subsequent to the pronouncement of competent Courts come about validating the existing legislation. Decisions of this Court in *I.N. Saksena v. State of Madhya Pradesh* (1976) 4 SCC 750, *Virender Singh Hooda and Ors. v. State of Haryana and Anr.* (2004) 12 SCC 588 and *State of Bihar and Ors. v. Bihar Pensioners Samaj* (2006) 5 SCC 65 deal with that category of cases.

26. In the case at hand, the State of Orissa had not suffered any adverse judicial pronouncement to necessitate a Validation Act, as has been the position in the generality of the cases dealt with by this Court. The title of the impugned Legislation all the same describes the legislation as a Validation Act. The title of a statute is no doubt an important part of an enactment and can be referred to for determining the general scope of the legislation. But the true nature of any such enactment has always to be determined not on the basis of the label given to it but on the basis of its substance.

27. In *M.P.V. Sundararamier & Co. v. State of A.P. & Anr.* AIR 1958 SC 468 this Court was considering whether the impugned enactment was a Validation Act in the true sense. This Court held that although the short title as also the marginal note described the Act to be a Validation Act, the substance of the legislation did not answer that description. This Court observed:

*"It is argued that to validate is to confirm or ratify, and that can be only in respect of acts which one could have himself performed, and that if Pa*

A a law relating to sales tax, it cannot validate such a law  
either, and that such a law is accordingly unauthorised  
and void. The only basis for this contention in the Act is  
its description in the Short Title as the "Sales Tax Laws  
Validation Act" and the marginal note to s. 2, which is  
similarly worded. But the true nature of a law has to be  
determined not on the label given to it in the statute but  
on its substance. Section 2 of the impugned Act which  
is the only substantive enactment therein makes no  
mention of any validation. It only provides that no law of  
a State imposing tax on sales shall be deemed to be  
invalid merely because such sales are in the course of  
inter-State trade or commerce. The effect of this provision  
is merely to liberate the State laws from the fetter placed  
on them by Art. 286(2) and to enable such laws to  
operate on their own terms."

(emphasis supplied)

28. We may also refer to *Maxwell on Interpretation of Statutes* (12th Edn., page 6), where on the basis of authorities on the subject, short title of the Act has been held to be irrelevant for the purpose of interpretation of statutes. Lord Moulton in *Vacher and Sons Ltd. v. London Society of Compositors* [1913] AC 107 described the short title of an Act as follows:

"A title given to the act is solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title....Its object is identification and not description."

(emphasis supplied)

29. Dr. Dhawan, learned senior counsel appearing for the appellants fairly conceded that the impugned legislation could not be described as a simple Validation Act. According to him,

A the Act achieved a dual purpose of (a) validating the invalid ad hoc appointments and (b) appointing the Stipendiary Engineers working as ad hoc Assistant Engineers on a substantive basis by regularising their appointments. While we have no difficulty in agreeing with the latter part of the contention urged by Dr. Dhawan and holding that the legislation regularises the appointment of Stipendiary Engineers as Assistant Engineers, we have not been able to appreciate the rationale behind the Legislature considering it necessary to validate the ad hoc appointments, especially when such appointments had been made by the Government pursuant to the directions issued by the High Court in the writ petitions filed by the Stipendiary Engineers. Validation of the ad hoc appointments of the Stipendiary Engineers as Assistant Engineers would even otherwise have served no purpose. That is because whether the appointments were officiating/ad hoc/temporary or described by any other expression, the fact that the Stipendiary Engineers had worked for a long period of time as Assistant Engineers in temporary/ad hoc/officiating capacity would have in itself been a ground for the State to regularise them, subject of course to such regularisation otherwise meeting constitutional requirements. It was not as if any such regularisation was legally impermissible unless the "ad hoc appointments" granted to Stipendiary Engineers were themselves validated. It is quite evident that the legislation with which we are concerned was in substance aimed at regularising the services of such persons as had worked in the capacity of Assistant Engineers. If that was the true purport of the legislation, it would be inaccurate to describe the same as a validation enactment.

30. The matter can be viewed from yet another angle. The enactment came de hors any compulsion arising from a judicial pronouncement regarding the invalidity attached to the appointment of Assistant Engineers on ad hoc basis and only because of the State's anxiety to appoint/absorb the Stipendiary Engineers, subsequently

A Assistant Engineers on a substantive/regular basis without following the route mandated by the Service Rules of 1941 applicable for making any such appointments. Having said that, we must hasten to add that a prior judicial pronouncement declaring an act, proceedings or rule to be invalid is not a condition precedent for the enactment of a Validation Act. Such a piece of legislation may be enacted to remove even a perceived invalidity, which the Court has had no opportunity to adjudge. Absence of a judicial pronouncement is not, therefore, of much significance for determining whether or not the legislation is a validating law.

C 31. There was in the above context some debate at the Bar whether or not the impugned enactment is a validating enactment as it purports to be. As seen above, Dr. Rajiv Dhawan and even Shri Narasimha, did not see the impugned enactment as a validating legislation, no matter it carries a label to that effect. Mr. Patwalia & Mr. Sisodia, senior advocates, appearing for the opposite parties were also not supportive of the legislation being a validating enactment and in our opinion rightly so. That is because the essence of a validating enactment is a pre-existing act, proceeding or rule, being found to be void or illegal with or without a judicial pronouncement of the Court. It is only when an act committed or a rule in existence or a proceeding taken is found to be invalid that a validating act may validate the same by removing the defect or illegality which is the basis of such invalidity. There is no question of validating something that has not been done or that has yet to come in existence. No one can say that an illegality which has not yet been committed can or ought to be validated by legislation. Existence of an illegal act, proceedings or rule or legislation is the sine qua non for any validating legislation to validate the same. There can be no validation of what has yet to be done, suffered or enacted.

H 32. Applying the above to the case at hand a Validation Act may have been necessary if the Government had

A appointed the ad hoc Assistant Engineers on a substantive basis in violation of the relevant recruitment Rules. For in that case, the Government would have done an act which was legally invalid requiring validation by a legislative measure. But a legislation that did not validate any such non-existent act, but simply appointed the ad hoc Assistant Engineers as substantive employees of the State by resort to a fiction, could not be described as a validating law.

C 33. The legislation under challenge was in that view not a Validation Act as it purported to be but an enactment that regularised the appointment of graduate Stipendiary Engineers working as ad hoc Assistant Engineers as Assistant Engineers. Reliance upon the decision of this Court in *Satchidananda Mishra v. State of Orissa and Ors.* (2004) 8 SCC 599 is, in our opinion, of no assistance to the respondents. In *Satchdinanda's* case (supra) the High Court had struck down the validation act which order was confirmed by this Court in appeal. What is significant, however, is that while affirming the view taken by the High Court that the validation law was not constitutionally sound, this Court proceeded on the assumption that the legislation with which it was dealing with was a validation act in the true sense. It was on that assumption that this Court looked into the invalidity and held that the validation act did nothing except validating the appointments without removing the basis on which such appointments could be invalidated. We have not proceeded on any such assumption in the instant case especially because learned counsel for some of the parties have argued that the legislation under challenge is not a Validation Enactment. The Enactment in the case at hand deals with the law relating to regularisation of incumbents holding public office on ad hoc or temporary basis, much in the same way as regularisation of such temporary appointments is ordered in terms of a scheme for that purpose. The only difference is that while a regularisation scheme can be framed by the Government in exercise of its executive power, the regularisation order

is by way of a legislation. It is trite that what could be achieved by the Government by exercise of its executive power could certainly be achieved by legislation, as indeed it has been achieved in the case at hand. Question No.1 is answered accordingly.

**Re. Question No.2**

34. A Constitution Bench of this Court in *Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors.* (2006) 4 SCC 1 ruled that regularisation of illegal or irregularly appointed persons could never be an alternative mode of recruitment to public service. Such recruitments were, in the opinion of this Court, in complete negation of the guarantees contained in Articles 14 and 16 of the Constitution. Having said so, this Court did not upset the regularisations that had already taken place, regardless of whether such regularisations related to illegal or irregular appointments. The ratio of the decision in that sense was prospective in its application, leaving untouched that which had already happened before the pronouncement of that decision. This is evident from the following passage appearing in the decision:

*"We also clarify that regularization, if any already made, but not subjude, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."*

35. The above is a significant feature of the pronouncement of this Court in *Umadevi's* case (supra). The second and equally significant feature is the exception which this Court made in para 53 of the decision permitting a one-time exception for regularising services of such employees as had been irregularly appointed and had served for ten years or more. The State Government and its instrumentalities were required to formulate schemes within a period of six months

A from the date of the decision for regularisation of such employees. This is evident from a reading of para 53 of the decision which is reproduced in extenso:

*"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date..."*

*(emphasis supplied)*

36. Dr. Dhawan, learned senior counsel, appearing for the appellants in some of these appeals argued, and in our opinion rightly so, that both the aspects referred to above bear considerable significance to the case at hand. He submitted that regularisations granted by the State or its instrumentalities given in regard to appointments that were strictly speaking illegal had not been upset by this Court in *Umadevi's* case (supra). That being so, the impugned E

A appointment of the appellants- Stipendiary Engineers were  
regularised as Assistant Engineers must also be treated to  
have been saved from the rigour of the view taken in *Umadevi's*  
case (supra). There is merit in that contention. The decision in  
*Umadevi's* case (supra) stated the true legal position on the  
subject but having regard to the fact that several earlier  
B decisions of this Court had sanctioned regularisation of those  
not regularly appointed, this Court was of the view that upsetting  
such regularisations would not only unsettle what stood settled  
but also gravely prejudice those who are benefitted from such  
C orders of regularisation. There is no gainsaying that most of  
such persons who entered the public service initially without  
going through any open competitive selection process would  
have lost by passage of time their prospects of entering public  
service by legal course even if vacancies were available for  
such appointments. In some of the decisions the continuance  
D of employees on ad hoc, temporary or daily-wage basis for an  
indefinite period was seen by this Court also to be a violation  
of the fundamental right to life apart from being discriminatory.  
Considering the magnitude of the problem that would arise if  
all such appointments were to be unsettled, this Court in  
E *Umadevi's* case (supra) left such regularisation alone and  
declared that in the future such orders of appointments de hors  
rules would not qualify for the grant of regularisation in public  
employment.

F 37. Equally important is the fact that even after declaring  
the true legal position on the subject and even after deprecating  
the practice of appointing people by means other than  
legitimate, this Court felt that those who had served for ten  
years or so may be put to extreme hardship if they were to be  
discharged from service and, therefore, directed the formulation  
G of a scheme for their regularisation. This was no doubt a one-  
time measure, but so long as the appointment sought to be  
regularised was not illegal, the scheme envisaged by para 53  
of the decision (supra) extracted above permitted the State to  
H regularise such employees. Dr. Dhawan argued that the

A appellants- Stipendiary Engineers had, by the time the decision  
in *Umadevi's* case (supra) was pronounced, qualified for the  
benefit of a scheme of regularisation having put in ten years  
as ad hoc Assistant Engineers and fifteen years if their tenure  
was to be counted from the date of their employment as  
B Stipendiary Engineers. He contended that even in the absence  
of a Validation Act, Stipendiary Engineers appointed on ad hoc  
basis as Assistant Engineers, who had worked for nearly ten  
years to the full satisfaction of the State Government would have  
been entitled to regularisation of their services in terms of any  
C such scheme.

38. On behalf of the diploma holder Junior Engineers, it  
was contended by Mr. Sisodia that the appointment of  
Stipendiary degree holders as ad hoc Assistant Engineers was  
not irregular but illegal. It was contended that Stipendiary  
D Engineers were appointed on ad hoc basis without following  
the procedure permitted under the rules which, inter alia, entitled  
the degree holder Junior Engineers also to compete. He  
submitted that although diploma holder Junior Engineers were  
not entitled to compete against the vacancies on the direct  
E recruitment quota in the cadre of Assistant Engineers, yet they  
were entitled to argue that any appointment to the cadre ought  
to be made in accordance with the rules especially when  
regularisation of degree holder Stipendiary Engineers would  
give them advantage in seniority to the prejudice of the diploma  
F holder Junior Engineers who may at their own turn be promoted  
in the cadre of Assistant Engineers. We have no hesitation in  
rejecting that contention. Diploma holder Junior Engineers were  
not, admittedly, eligible to be appointed as Assistant Engineers  
in the direct recruitment quota. They could not make a  
G grievance against regularisation simply because of the fact that  
those regularised may figure above them in seniority. Seniority  
is an incident of appointment to the cadre which must be  
regulated by the relevant rules. Any possible prejudice to  
diploma holders in terms of seniority would not, therefore, make  
H the regularisation unconstitutional or ille

the purview of para 53 in *Umadevi's* case (supra).

39. Mr. Patwalia, learned senior counsel appearing for the degree holder Junior Engineers who were also appointed on ad hoc basis as Assistant Engineers against 5% quota which the Government resolution had provided for, argued that although degree holder Junior Engineers are eligible for appointment against the vacancies in direct recruits quota, that opportunity was not available to his clients when the degree holder Junior Engineers were appointed as Assistant Engineers. He contended that Junior Engineer degree holders who were appointed as ad hoc Assistant Engineers against 5% quota reserved for them under the Government resolution would have no objection to the regularisation being upheld provided degree holder Junior Engineers who had served for a relatively longer period as Assistant Engineers on ad hoc basis were also given a similar treatment. He submitted that the exclusion of degree holder Junior Engineers from the legislative measure aimed at regularising the Stipendiary degree holders was clearly discriminatory and that the High Court was on that count justified in holding that the Validation Act itself was ultra vires. It was contended by Mr. Patwalia that even if the legislature had restricted the benefit of regularisation to the Stipendiary Engineers later appointed on ad hoc basis as Assistant Engineers, there was no reason why this Court could not extend the very same benefit to degree holder engineers who had similarly worked for over 15 years.

40. The decision in *Umadevi's* case (supra), as noticed earlier, permitted regularisation of regular appointments and not illegal appointments. Question, however, is whether the appointments in the instant case could be described as illegal and if they were not, whether the State could be directed to regularise the services of the degree holder Junior Engineers who have worked as ad hoc Assistant Engineers for such a long period, not only on the analogy of the legislative enactment for regularisation but also on the principle underlying para 53 of

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A the decision in *Umadevi's* case (supra).

41. As to what would constitute an irregular appointment is no longer res integra. The decision of this Court in *State of Karnataka v. M.L. Kesari and Ors.* (2010) 9 SCC 247, has examined that question and explained the principle regarding regularisation as enunciated in *Umadevi's* case (supra). The decision in that case summed up the following three essentials for regularisation (1) the employees worked for ten years or more, (2) that they have so worked in a duly sanctioned post without the benefit or protection of the interim order of any court or tribunal and (3) they should have possessed the minimum qualification stipulated for the appointment. Subject to these three requirements being satisfied, even if the appointment process did not involve open competitive selection, the appointment would be treated irregular and not illegal and thereby qualify for regularisation. Para 7 in this regard is apposite and may be extracted at this stage:

E *"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi, if the following conditions are fulfilled:*

F *(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.*

G *(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where*

*possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."*

42. It is nobody's case that the degree holder Junior Engineers were not qualified for appointment as Assistant Engineers as even they possess degrees from recognised institutions. It is also nobody's case that they were not appointed against the sanctioned post. There was some debate as to the actual number of vacancies available from time to time but we have no hesitation in holding that the appointments made were at all relevant points of time against sanctioned posts. The information provided by Mr. Nageshwar Rao, learned Additional Solicitor General, appearing for the State of Orissa, in fact, suggests that the number of vacancies was at all points of time more than the number of appointments made on ad hoc basis. It is also clear that each one of the degree holders has worked for more than 10 years ever since his appointment as ad hoc Assistant Engineer. It is in that view difficult to describe these appointments of the Stipendiary Engineers on ad hoc basis to be illegal so as to fall beyond the purview of the scheme envisaged in *Umadevi's* case (supra).

43. The upshot of the above discussion is that not only because in *Umadevi's* case (supra) this Court did not disturb the appointments already made or regularisation granted, but also because the decision itself permitted regularisation in case of irregular appointments, the legislative enactment granting such regularisation does not call for interference at this late stage when those appointed or regularised have already started retiring having served their respective departments, in some cases for as long as 22 years.

44. We need to advert to one other aspect which bears relevance to the issue whether regularisation under the impugned Enactment is legally valid. The appointment process of unemployed degree holders, as noticed earlier, started with

A the resolution passed by the State Government which envisaged appointments of such unemployed Graduate Engineers as Stipendiaries on a consolidated stipend of Rs.2,000/- p.m. The resolution further envisaged their absorption in service after a period of two years. Not only that, B appointments as Stipendiary Engineers were made on the basis of a selection process and on the basis of merit no matter determined de hors the relevant rules which provided for C Commission was no doubt considered unnecessary but the fact remains that appointment of unemployed degree holders as Stipendiary Engineers were made pursuant to a notification by which everyone who was unemployed and held an Engineering D large number of unemployed engineers responded to the notification inviting applications out of whom nearly 932 were selected by a Selection Committee constituted for the purpose. What is significant is that the empanelment of the unemployed E any criticism from any quarter either as to the method of appointment or the fairness of the selection process. The process of appointment was at no stage questioned before the Court, a feature which is notable keeping in view the number of people appointed/empanelled and a larger number who were F was any. It is not, therefore, wholly correct to suggest that the entry of the degree holder Junior Engineers as Stipendiary Engineers and later as Assistant Engineers was through "the backdoor", an expression very often used in service matters where appointments are made de hors the rules. The process G of selection and appointments may not have been as per the relevant rules as the same ought to have been, but it is far from saying that there was complete arbitrariness in the manner of such appointments so as to violate Articles 14 and 16 of the Constitution of India.

45. That apart the appointment of Stipendiary Engineers was at the level of Junior Engineers although it was argued on their behalf that they were discharging the functions of Assistant Engineers from the date they were employed. In the absence of any finding from the High Court on the subject and in the absence of any cogent material before us to support that claim, we find it difficult to hold that the appointment of the Stipendiary Engineers was from the beginning itself as Assistant Engineers. The fact that the resolution of the State Government itself envisaged appointment of Stipendiary Engineers as ad hoc Assistant Engineers on the basis of performance makes it amply clear that the Stipendiary Engineers were not treated as Assistant Engineers for otherwise there would have been no question of appointing them as Assistant Engineers on ad hoc or any other basis. It is also noteworthy that the appointment of the Stipendiary Engineers on ad hoc basis came pursuant to the direction from the High Court which is yet another reason why it is not open to the Stipendiary Engineers to claim that they were at all points of time working as Assistant Engineers. Having said that we cannot lose sight of the fact that the appointment of graduate engineers as Stipendiaries was on a clear representation that they would be eventually absorbed in service as Assistant Engineers. That representation is evident from the resolution of the State Government where it stated:

*"In all, therefore, 741 posts will be available for recruiting these Degree Engineers in the first instance. They may be designed as Junior Engineers or Stipendiary Engineers in the first phase. They may be paid salary in the scale of Junior Engineers or in a consolidated stipend of Rs.2,000/- per month. Absorption into regular posts may be done after two years on the basis of their performance."*

46. In the counter-affidavit filed by the State Government before the High Court the State re-affirmed its commitment to the appointment of Stipendiary Engineers as Assistant

A Engineers on ad hoc basis.

47. In the circumstances and taking a holistic view of the matter, it cannot be said that the appointment of Stipendiary Engineers on ad hoc basis and their subsequent regularisation came as a side wind or was inspired by any political or other consideration. The Government, it appears, was from the very beginning, keen to utilise the services of unemployed Graduate Engineers selected on their merit by the Selection Committee and, therefore, remained steadfast in its efforts for achieving that purpose and in the process going even to the extent of getting them regularised by a legislative measure. Suffice it to say that the question whether regularisation was justified cannot be viewed in isolation or divorced from the context in which the same arises.

48. We may now turn to the contention urged by Mr. Patwalia, that the impugned Legislation was discriminatory in as much as it granted regularisation to persons similarly situated while denying such benefit to his client who not only held a degree qualification like the Stipendiary Engineers but were in terms of the Government resolution promoted as Ad hoc Assistant Engineers against 5% quota reserved for them. It was argued that State could not have classified ad hoc Assistant Engineers who came from the Stipendiary Engineers stream, on one hand, and those appointed as ad hoc Assistant Engineers on account of their being in service as Junior Engineers holding a degree qualification. The degree holder Junior Engineers, it was contended, were in comparison better entitled to regularisation as they had not only the requisite qualification but had put in longer service as ad hoc Assistant Engineers vis-a-vis their Stipendiary counterparts. Alternatively, it was contended that the degree holder Junior Engineers who too had put in more than 15 years service, were entitled to a direction for their regularisation as Assistant Engineers not only on account of the length of service rendered by them but also on the analogy of the legislative ben

counterpart Stipendiaries.

49. The approach to be adopted and the principles applicable to any forensic exercise aimed at examining the validity of a legislation on the touchstone of Article 14 of the Constitution have been long since settled by several decisions of this Court. Restatement or repetition of those principles was, therefore, considered platitudinous. The real difficulty as often acknowledged by this Court lies not in stating the principles applicable but in applying them to varying fact situations that come up for consideration. Trite it is to say at the outset that a piece of legislation carries with it a presumption of constitutional validity. Also settled by now is the principle that Article 14 does not forbid reasonable classification. A classification is valid on the anvil of Article 14, if the same is reasonable that is it is based on a reasonable and rational differentia and has a nexus with the object sought to be achieved. (See *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75 and *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Ors.* AIR 1958 SC 538). A comprehensive review of the law is, in our opinion, unnecessary at this stage in view of the Constitution Bench decision of this Court in *Re: The Special Courts Bill, 1978* (1979) 1 SCC 380 where this Court undertook that exercise and noticed as many as thirteen propositions that bear relevance to any forensic determination of the validity of a law by reference to the equality clause enshrined in Article 14 of the Constitution. Some of those principles were stated by this Court in the following words:

"xxx xxx xxx

(2) *The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.*

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(3) *The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.*

(4) *The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.*

(5) *By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.*

(6) *The law can make and set apart the classes according to the needs and exigencies o*

*suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.*

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*(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.*

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*(8) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense abovementioned.*

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*(11) Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the*

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*mere fact of inequality in no manner determines the matter of constitutionality.*

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50. Applying the above to the case at hand, the first and foremost question would be whether the classification of ad hoc Assistant Engineers is reasonable, that there is a reasonable differentia that distinguishes those grouped together for the grant of the benefit from those left out and if there is such a differentia, whether the classification has a reasonable nexus with the object underlying the legislation.

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51. The second and by no means less important is the question whether the impugned legislation is ultra vires of Article 14 because of under inclusion. That is because the argument of the writ petitioners in substance is that the legislation ought to have included even in-service Junior Engineers degree holders working as Ad hoc Assistant Engineers for the benefit of regularisation.

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52. There is no difficulty in answering the first question. We say so because the beneficiaries of the impugned legislation constitute a class by themselves inasmuch as they were unemployed degree holders appointed as Stipendiary Engineers on a consolidated pay. The method of their employment was also different inasmuch as although they were selected on the basis of inter-se merit, the process of selection itself was not conducted by the Public Service Commission. Their appointment as ad hoc Assistant Engineers also came pursuant to a direction issued by the High Court no matter the direction itself was based on a resolution passed by the State Government that provided for such appointments upon proof of satisfactory performance. The object underlying the legislation evidently being to ensure continued utilisation of the services of such Stipendiaries appointed on ad hoc basis as Assistant Engineers, there was a reasonable nexus between the classification and the object sought to be

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A case of writ petitioners that Stipendiary Engineers appointed as ad hoc Assistant Engineers were left out of the group for a hostile treatment by refusal of the benefit extended to others similarly situated. What the writ petitioners contend in support of their challenge to the validity of the legislation is that since they were also appointed on ad hoc basis though in a different way, the legislation was bad for under inclusion. We shall presently deal with the test applicable to cases where the challenge to the legislation is founded on under inclusion but before we do so, we need to dispel the impression that the writ petitioners were similarly situated as the Stipendiaries only because they were also working as ad hoc Assistant Engineers. There is no gainsaying that the legislation does not aim at regularising all ad hoc Assistant Engineers regardless of the circumstances in which such appointments came about. If that were so, the writ petitioners could well argue that since the object underlying the enactment is to regularise all ad hoc Assistant Engineers, they could not be left out without violating their fundamental rights under Article 14 of the Constitution. The impugned legislation, however, has limited its beneficence to ad hoc Assistant Engineers who came in as Stipendiary Engineers pursuant to a policy decision of the State Government that aimed at utilising their services and dealing with the unemployment problem in the State. That being the object, ad hoc Assistant Engineers appointed by other modes or in circumstances other than those in which Stipendiaries entered the service, cannot cry foul or invite the wrath of Article 14 upon the legislation. As a matter of fact, the State Government's resolve to give 5% vacancies to in service degree holder Junior Engineers itself brought about a classification between Stipendiaries on one hand and the in-service Junior Engineers on the other. The proposed reservation having run into rough waters because of the opposition of the Orissa Public Service Commission, the in-service Junior Engineer writ petitioners before the High Court lost their fight for a share in the higher cadre of Assistant Engineers based on their higher qualification. Suffice it to say

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A that Stipendiary Engineers later appointed as ad hoc Assistant Engineers were a class by themselves and any benefit to them under the impugned Enactment could not be grudged by in-service Junior Engineers no matter the latter had in anticipation of the amendment to the recruitment rules also got appointed as ad hoc Assistant Engineers.

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53. Coming then to the question of "under inclusion" we need to keep in mind that a challenge based on "under inclusion" is not readily accepted by Courts. Constitution Bench's decision of this Court in *State of Gujarat and Anr. v. Shri Ambica Mills Ltd., Ahmedabad and Anr.* (1974) 4 SCC 656, dealt with the question of a classification which was under inclusive and declared that having regard to the real difficulties under which legislatures operate, the Courts have refused to strike down legislations on the ground that they are under inclusive. The Court observed:

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55. A classification is under-inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under-inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification.

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56. The first question, therefore, is, whether the exclusion of establishments carrying on b

employing less than 50 persons makes the classification under-inclusive, when it is seen that all factories employing 10 or 20 persons, as the case may be, have been included and that the purpose of the law is to get in unpaid accumulations for the welfare of the labour. Since the classification does not include all who are similarly situated with respect to the purpose of the law, the classification might appear, at first blush, to be unreasonable. But the Court has recognised the very real difficulties under which legislatures operate - difficulties arising out of both the nature of the legislative process and of the society which legislation attempts perennially to re-shape - and it has refused to strike down indiscriminately all legislation embodying classificatory inequality here under consideration. Mr. Justice Holmes, in urging tolerance of under- inclusive classifications, stated that such legislation should not be disturbed by the Court unless it can clearly see that there is no fair reason for the law which would not require with equal force its extension to those whom it leaves untouched."

(emphasis supplied)

54. The above was followed by this Court in *The Superintendent and Remembrancer of Legal Affairs, West Bengal v. Girish Kumar Navalakha and Ors.* (1975) 4 SCC 754 where this Court held that some sacrifice of absolute equality may be required in order that legal system may preserve the flexibility to evolve new solutions to social and economic problems. This Court said:

"8. Often times the courts hold that under-inclusion does not deny the equal protection of laws under Article 14. In strict theory, this involves an abandonment of the principle that classification must include all who are similarly situated with respect to the purpose. This under-inclusion is often explained by saying that the legislature is free to remedy parts of a mischief or to recognize

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*degrees of evil and strike at the harm where it thinks it most acute.*

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*10. There are two main considerations to justify an under-inclusive classification. First, administrative necessity. Second, the legislature might not be fully convinced that the particular policy which it adopts will be fully successful or wise. Thus to demand application of the policy to all whom it might logically encompass would restrict the opportunity of a State to make experiment. These techniques would show that some sacrifice of absolute equality may be required in order that the legal system may preserve the flexibility to evolve new solutions to social and economic problems. The gradual and piecemeal change is often regarded as desirable and legitimate though in principle it is achieved at the cost of some equality. It would seem that in fiscal and regulatory matters the court not only entertains a greater presumption of constitutionality but also places the burden on the party challenging its validity to show that it has no reasonable basis for making the classification."*

55. The above decisions were followed in *Ajoy Kumar Banerjee and Ors. v. Union of India and Ors.* (1984) 3 SCC 127 where this Court observed:

*"...Article 14 does not prevent legislature from introducing a reform i.e. by applying the legislation to some institutions or objects or areas only according to the exigency of the situation and further classification of selection can be sustained on historical reasons or reasons of administrative exigency or piecemeal method of introducing reforms. The law need not apply to all the persons in the sense of having a universal application to all persons. A law can be sustained if it deals equally with the people of well-defined*

*insurance companies as such and such a law is not open to the charge of denial of equal protection on the ground that it had no application to other persons."*

56. We have in the light of the above no hesitation in holding that the legislation under challenge does not suffer from any constitutional infirmity and that the High Court was in error in having struck it down.

57. Having said that we are of the opinion that even when the challenge to the constitutional validity of the impugned enactment fails, the degree holder Junior Engineers currently working as ad hoc Assistant Engineers are entitled to the relief of regularisation in service, having regard to the fact that they have rendered long years of service as Assistant Engineers on ad hoc basis for 17 to 18 years in some cases. While it is true that those in service degree holders working as Junior Engineers were not the beneficiaries of the legislation under challenge, the fact remains, that they were eligible for appointment as Assistant Engineers on account of their being degree holders. It is also not in dispute that they were appointed against substantive vacancies in the cadre of Assistant Engineers no matter by utilizing the direct recruit quota. Even in the case of Stipendiary Engineers the vacancies were utilized out of the 67% quota meant for direct recruitment. What is, however, significant is that the utilization of the quota reserved for direct recruitment for appointing Stipendiary and Junior Engineers as Assistant Engineers has not been assailed either before the High Court or before us. On the contrary the contention urged on behalf of Junior Engineers degree holders who are still working as Junior Engineers was that the remainder of vacancies comprising 5% of the cadre strength should be utilised to appoint the eligible degree holder Junior Engineers. We shall presently deal with that contention. Suffice it to say for the present that the appointments granted to degree holder Junior Engineers as Assistant Engineers on ad hoc basis were pursuant to a Government decision whereunder

A such degree holders as were already in-service as Junior Engineers, were also given an opening for upward movement. Appointment of such degree holders was not grudged by their diploma holder colleagues as no challenge was mounted by them to such appointments ostensibly because degree holder  
B Junior Engineers were getting appointed without in the least affecting the quota of 33% reserved for the promotees. In a way the upward movement of the degree holders as Assistant Engineers brightened the chances of the rest to get promoted at their turn in the promotees quota. All told, the Junior  
C Engineers have served for almost a lifetime and held substantive vacancies no matter on ad hoc basis. To revert them at this distant point of time would work hardship to them. Besides, we cannot ignore the march of events especially the fact that Stipendiaries appointed at a later point of time with the same qualifications and pursuant to the very same Government  
D policy as took shape for both the categories, have been regularised by the Government through the medium of a legislation. That this Court can suitably mould the relief, was not in serious controversy before us. In the circumstances, we hold the degree holder Junior Engineers currently working as  
E Assistant Engineers on ad hoc basis writ petitioners in the High Court entitled to the relief of regularisation with effect from the same date as the Validation Act granted such regularisation to the Stipendiary Engineers.

F 58. We shall advert to the question of inter se seniority between the two categories while we take up question No.3. But before we turn to question No.3 we need to briefly deal with the contention urged on behalf of some of the degree holder Junior Engineers represented by Mr. Dholakia who contended that since the Government resolution had provided for 5% quota for degree holder Junior Engineers the Government was duty bound to make appointments against that quota. It was urged that the cadre strength of the Assistant Engineers had not been presently determined by the Government nor were the figures given by the State Government accurate

Engineers who should have got appointed against 5% quota reserved for them would have been large, agreed Mr. Dholakia. To the extent of shortfall the State Government was bound to continue the process of appointment, contended the learned counsel.

59. There is, in our opinion, no merit in the submissions urged by Mr. Dholakia and by learned counsel for some of the interveners. We say so because the quota which the Government resolution proposed to carve out never fructified by a corresponding amendment of the Service Rules. As noticed in the earlier part of this order, the Orissa Public Service Commission was not agreeable to the reservation of a quota for the subordinate engineering service members who held a degree qualification. No such classification was, therefore, made or could be made by the Government, nor was the Government resolution translated into a binding rule that could be enforced by a Court of law. Assuming, therefore, that on a true and proper determination of the posts comprising the cadre strength of Assistant Engineers, some more vacancies could fall in the 5% quota proposed to be reserved for the degree holder Junior Engineers and no mandamus could be issued for filling up such vacancies. It is trite that existence of an enforceable right and a corresponding obligation is a condition precedent for the issue of a mandamus. We fail to locate any such right in favour of the writ petitioner degree holders who are still holding posts as Junior Engineers. They will have, therefore, to wait for their turn for promotion against the 33% quota reserved for them along with their diploma holder colleagues. We hardly need to emphasise that those appointed against 5% quota may also have had no such right, but since they have worked in the higher cadre for a long period and discharged duties attached to the posts of Assistant Engineers with the benefits attached thereto, their regularisation comes on a totally different juristic basis than the one sought to be urged on behalf of those who were left out. Appointments as Assistant Engineers were from out of Junior Engineers

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A made strictly according to seniority. The fortuitous circumstance under which the appointments did not extend to the full quota of 5% would make no material difference when it comes to finding out whether the Junior Engineers can claim an enforceable legal right.

B 60. Question No.2 is answered accordingly.

**Re. Question No.3**

C 61. Section 3(2) of the impugned legislation deals entirely with the inter se seniority of Assistant Engineers whose appointments are validated/regularised by the said enactment and stipulates that such inter se seniority shall be determined according to the dates of appointment of the officers concerned on ad hoc basis as mentioned in the schedule. It further stipulates that all those regularised under the legislation shall be en bloc junior to the Assistant Engineers of that year appointed to the service in their respective discipline in their cadre in accordance with the provisions of the Recruitment Rules. Sub-section (3) of Section 3 makes the ad hoc service rendered by such Assistant Engineers count for the purpose of their pension, leave and increments and for no other purpose.

F 62. Appearing for the State of Orissa, Mr. Nageshwar Rao contended that grant of seniority to ad hoc Assistant Engineers regularised under the legislation w.e.f. the date they were appointed on ad hoc basis was legally permissible especially when the ad hoc appointments had continued without any interruption till their regularisation. Reliance in support was placed by Mr. Rao upon a Constitution Bench decision of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors.* (1990) 2 SCC 715. The case at hand, according to the learned counsel, fell under proposition (B) formulated in the said decision. Grant of seniority from the date of initial appointments did not, therefore, suffer from any constitutional or other infirmity to warrant interference from this Court.

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63. Mr. Sisodia appearing for some of the parties, on the other hand, contended that seniority could be granted only from the date of regularisation under the enactment and not earlier. Learned counsel for some of the interveners adopted that contention, including Ms. Aishwarya appearing for some of the diploma holder Junior Engineers and urged that ad hoc service rendered by the Engineers appointed otherwise than in accordance with the rules could not count for the purposes of seniority and that even if Section 3(1) of the Validation Act was held to be valid, Section 3(2) which gave retrospective seniority from the date they were first appointed on ad hoc basis must go.

64. In *Direct Recruit's* case (supra) this Court reviewed and summed up the law on the subject by formulating as many as 11 propositions out of which propositions A and B stated in Para 47 of the decision in the following words are relevant for our purposes:

"47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

65. There was some debate at the bar whether the case at hand is covered by corollary to proposition A or by proposition B (supra). But having given our consideration to the submissions at the Bar we are inclined to agree with Mr. Rao's submission that the case at hand is more appropriately covered by proposition B extracted above. We say so because the initial appointment of ad hoc Assistant Engineers in the instant case was not made by following the procedure laid down by the Rules. Even so, the appointees had continued in the posts uninterruptedly till the Validation Act regularised their service. There is, in the light of those two significant aspects, no room for holding that grant of seniority and other benefits referred to in Section 3(3) of the impugned Act were legally impermissible or violated any vested right of the in service Assistant Engineers appointed from any other source. Proposition A, in our opinion, deals with a situation where an incumbent is appointed to a post according to the rules but the question that arises for determination is whether his seniority should be counted from the date of his appointment or from the date of his confirmation in the said service. The corollary under proposition A, in our opinion, deals with an entirely different situation, namely, where the appointment is ad hoc and made as a stop-gap-arrangement in which case officiation in such post cannot be taken into consideration for seniority. Be that as it may, as between proposition A and B the case at hand falls more accurately under proposition B which permits grant of seniority w.e.f. the date the appointees first started officiating followed by the regularisation of their service as in the case at hand.

66. We may also refer to a three-Judge Bench of this Court in *Union of India and Anr. etc. etc. v. Lalita S. Rao and Ors. etc. etc.* (2001) 5 SCC 384 where doctors appointed by Railway Administration on ad hoc basis had been upon regularisation granted seniority from the date of their ad hoc appointment. This Court held that proposition B stated in *Direct Recruits* case (supra) permitted such s

This Court observed:

"Obviously the Court had in mind the principle B evolved by the Constitution Bench in the Direct Recruit Engineering Officers Association case (supra). If the initial appointment had not been made in accordance with the prescribed procedure laid down by the Recruitment Rules, and yet the appointees Medical Officers were allowed to continue in the post uninterruptedly and then they appeared at the selection test conducted by the Union Public Service Commission, and on being selected their services stood regularised then there would be no justification in not applying the principle 'B' of the Direct Recruit Class II Engineering Officers Association case (supra) and denying the period of officiating services for being counted for the purpose of seniority."

67. Reference may also be made to the decision of this Court in *State of Andhra Pradesh & Anr. V. K.S. Muralidhar & Ors.* (1992) 2 SCC 241 where the Government of India gave weightage to service rendered by employees prior to their regularisation. The dispute in that case was regarding inter se seniority between the Supervisors who were upgraded as Junior Engineers and the degree holders who were directly appointed as Junior Engineers. This Court held that the State Government had as a matter of policy given weightage to both the categories and that there was nothing unreasonable in giving a limited benefit or weightage to the upgraded Supervisors in the light of their experience. This Court said:

"The question to be considered is from which date the weightage of four years' service should be given to the upgraded Junior Engineers namely the Supervisors. Is it the date of acquiring the degree qualification or the date of their appointment? Having given our earnest consideration and for the reasons stated above we hold that the weightage can be given only from the date of their appointment."

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*The Tribunal in the course of its order, however, observed that in accordance with the existing rules the appointments of these Junior Engineers from the notional date have to be cleared by the Public Service Commission and the appointments cannot be held to be regular appointments as long as they are not approved by the Public Service Commission.*

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*To sum up, our conclusions are as under:*

*(i) The weightage of four years in respect of upgraded Junior Engineers as provided in G.O. Ms. No. 559 has to be reckoned from the date of appointment and not the date of their acquiring the degree qualification;*

*(ii) On the basis of that notional date, their inter-se seniority has to be fixed;*

*(iii) The regularisation of the degree-holder Junior Engineers who passed the SQT by giving retrospective effect cannot be held to be illegal, and their seniority among themselves shall be subject to the order of ranking given by the Public Service Commission on the basis of the SQT;*

*(iv) The Government shall prepare a common seniority list of the degree-holders Junior Engineers and the upgraded Junior Engineers on the above lines and that list shall be the basis for all the subsequent promotions. Promotions, if any, already given shall be reviewed and readjusted in accordance with the said seniority list; and*

*(v) The approval of the Public Service Commission in respect of these appointments and their seniority thus fixed need not be sought at this distance of time."*

68. In *Narender Chadha & Ors. v. Union of India & Ors.* (1986) 2 SCC 157, this Court was dealing with a somewhat similar fact situation. The petitioners in that case were not promoted by following the actual procedure prescribed by the relevant Service Rules even though the appointments were made in the name of the President by the competent authority. They had based on such appointments, continuously held the post to which they were appointed and received salary and allowances payable to incumbent of such post. The incumbents were entered in the direct line of their promotion. The question, however, was whether it would be just and proper to hold that such promotees had no right to the post held by them for 15-20 years and could be reverted unceremoniously or treated as persons not belonging to the service at all. Repelling the argument that such service would not count for the purposes of seniority, this Court observed:

" It would be unjust to hold at this distance of time that on the facts and in the circumstances of this case the petitioners are not holding the posts n Grade IV. The above contention is therefore without sub-stance. But we, however, make it clear that it is not our view that whenever a person is appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post. Such a person may be reversed from that post. But in a case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the Service at all, particularly where the Government is endowed with the power to relax the Rules to avoid unjust results. In the instant case the Government has also not expressed its unwillingness to continue them in the said posts. The other contesting respondents have also not

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A urged that the petitioners should be sent out of the said posts. The only question agitated before us relates to the seniority as between the petitioners and the direct recruits and such a question can arise only where there is no dispute regarding the entry of the officers concerned into the same Grade. In the instant case there is no impediment even under the Rules to treat these petitioners and others who are similarly situated as persons duly appointed to the posts in Grade IV because of the enabling provision contained in the Rule 16 thereof. Rule 16 as it stood at the relevant time read as follows :

16. The Government may relax the provisions of these rules to such extent as may be necessary to ensure satisfactory working or remove inequitable results."

(emphasis supplied)

69. The ratio of the decision in the above case was not faulted by the Constitution Bench of this Court in *Direct Recruit's* case (supra). As a matter of fact the Court approved the said decision holding that there was force in the view taken by this Court in that case. This Court observed:

"In Narender Chadha v. Union of India the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules

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*prescribed for regular substantive appointments in the service."* A

70. In the light of what we have said above, we do not see any illegality or constitutional infirmity in the provisions of Section 3(2) or 3(3) of the impugned legislation. B

71. Having said so, there is no reason why a similar direction regarding the writ-petitioners degree holder Junior Engineers who have been held by us to be entitled to regularisation on account of their length of service should also not be given a similar benefit. We must mention to the credit of Dr. Dhawan, appearing for the Stipendiary Engineers who have been regularised under the provisions of the Legislation that such Stipendiary-ad hoc Assistant Engineers cannot, according to the learned counsel, have any objection to the degree holder Junior Engineers currently working as Assistant Engineers on ad hoc basis being regularised in service or being given seniority from the date they were first appointed. It was also conceded that Stipendiary Engineers all of whom were appointed after the appointment of the Junior Engineers would enbloc rank junior to such ad hoc Assistant Engineers from out of degree holder Junior Engineers. But all such regularised Assistant Engineers from Stipendiary Stream and from Junior Engineers category would together rank below the promotee Assistant Engineers. C D E

72. Question No.3 is answered accordingly. F

73. Several intervention applications have been filed in these appeals to which we may briefly refer at this stage. In IA No.5 of 2012 filed in Civil Appeal No.8324 of 2009, the interveners have sought permission for the State Government to complete the re-structuring process and to fill up the vacancies subject to a final decision of this Court in these appeals. In IA Nos.6 and 7 of 2012 also filed in Civil Appeal No.8324 of 2009, the interveners seek a direction to the State of Orissa to upgrade the post of Assistant Engineers Class II H

A (Group B) to Assistant Executive Engineer Junior Class I (Group A) and to make such up-gradation retrospective w.e.f. 28th February, 2009. IA No.8 of 2012 has been filed in the very same appeal in which the interveners have sought a direction against the State of Orissa to give effect to the up-gradation of posts considering inter se seniority of in-service degree holder Junior Engineers who are otherwise eligible for appointment against the vacancies reserved for direct recruits. In IA No.3 of 2009 in SLP No.29765 of 2008, the interveners seek permission to support the judgment of the High Court whereby the impugned legislation has been struck down as unconstitutional. Similarly, IAs filed in some other appeals either seek to support the judgment passed by the High Court or pray for permission to argue the case on behalf of one or the other party. C

D 74. We have heard counsel for the interveners also at some length. We, however, do not consider it necessary to enlarge the scope of these proceedings by examining issues that are not directly related to the controversy at hand. Three questions that have primarily engaged our attention in these petitions relate to (a) the validity of the impugned Validation Act. (b) regularization of in-service degree holder Junior Engineers who have been working for considerable length of time as Assistant Engineers on ad hoc basis and (c) the seniority position of those being regularized either under the Validation Act or in terms of the directions being issued by us in these appeals. Other issues which the interveners seek to raise especially issues regarding grant or denial of the benefit of reservation to SC and ST candidates, have not been touched by us in these proceedings for want of proper pleadings on the subject and also for want of any pronouncement by the High Court on the said questions. In the circumstances, this order shall be taken to have settled only what we have specifically dealt with or what would logically follow therefrom. Any question whether the same relates to inter se seniority of those regularized under the legislation or by reason of the direction H

issue or issues relating to the benefit of seniority on the basis of roster points if any prescribed for that purpose are left open and may be agitated by the aggrieved party before an appropriate forum in appropriate proceedings. To the extent any such questions or aspects have not been dealt with by us in this order, may be dealt with in any such proceedings. Beyond that we do not consider it proper or necessary to say anything at this stage.

75. In the result we pass the following order:

- (1) Civil Appeals No.8324-8331 of 2009 filed by the State of Orissa and Civil Appeals No.8322-8323 of 2009 and 1940 of 2010 filed by the Stipendiary Engineers are allowed and the impugned judgment and order dated 15th October, 2008 passed by the High Court of Orissa set aside.
- (2) Writ Petitions No.9514/2003, 12494/2005, 12495/2005, 12627/2005, 12706/2006 and 8630/2006 filed by the degree holders Junior Engineers working as Assistant Engineers on ad hoc basis are also allowed but only to the limited extent that the services of the writ-petitioners and all those who are similarly situated and promoted as ad hoc Assistant Engineers against the proposed 5% quota reserved for in-service Junior Engineers degree holder shall stand regularized w.e.f. the date Orissa Service of Engineers (Validation of Appointment) Act, 2002 came into force. We further direct that such in-service degree holder Junior Engineers promoted as Assistant Engineers on ad hoc basis shall be placed below the promotees and above the Stipendiary Engineers regularized in terms of the impugned Notification. The inter se seniority of the Stipendiary Engineers regularized as Assistant Engineers under the

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- impugned Legislation and Junior Engineer degree holders regularized in terms of this order shall be determined on the basis of their date of first appointment as Assistant Engineers on ad hoc basis.
- (3) Civil Appeal No.1768 of 2006 is resultantly allowed, the judgment and order impugned therein set aside and Writ Petitions OJC Nos.6354-55 of 1999 disposed of in terms of the above direction.
  - (4) Intervention applications filed in these appeals are also disposed of in the light of observations in Para 74 of this judgment.
  - (5) Parties are left to bear their own costs.
- Appeals allowed.

SHABNAM HASHMI

v.

UNION OF INDIA &amp; ORS.

(Writ Petition (Civil) No. 470 of 2005)

FEBRUARY 19, 2014

**[P. SATHASIVAM, CJI, RANJAN GOGOI AND  
SHIVA KIRTI SINGH, JJ.]**

*Juvenile Justice (Care And Protection of Children) Act, 2000: ss.41 to 44, 68 - Writ petition filed under Art 32 - Prayer to lay down law about adoption as a fundamental right and in alternate to lay down guidelines about adoption of children irrespective of religion, caste and seeking direction to the UOI to enact optional law on the subject - Held: Petitioner admitted that JJ Act of 2000 is a secular law that enable adoption irrespective of religion and meets prayers made with petition - Muslim Personal Law Board claimed that Islamic law does not recognize that an adopted child is at par with a biological one; that it allows Kafala system under which adopted child remains descendent of biological parents and that child welfare committee should keep this in mind - The 2000 Act allows choice of personal law and is an optional legislation and is a small step towards fulfillment of Art 44 - Choice will remain open till a Uniform Civil Code is made to sink conflicting faiths and prevalent beliefs - The question of adoption to be declared a fundamental right is not ripe and must wait its evolution till different group reach maturity - Till then restraint must be maintained - Juvenile Justice (Care and Protection of Children) Rules, 2007 - r.33(2) - Constitution of India, 1950 - Article 44.*

The instant writ petition was filed under Art 32. The prayer in the writ petition was to lay down law about adoption as a fundamental right and in alternate to lay down guidelines about adoption of children irrespective

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A of religion, caste and seeking direction to the respondent UOI to enact optional law on the subject.

Disposing of the writ petition, the Court

B Held: 1. The alternative prayer made in the writ petition was substantially fructified by the judicial verdict in \*Lakshmi Kant Pandey case and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care And Protection of Children) Act, 2000 as amended in 2006 as also the Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007. Dealing with inter-country adoptions, elaborate guidelines had been laid by the Supreme Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency ('CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000. [paras 2, 3] [1108-F-H; 1109-A-D]

G \*Lakshmi Kant Pandey Vs. Union of India (1984) 2 SCC 244: 1984 (2) SCR 795 - relied on.

H 2. In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 dealt with only "neglected" and "delinquent juveniles". The provisions of the 1986 Act dealt with delinquent juveniles and all that was contempl

juvenile' was custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head 'Rehabilitation and Social Reintegration' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. [Rule 33 (5)] Substantial changes were made in the other subsections of Section 41 of the JJ Act, 2000. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)]. [paras 4 to 6] [1109-E-H; 1110-A-E]

3. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with rehabilitation and social reintegration. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central

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A Government under Section 41 (3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. Pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the concerned State. Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organisation. D Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions. [Paras 7] [1110-F-H; 1111-A-C]

E 4. In the light of the developments, the petitioner in his written submission admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States,

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authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified. [Paras 8, 9] [1112-B-D]

5. The All India Muslim Personal Law Board which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/ surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption under Section 41(5) of the JJ Act, 2000. [para 10] [1112-E-H; 1113-A-B]

6. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving

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A such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. The Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. An optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date. [para 11] [1113-C-G]

7. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly

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expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. The present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. [Para 13] [1114-C-G; 1115-A]

*In re: Manuel Theodore D'souza (2000) 3 BomCR 244: Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors. AIR 1999 Kerala 187 - referred to.*

#### Case Law Reference:

1984 (2) SCR 795	Relied on	Para 2
(2000) 3 Bom CR 244	Referred to	Para 12
AIR 1999 Kerala 187	Referred to	Para 12

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Civil) No. 470 of 2005.

R.K. Khanna ASG, Colin Gonslaves, J.S. Attri, Raju Rama Chandran, Y.H. Muchhala, Huzefa Ahmadi, A. Mariaputham, Saurab Ajay Gupta, Suryanarayana Singh, Manjit Singh, AAGs, Varnika Singh, Jyoti Mendiratta, Sunita Sharma, Seema Rao, Anirudh Tanwar, V.N. Subramaniam, A.K. Kaul, D.S. Mahra, Sushma Suri, B. Krishna Prasad, Ejaz Maqbool, Tanima Kishore, Mrigank Prabhakar, K. Enatoli Sema, Amit Kumar Singh, J.S. Chhabra, Pragati Neekhara, Mishra Saurabh, Naveen Sharma, Vanshaja Shukla, Mukul Singh, Anil K. Jha, Priyanka Tyagi, Bina Madhavan, Sapam Biswajit Meitei,

Khwairakpam Nobin Singh, Aruna Mathur, Yusuf, Arputham, Aruna & Co. Balasubramanian, K.V. Jagdishvaran, G. Indira, Abhishek Atrey, Ashutosh Kr. Sharma, Babita Tyagi, Hemantika Wahi, Preeti Bhardwaj, Anip Sachthey, Mohit Paul, K.J. John & Co., Neeru Vaid, Ajay Pal, Gopal Singh, Corporate Law Group, Shibashish Misra, Milind Kumar, P.V. Yogeshwaran, Sanjay R. Hegde, B.S. Banthia, Anuvrat Sharma, T.V. George, G. Prakash, Naresh K. Sharma, Kamini Jaiwal, T. Harish Kumar, D. Bharathi Reddy, Aniruddha P. Mayee, Balaji Srinivasan, A. Subhashini, Debasis Misra for the appearing parties.

The Judgment of the Court was delivered by

**RANJAN GOGOI, J.** 1. Recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution is the vision scripted by the public spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this sphere of law, gently nudged by the judicial verdict in *Lakshmi Kant Pandey Vs. Union of India*<sup>1</sup> and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care And Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short 'the JJ Act, 2000) as also The Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short 'the JJ Rules, 2007').

3. The alternative prayer made in the writ petition may be conveniently dealt with at the outset.

1. (1984) 2 SCC 244.

The decision of this Court in *Lakshmi Kant Pandey* (supra) is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid by this Court to protect and further the interest of the child. A regulatory body, i.e., Central Adoption Resource Agency (for short 'CARA') was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as in country adoptions. The said norms have received statutory recognition on being notified by the Central Govt. under Rule 33 (2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several states under the Rules framed by the states in exercise of the Rule making power under Section 68 of the JJ Act, 2000.

4. A brief outline of the statutory developments in the concerned sphere may now be sketched.

In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short 'the JJ Act, 1986') dealt with only "neglected" and "delinquent juveniles". While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a 'neglected juvenile' is custody in a juvenile home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head '*Rehabilitation and Social Reintegration*' for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organization. Section 41 contemplates adoption though

it makes it clear that the primary responsibility for providing care and protection to a child is his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation namely, foster care, sponsorship and being looked after by an after-care organisation.

5. The JJ Act, 2000, however did not define 'adoption' and it is only by the amendment of 2006 that the meaning thereof came to be expressed in the following terms:

"2(aa)-"adoption" means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship"

6. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the Court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the court of the district judge, family courts and the city civil court. [Rule 33 (5)] Substantial changes were made in the other sub-sections of Section 41 of the JJ Act, 2000. The CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Govt. [Section 41(3)].

7. In exercise of the rule making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deal with *rehabilitation and social reintegration*. Under Rule 33(2) guidelines issued by the CARA, as notified by the Central Government under Section 41 (3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territor

concerned State.

Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption & lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an aftercare organisation. Whatever the Rules do not provide for are supplemented by the CARA guidelines of 2011 which additionally provide measures for post adoption follow up and maintenance of data of adoptions.

8. It will now be relevant to take note of the stand of the Union of India. Way back on 15th May, 2006 the Union in its counter affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (respondent No. 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 Child Welfare Committees (CWC) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognized adoption organisations in the country are 395. According to the Union the number of reported adoptions in the country from January, 2013 to September, 2013 was 19884 out of which 1712 cases are of inter-country adoption. The third respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay

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A in processing of adoption cases at the level of Child Welfare Committees (CWS), the Adoption Recommendation Committees (ARCs) as well as the concerned courts.

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9. In the light of the aforesaid developments, the petitioner in his written submission before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act 1954, which enables any person living in India to get married under that Act, irrespective of the religion he follows. JJA 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the Amending Act of 2006 the prayers made in the writ petition with regard to guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA guidelines as notified.

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10. The All India Muslim Personal Law Board (hereinafter referred to as 'the Board') which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other/ alternative modes of taking care of an abandoned/surrendered child. It is contended that Islamic Law does not recognize an adopted child to be at par with a biological child. According to the Board, Islamic Law professes what is known as the "Kafala" system under which the child is placed under a 'Kafil' who provides for the well being of the child including financial support and thus is legally allowed to

though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "Kafala" system which is recognized by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of Islamic Law before declaring a muslim child available for adoption under Section 41(5) of the JJ Act, 2000.

11. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, Rules and the CARA guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

12. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the

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A views of the Bombay and Kerala High Courts in *In re: Manuel Theodore D'souza*<sup>2</sup> and *Philips Alfred Malvin Vs. Y.J.Gonsalvis & Ors.*<sup>3</sup> respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

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13. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised. The Fundamental Rights embodied in Part-III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel us to take

2. (2000) 3 BomCR 244.  
3. AIR 1999 Kerala 187.

A the view that the present is not an appropriate time and stage  
where the right to adopt and the right to be adopted can be  
raised to the status of a fundamental right and/or to understand  
such a right to be encompassed by Article 21 of the  
Constitution. In this regard we would like to observe that the  
B decisions of the Bombay High Court in *Manuel Theodore D'souza* (supra) and the Kerala High Court in *Philips Alfred Malvin* (supra) can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua Fundamental Rights was not directly in issue before the Kerala High Court, in *Manuel Theodore D'souza* (supra) the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of Constitutional interpretation unless such an exercise is but unavoidable.

14. Consequently, the writ petition is disposed of in terms of our directions and observations made above.

D.G. Writ Petition disposed of. E

A P.L. TATWAL  
v.  
STATE OF MADHYA PRADESH  
(Criminal Appeal No. 456 of 2014)

B FEBRUARY 19, 2014  
[SUDHANSU JYOTI MUKHOPADHAYA AND  
KURIAN JOSEPH, JJ.]

C *PREVENTION OF CORRUPTION ACT, 1988:*  
D *s. 19 (1) (c) r/w 13 (1) (d) and 13 (2) - Previous sanction -- Competent Authority - Assistant Engineer appointed when Corporation was ruled by Administrator - Sanction accorded by Standing Committee of Corporation - Held: Administrator is only an ad hoc arrangement made by Government u/s 424 of Municipal Corporation Act when an elected committee is superseded or dissolved -- Standing Committee being appointing authority of appellant, was the competent authority to accord sanction - Madhya Pradesh Municipal Corporation Act, 1956 - ss. 58 and 424.*

E *s. 19 - Previous sanction for prosecution - Application of mind by competent authority - Held: The authority has to be apprised of all the relevant materials, and on such materials, it has to take a conscious decision as to whether the facts  
F would reveal the commission of an offence -- The decision making on relevant materials should be reflected in the order and if not, it should be capable of proof before the court -- In the instant case, though appellant made a specific objection before Special Judge, the order does not indicate any inquiry  
G by the court in this regard -- Orders passed by High Court and trial court are set aside and matter is remitted to trial court to record a finding as to valid sanction - It may also consider the effect of quashing of the prosecution as regards superior officers and there being no sanction for prosecution of others.*

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The appellant, an Assistant Engineer, along with others, was sought to be prosecuted for offences punishable u/ss 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 on the allegations of irregularities in the award of the contract and construction of administrative building for the Corporation. At the relevant time, the Corporation was ruled by an Administrator. However, the sanction was granted by the Standing Committee of the Corporation.

In the instant appeal, it was mainly contended for the appellant that since he was appointed in service by the Administrator, sanction for prosecution could be given only by the Administrator and in his absence by the State Government; that there was no proper and valid sanction by the competent authority; and that since the proceedings for prosecution against his superior officers had been quashed, proceedings in his case also be quashed as it was not likely in such a situation to have a successful prosecution.

Allowing the appeal in part, the Court

HELD: 1.1 In view of s. 19 (1) (c) of the Prevention of Corruption Act, 1988, the competent authority to give previous sanction in the case of the appellant is the authority competent to remove him from service. No doubt the appointing authority is the authority competent to remove him from service. Under s. 58 of the Municipal Corporation Act, 1956, the Standing Committee is the competent authority for appointment of the appellant. The Administrator is only an ad hoc arrangement made by the Government u/s 424 of the Municipal Corporation Act when an elected committee is superseded or dissolved. It so happened that the appointment of the appellant was at a time when the Municipal Corporation was ruled by the Administrator. It is the Standing Committee which gave the sanction by its order dated 27.08.1996.

Therefore, the trial court and the High Court cannot be faulted in taking the view that there was an order of sanction for prosecution from the competent authority. [para 7-9] [1122-C-D; 1123-A-B, D]

1.2 The grant of sanction is only an administrative function. It is intended to protect public servants against frivolous and vexatious litigation. It also ensures that a dishonest officer is brought before law and is tried in accordance with law. Thus, it is a serious exercise of power by the competent authority. The authority has to be apprised of all the relevant materials, and on such materials, it has to take a conscious decision as to whether the facts would reveal the commission of an offence under the relevant provisions. The decision making on relevant materials should be reflected in the order and if not, it should be capable of proof before the court. Though the appellant made a specific objection in this regard before the Special Judge, in the order dated 27.12.2004, there is no inquiry by the court in this regard. There is no reference at all to the recommendation made by the Municipal Commissioner. [para 12 and 15] [1125-E-G; 1126-E]

1.3 In the circumstances, the trial court should conduct a proper inquiry as to whether all the relevant materials were placed before the competent authority and whether it has referred to the same so as to form an opinion as to whether the same constituted an offence requiring sanction for prosecution. Accordingly, the orders passed by the High Court and the trial court are set aside and the matter is remitted to the trial court to conduct a proper inquiry as to according of the sanction. [para 16] [1128-B-C]

1.4 The fact that the proceedings for prosecution in the case of the Commissioner and Administrator who were the controlling officers of the

quashed, may also be brought to the notice of the Special Judge which would be considered at the time of consideration of charge, in case the court enters a finding on valid sanction and decides to proceed with the case. The court may also consider the fact that there is no sanction for prosecution in the case of the Superintending Engineer and the City Engineer, who were the superior officers of the appellant at the relevant time and in whose case, the Standing Committee decided not to give sanction on the ground that they were not in service when the decision on sanction was taken. [para 17] [1128-D-F]

*State of Maharashtra through Central Bureau of Investigation v. Mahesh G. Jain*, 2013 (3) SCR 850 = (2013) 8 SCC 119 - relied on.

*Chittaranjan Das v. State of Orissa* 2011 (7) SCR 836 = (2011) 7 SCC 167 - cited.

#### Case Law Reference:

2011 (7) SCR 836 cited para 2 E

2013 (3) SCR 850 relied on para 3 E

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 456 of 2014.

From the Judgment and Order dated 25.08.2011 of the High Court of M.P. at Indore in CRR No. 96 of 2005.

Rekha Pandey, Shiv Prakash Pandey for the Appellant.

C.D. Singh, Sakshi Kakkar, Bhupender Pratap Singh for the Respondent, G

The Judgment of the Court was delivered by

**KURIAN, J.** 1. Leave granted. H

A 2. The appellant along with two others were sought to be prosecuted under Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'PC Act'). The allegations pertain to the irregularities in the award of the contract and construction of administrative building for the Corporation of Ujjain during the period 1991-1993. At the relevant time, the appellant was working as the Assistant Engineer in the Corporation and the Corporation was ruled by an Administrator. In the case of the co-accused Shri D.L. Rangotha, the then Commissioner of the Municipal Corporation and Shri D. P. Tiwari, the then Administrator of the Corporation, the State Government and the Central Government respectively had declined to grant sanction, while they were in service. Since the prosecution was sought to be launched after their retirement, the same was challenged before the trial court and the High Court unsuccessfully. However, by order dated 21.08.2013, in Criminal Appeal No. 1213 of 2013 and Criminal Appeal No. 1214 of 2013, this Court quashed the proceedings for prosecution against Shri D. L. Rangotha and Shri D. P. Tiwari on the ground that once sanction for prosecution is refused by the competent authority while the officer is in service, he cannot be prosecuted after retirement notwithstanding the fact that no sanction for prosecution under the PC Act is necessary after the retirement of a public servant. The order was passed following the decision in *Chittaranjan Das v. State of Orissa*<sup>1</sup>.

F 3. However, in the case of the appellant herein, sanction was granted by the Standing Committee of the Corporation while he was in service. Though the same was subsequently withdrawn, that order was set aside by the High Court holding that the order on withdrawal was passed without proper application of mind. G

4. The appellant has three main contentions:

H 1. (2011) 7 SCC 167.

- (i) Since he was appointed in service by the Administrator, sanction for prosecution can be given only by the Administrator and in case, the Administrator is not in position, then the sanction is to be given by the State Government who appoints the Administrator. A B
- (ii) At any rate, there is no proper and valid sanction by the competent authority. C
- (ii) Since the proceedings for prosecution against his superior officers have been quashed by this Court, proceedings in his case also be quashed since it is not likely in such a situation to have a successful prosecution. C

5. It is not in dispute that the appellant was appointed by the Administrator when the Corporation was ruled by the Administrator. Therefore, it is the contention of the appellant that the competent authority to give sanction for prosecution under Section 19 of the PC Act is the Administrator and in case the Administrator is not available, the sanction is to be given by the State Government. D E

6. We are afraid, the contentions cannot be appreciated as the same do not found any basis in law or logic. Section 19(1) of the PC Act reads as follows: F

**"19. Previous sanction necessary for prosecution.-**

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,- G

- (a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that H

- A Government;
- B (b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;
- C (c) in the case of any other person, of the authority competent to remove him from his office."

(Emphasis supplied)

7. The appellant comes under Section 19(1)(c). The competent authority to give previous sanction is the authority competent to remove one from service. No doubt the appointing authority is the authority competent to remove him from service. Under Section 58 of the Municipal Corporation Act, 1956, the Standing Committee is the competent authority for appointment in any post in the municipality having a salary for more than Rs.400/- per month. For easy reference, we may extract the relevant portion from the statement made on behalf of the State Government on a specific query from the court: E

"The Respondent most respectfully submits that (sic) Section 45 and 48 of the Municipal Corporation Act 1956 empowers the Municipal Corporation to establish the committees and through Gazette Notification 1977 dated 21.03.1977 whereby Section 58 of the Municipal Corporation Act was amended, power was vested in the Standing committee to appoint any persons on the post of any such municipal post, which has maximum salary of more than Rs.400/- ... F G

xxx xxx xxx xxx

The Respondent most respectfully submits that the above mentioned amendment was made in 1977 and the Petitioner was initially appoint H

Corporation on 17.12.79 by the Standing committee..." A

8. The Administrator is only an ad hoc arrangement made by the Government under Section 424 of the Madhya Pradesh Municipal Corporation Act, 1956 when an elected committee is superseded or dissolved. It so happened that the appointment of the appellant was at a time when the Municipal Corporation was ruled by the Administrator. That does not mean that there should be an Administrator to take any decision with regard to the sanction for prosecution of the appellant under the PC Act. B

9. The Statute is very clear that the authority competent to remove an officer from service is the authority to give sanction for prosecution. In the case of the appellant, being an employee having a salary of more than Rs.400/- per month, the authority competent to remove him from service is the Standing Committee. It is the Standing Committee which gave the sanction by its order dated 27.08.1996. Therefore, the trial court and the High Court cannot be faulted in taking the view that there was an order of sanction for prosecution from the competent authority. C

10. It is vehemently contented by the learned counsel for the appellant that there is no proper and valid sanction for prosecuting the appellant. The authority has not applied its mind and has not taken a conscious decision by referring to any of the relevant materials. It is pointed out that the authority has only accepted the recommendations of the Commissioner. But there is nothing to show that the recommendation was before the authority. Still further, it is pointed out that the order of sanction does not indicate reference to any material; however, the enclosures give an indication that the inquiry report of the Special Police Establishment and government letter were before the competent authority. In order to appreciate the contention properly, we shall extract the Resolution of the Standing Committee, which reads as follows: D

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A **"RESOLUTION NO.309 DATED 27-08-1996 OF STANDING COMMITTEE MEETING, UJJAIN MUNICIPAL CORPORATION"**

B With regard (sic) to sanction of prosecution in Crime No. 54/93 against Administrator of Municipal Corporation and others, letter of Commissioner Municipal Corporation No.310 dated 22.06.1996 stating that "the Government has sought sanction for prosecution of Shree R.K. Sharma, the then Superintending Engineer, Shree R.K. Bhagat the then City Engineer, Shree P.L. Tatwal, the then Assistant Engineer, who were posted with Municipal Corporation Ujjain. Under section 19(1)(c) (sic) of Prevention of Corruption Act, sanction for prosecution can be accorded by the authority which is competent to remove such public servant from the office. The Standing Committee is the Appointing Authority of the above three officers. That way Corporation is competent to accord sanction for prosecution against them. The factual position about the three officers is as below. Shree R.K. Sharma the then Superintending Engineer was not from this department and was sent on deputation by the government and is now at presently retired. Shree R.K. Bhagat the then City Engineer has since retired and Shree P.L. Tatwal the then Assistant Engineer is presently posted with Municipal Corporation Ujjain. So please intimate Honourable Mayor about the above factual position and decision about grant of sanction be intimated so that the government may be intimated of the decision. C

D After discussion, unanimously resolved that as per the recommendation of Municipal Commissioner, sanction is granted to take action to prosecute the concerned officers. Action be taken according to law. E

F Sd/- (Smt. Anju Bhargav)  
Chairman Standing Committee  
Municipal Corporation Ujjain

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Sr. No.:- 1334 Date :- 11-9-96

Commissioner, Ujjain Municipal Corporation to take necessary action.

Enclosed:- Government letter and photocopy of enquiry report of Special Police Establishment. B

Sd/-  
Municipal Secretary  
Ujjain Municipal Corporation"  
(Emphasis supplied) C

11. It may be seen that only the second paragraph of the Resolution speaks about the sanction and that is following the recommendation of the Municipal Commissioner. Whether that formed part of the government letter, it is not clear. The contents otherwise of the government letter are also not clear. D

12. The grant of sanction is only an administrative function. It is intended to protect public servants against frivolous and vexatious litigation. It also ensures that a dishonest officer is brought before law and is tried in accordance with law. Thus, it is a serious exercise of power by the competent authority. It has to be apprised of all the relevant materials, and on such materials, the authority has to take a conscious decision as to whether the facts would reveal the commission of an offence under the relevant provisions. No doubt, an elaborate discussion in that regard in the order is not necessary. But decision making on relevant materials should be reflected in the order and if not, it should be capable of proof before the court. F

13. In a recent decision in *State of Maharashtra through Central Bureau of Investigation v. Mahesh G.Jain*<sup>2</sup>, the court

2. (2013) 8 SCC 119.

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A has referred to the various decisions on this aspect from paragraph 8 onwards. It has been held at paragraph 8 as follows:

B "8. In *Mohd. Iqbal Ahmed v. State of A.P.*<sup>5</sup> this Court lucidly registered the view that (SCC p. 174, para 3) it is incumbent on the prosecution to prove that a valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out constituting an offence and the same should be done in two ways; either (i) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction, and (ii) by adducing evidence aliunde to show the facts placed before the sanctioning authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void ab initio." C

D 14. After referring to subsequent decisions, the main principles governing the issue have been culled out at paragraph 14 which reads as follows: E

E "14.1. It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out. F

F 14.2. The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution. G

G 14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it. H

14.4. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence. A

14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order. B

14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction. C

14.7. The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity." D

15. Though the appellants made a specific objection in this regard before the Special Judge, unfortunately in the order dated 27.12.2004, it is seen that there is no inquiry by the court in this regard. There is no reference at all to the recommendation made by the Municipal Commissioner. Before the High Court also, though the submissions were reiterated, the only consideration in that regard is available at paragraph 21 of the impugned order which reads as follows: E

"21. It is not a case of the applicant that standing committee of the Municipal Corporation was not competent to grant sanction under section 19 of the Prevention of Corruption Act, 1988. Undisputedly, the competent authority had passed the orders of sanction against all the accused persons concerned. The order of the sanction was passed after considering the whole record of the case and proper application of mind. The applicant failed to H

A demonstrate the order of sanction is suffering from non application of mind."

B 16. In such circumstances, we are of the view that the trial court should conduct a proper inquiry as to whether all the relevant materials were placed before the competent authority and whether the competent authority has referred to the same so as to form an opinion as to whether the same constituted an offence requiring sanction for prosecution. In that view of the matter, we set aside the impugned order passed by the High Court and also order dated 27.12.2004 passed in Special Case No. 12 of 2004 by the trial court and remit the matter to the Special Judge (P.C. Act, 1988), Ujjain, Madhya Pradesh. C

D 17. Incidentally, we may also refer to the third point raised by the appellant. It is the submission that the proceedings for prosecution in the case of the Commissioner and Administrator, who were the controlling officers of the appellant, having been quashed, there is no point in continuing the trial in the case of the appellant and it would only be an attempt in futility. This subsequent development may also be brought to the notice of the Special Judge which would be considered at the time of consideration of charge, in case the court enters a finding on valid sanction and decide to proceed with the case. The court may also consider the fact that there is no sanction for prosecution in the case of the Superintendent Engineer and the City Engineer, who were the superior officers of the appellant at the relevant time and in whose case, the Standing Committee decided not to give sanction on the ground that they were not in service when the decision on sanction was taken. F

G 18. The appeal is allowed to that extent. Parties to appear before the Special Judge (P.C. Act, 1988), Ujjain, Madhya Pradesh on 05.04.2014.

R.P.

Appeal partly allowed.

MAYA DEVI  
v.  
LALTA PRASAD  
(Civil Appeal No. 2458 of 2014)

FEBRUARY 19, 2014

**[K.S. RADHAKRISHNAN AND VIKRAMAJIT SEN, JJ.]**

*Code of Civil Procedure, 1908: Order XXI r.58 - Execution proceedings - Suit for recovery of money sought to be realized on a property covered by an agreement for sale - Suit claim based on the stipulation in the contract that double the amount of earnest money would be payable in the event the contract was not performed - Suit decreed ex parte - Objection by appellant-objector before executing court that in respect of the said property a registered power of attorney in 2006 was already executed between objector and wife of Judgment Debtor (JD) and possession was handed over to objector - Executing court dismissed the objection - Held: Power of Attorney executed in favour of objector was a genuine transaction - The ex parte decree was obtained by Decree Holder (DH) to get over the registered power of attorney executed in favour of objector - DH could not disprove the title of objector - Documents purportedly in favour of DH were unregistered and alleged payment made by JD was in cash - Also, objector was in possession of property in question since 2006 -Imposition and recovery of penalty on breach of contract is legally impermissible under the Indian Contract Act - No evidence was led by DH that claim for twice the amount of earnest money was a fair estimate of damages - Conjoint reading of Order XXI Rule 58 and the fasciculus of Order XXI comprising Rules 97 to 104 would show that all questions raised by the Objector should have been comprehensively considered on their merits - Decree from which the execution proceedings*

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*emanated was not one for delivery of possession, but was a simple money decree - The objector was a third party and was brought into the lis as her property was sought to be attached with the intention of satisfying a decree in which she was not directly or intrinsically concerned - The objections ought to have been allowed without disturbing the decree, leaving all other remedies open to the DH including proceedings against the estate of the JD.*

**A suit for recovery of Rs.3.40 lacs was filed by the respondent against one PCV which was sought to be realized on the property covered by agreement for sale dated 3.11.2003 executed between them. The suit was decreed ex parte. The appellant filed objection petition before the executing court on the ground that a registered Power of Attorney was already executed between the appellant and NV who was wife of Judgment Debtor. The executing court dismissed the objection petition. The High Court upheld the same.**

**In the instant appeal, it was contended for the appellant that the decree was obtained by collusion and practicing fraud on the court; that she became the absolute owner of the suit property by virtue of a registered General Power of Attorney dated 12.5.2006 and that she has been in actual physical possession of the suit property.**

**Allowing the appeal, the Court**

**HELD:**

**K.S. RADHAKRISHNAN, J.**

**1. The Executing Court as well as High Court have committed a grave error in not properly appreciating the objections filed by the appellant. The registered Power of Attorney was executed by none of them, the wife of**

Judgment Debtor and the appellant on 12.5.2006 in respect of the property in question for a sale consideration of Rs.70,000/-, which was received by NV in cash in advance and she acknowledged the same before the Sub-Registrar, Delhi. On the same day, NV, wife of Judgment Debtor handed over physical vacant possession of the land and building situated thereon and from 12.5.2006 onwards, the appellant was in possession of the property. A decree was obtained by the respondent without any proper contest and the court proceeded against Judgment Debtor ex-parte. These facts speak for itself. Evidently, the collusive decree was obtained by the respondent to get over the registered Power of Attorney executed in favour of the appellant. The Power of Attorney executed on 12.5.2006 in favour of the appellant by the wife of Judgment Debtor was a genuine transaction executed years before the judgment of Suraj Lamp. Facts will clearly indicate that the Agreement for Sale dated 3.11.2003 was created by none other than the husband of NV, who had executed the General Power of Attorney and possession was handed over to the appellant. That being the fact situation, the Objection filed by the appellant under Order 21 Rule 58 in execution has to be allowed. The executing court can execute the decree but without proceeding against the property referred to in registered Power of Attorney dated 12.5.2006. [paras 5 to 7, 9] [1141-E, G-H; 1142-A-C; 1143-A-D]

*Suraj Lamp and Industries Private Limited Through Director v. State of Haryana & Anr. (2009) 7 SCC 363: 2011 (11) SCR 848; Suraj Lamp and Industries Private Limited (2) Through Director v. State of Haryana & Anr. (2012) 1 SCC 656 - relied on.*

**VIKRAMAJIT SEN, J.**

1. A perusal of the evidence of the Decree Holder showed that he has failed altogether to disprove the title

A of the appellant, and he has maintained that the Defendant/Judgment Debtor was the owner, which was admittedly not the actual legal position. If the Decree Holder has been defrauded by the Defendant/Judgment Debtor, largely because of the former's careless disregard to conduct a title-search, he must face the legal consequences; they cannot be transferred/imposed upon a third party to its detriment. In the wake of the Decree Holder/Plaintiff denying the title of NV, the courts below erred in proceeding against her property. Both the courts below have preferred the view that the appellant, who has been in possession from the date of the execution of the registered GPA in her favour, has been introduced into the scene in order to defeat the interests of the Respondent, which is a perverse approach. The documents purportedly in favour of the Respondent/Decree Holder were unregistered and the alleged payment made by him to PCV was in cash. Therefore, there was no justification for favouring the view that the alleged transaction between Judgment Debtor and the Respondent/Decree Holder was genuinely prior in time to the execution of the registered Power of Attorney in favour of the appellant by NV, and the former simultaneously and contemporaneously was put into possession of the property by the latter. [paras 3, 4] [1146-B-G]

*Suraj Lamp and Industries Private Limited Through Director v. State of Haryana & Anr. (2009) 7 SCC 363: 2011 (11) SCR 848 - relied on.*

2. There can be no gainsaying that when the probative value of documents is to be assessed, specially those dealing with the creation of any interest in property or its transfer, of a value exceeding Rs.100/-, obviously documents which have been duly registered regardless of whether or not that was legally mandatory, would score over others. A perusal of the ju

whether the sum of Rs.1,70,000/- allegedly paid by the Plaintiff to PCV was in cash or through a traceable Bank transaction or through a registered acknowledgment has not been cogitated upon. It was not controverted that the appellant was in possession of the property in question from May, 2006. A reading of the judgment by which the suit was decreed for a sum of Rs.3,40,000/- did not shed any light on the circumstances which made the Plaintiff wait to initiate legal action till after the property was sold and its possession delivered to the appellant. Therefore, the so-called "Deed of Agreement for Earnest Money" allegedly executed almost three years earlier on 03.11.2003 does not appear genuine. The veracity of the document dated 3.11.2003, looking upon the Power of Attorney and other documents appear mala fide. It is not disputed that the title and possession of the property which has been brought within the sweep of the execution proceedings, was never held in any capacity by the Defendant/ Judgment Debtor, but by his wife, NV. To give even a semblance of a case to the Plaintiff-respondent, the Deed of Agreement for Earnest Money should have been between the Plaintiff/Decree Holder/ Respondent and NV. [para 5] [1146-G-H; 1147-A-F]

3. The trial court having accepted the payment of Rs.1,70,000/- without insisting on any proof, did not go into the question whether a covenant stipulating that double the amount of earnest money would be payable in the event the contract was not performed, is legal in terms of the Indian Contract Act. The imposition and the recovery of penalty on breach of a contract is legally impermissible under the Indian Contract Act. As regards liquidated damages, the Court would have to scrutinize the pleadings as well as evidence in proof thereof, in order to determine that they are not in the nature of a penalty, but rather as a fair pre-estimate of what the damages are likely to arise in case of breach of the contract. No evidence whatsoever has been led by the

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A Plaintiff to prove that the claim for twice the amount of earnest money was a fair measure or pre-estimate of damages. [Para 6] [1148-A-D]

B 4. Returning to the facts of the instant case, the so called Deed of Agreement for Earnest Money inasmuch as it postulates the payment of twice the sum received ought not to have been decreed as firstly, the contract itself could not have been specifically enforced since the Defendant was devoid of title; and secondly, the Plaintiff had not proved that he had suffered any damages and facially the stipulated sum was in the nature of a penalty. [Para 11] [1153-E-F]

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D 5. The Execution proceedings were initiated by the Respondent/Decree holder on 27.10.2007 under Order XXI Rule 11, CPC. Objection application under Order XXI Rule 58 read with Section 151, CPC was preferred by the appellant pleading, inter alia, that the Decree Holder had wrongly scheduled her property in the Execution Application; that she was the absolute and real owner thereof having purchased it on 12.05.2006 from NV, wife of Judgment Debtor; that she has no other connection or concern with the Judgment Debtor or with his wife in any manner whatsoever. In the Execution proceedings, the Plaintiff/Decree Holder/Respondent in cross-examination of the appellant has only suggested that the documents were fabricated in collusion with NV. This was noy possible, since they were duly registered documents. The other question put in cross-examination was that NV was never the owner of the property; and that the appellant's Objections were filed at the behest of NV. All these suggestions were denied. If NV had no title, the consequence would be that the property would revert to her predecessor-in- title, thereby placing the property beyond the pale of the Execution proceedings. [para 14] [1155-E-H; 1156-A-D]

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H 6. NV had also participated in the Execution proceedings and had filed her aff

therein that she had sold the property to the appellant by executing a registered General Power of Attorney, Agreement to Sell, Affidavit, Receipt, Possession Letter, Will Deed, which were duly notarised on 12.05.2006. She further stated that she had purchased the property by means of similar documentation all of which were handed over by her to the appellant at the time of selling of the said property. She stated that her husband PCV / Judgment Debtor had expired on 8.10.2008. As Order XXI Rule 97 to Rule 101 of CPC envisage the determination of all questions in Execution proceedings and not by way of an independent suit, the Executing Court was duty bound to consider and decide the Objections filed by the Appellant with complete care and circumspection. This was not done. This showed that the Executing Court ignored and overlooked the important submission of the appellant stating that she was the absolute owner of the suit property and that she had no truck whatsoever either with the Judgment Debtor or his wife NV beyond purchasing the subject property from the latter. What has also escaped the attention of the Court was that Suraj Lamp case has prospective operation, thereby rendering it inapplicable to the subject 2006 transaction. Secondly, if the General Power of Attorney in favour of the appellant was bereft of legal efficacy, the ownership of NV would also be invalid, and sequentially the property would have no connection whatsoever with the Judgment Debtor since he had purportedly derived title only through a Will. Unfortunately, this is also the approach which has been preferred by the High Court in terms of the impugned order. The High Court has also wrongly applied Suraj Lamp and has also neglected to reflect upon the appellant's plea that she was the actual owner of the suit property having purchased it for valuable consideration, and being a third party not connected in any mala fide manner with the Judgment Debtor, and not having received prior notice of any action of PCV was imperious to Execution proceedings. A miscarriage of justice, of

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monumental proportions, took place on an unsubstantiated presumption that one of the assets of the Judgment Debtor had been illegally transferred to defeat the decree. The appellant had no other recourse than to file Objections under Order XXI Rule 58 CPC. [paras 15 to 17] [1156-G-H; 1157-A-H; 1158-A-D]

*Sir Chunilal V. Mehta & Sons Ltd. vs Century Spinning and Manufacturing Co. Ltd.* AIR 1962 SC 1314; 1962 Suppl. SCR 549; *Fateh Chand vs Balkishan Dass* AIR 1963 SC 1405; 1964 SCR 515; *Phulchand Exports Limited Vs O.O.O. Patriot* 2011 (10)SCC 300; 2011 (15) SCR 1129; *Maula Bux vs Union of India* 1969 (2) SCC 554; 1970 (1) SCR 928; *UOI vs Raman Iron Foundry* 1974 (2) SCC 231; 1974 (3) SCR 556; *BSNL vs Reliance Communication Ltd.* 2011 (1) SCC 394; 2010 (15) SCR 705; *Shantilal Gulabchand Mutha vs Tata Engineering and Locomotive Company Limited*, (2013) 4 SCC 396 - relied on.

7. The plaint contained an averment that the suit property had already been sold. The Judgment Debtor, (his wife NV was not impleaded) had appeared in the trial court and filed his Written Statement in which, whilst admitting the documentation executed between the parties, he had denied that he had been served with any legal notice and set up the defence that he was entitled to forfeit the amount received by him because the Plaintiff/Decree Holder had failed to pay the balance sale consideration as envisaged in the Deed of Agreement for Earnest Money. After filing his Written Statement he stopped appearing, and the suit proceeded ex-parte. Significantly, the Deed of Agreement for Earnest Money as well as the Written Statement predicate Defendant's title on a Will, and in this context there is no evidence on record that it had taken effect because of the death of the Testator. In the event, as is to be expected, no appeal against the judgment and decree came to be filed, and, therefore, the decision was no

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scrutinized by the Appellate Court. The absence of the Defendant does not absolve the trial court from fully satisfying itself of the factual and legal veracity of the Plaintiff's claim; nay, this feature of the litigation casts a greater responsibility and onerous obligation on the trial court as well as the Executing Court to be fully satisfied that the claim has been proved and substantiated to the hilt by the Plaintiff. [para 18] [1158-E-H; 1159-A-B]

8. The appellant has not taken any steps for setting aside the ex parte decree against Judgment Debtor. This was only to be expected since the Appellant/Objector had no reason to evince or harbour any interest in the inter se dispute between the Decree Holder and the Judgment Debtor. Indeed, if the appellant had made any endeavour to assail or nullify the decree, it would be fair to conclude that she had been put up by the Judgment Debtor in an endeavour to defeat the decree. On a conjoint reading of Order XXI Rule 58 CPC and the fasciculus of Order XXI comprising Rules 97 to 104, it becomes clear that all questions raised by the Objector have to be comprehensively considered on their merits. In the case in hand, the decree from which the Execution proceedings emanate is not one for delivery of possession, but is a simple money decree. Order XXI prescribes the filing of a separate suit and prescribes that all relevant questions shall be determined by the Court. Objection under Order XXI should be meaningfully heard so as to avoid the possibility of any miscarriage of justice. Rule 103 ordains that where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise, as if it were a decree. The appellant is a third party and has been brought into the lis by a side wind in that her property is sought to be attached with the intention of satisfying a decree in which she was not directly or intrinsically concerned. The appellant/Objector who has

approached the Court under Order XXI Rule 58 is more advantageously or favourably placed inasmuch as she is a third party so far as the decree is concerned, and her property is not the subject-matter of the decree. It is thus clear to me that the courts below have in a hurried, if not prejudiced manner, rejected the Objections merely because of some sympathy towards the Decree Holder. The Objections deserved to be allowed without disturbing the decree, leaving all other remedies open to the Decree Holder/Respondent, including proceedings against the Estate of the Judgment Debtor. [para 19] [1159-E-H; 1160-A-C, D-G]

*Brahmdeo Chaudhary vs Rishikesh Prasad Jaiswal, (1997) 3 SCC 694, Shreenath vs Rajesh, (1998) 4 SCC 543, and Tanzeem-e-sufia vs Bibi Haliman, (2002) 7 SCC 50 - referred to.*

Halsbury's Laws of England (4th edn Reissue, 1998) Vol 12(1), para 1065; Corpus Juris Secundum, Volume 25A (2012) - referred to.

K. S. RADHAKRISHNAN, J.

Case Law Reference:

2011 (11) SCR 848 Relied on Para 2

(2012) 1 SCC 656 Relied on Para 3

VIKRAMAJIT SEN, J.

Case Law Reference:

1962 Supp SCR 549 Relied on Para 7, 8

2010 (15) SCR 705 Relied on Para 7, 8

1964 SCR 515 Relied on Para 7

2011 (15) SCR 1129 Relied on Para 12

1970 (1) SCR 928 Relied on

<b>1974 (3) SCR 556</b>	<b>Relied on</b>	<b>Para 13</b>	A
<b>2010 (15) SCR 705</b>	<b>Relied on</b>	<b>Para 13</b>	
<b>(2013) 4 SCC 396</b>	<b>Relied on</b>	<b>Para 18</b>	
<b>(1997) 3 SCC 694</b>	<b>Relied on</b>	<b>Para 19</b>	B
<b>(1998) 4 SCC 543</b>	<b>Referred to</b>	<b>Para 19</b>	
<b>(2002) 7 SCC 50</b>	<b>Referred to</b>	<b>Para 19</b>	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2458 of 2014. C

From the Judgment and Order dated 24.01.2011 of the High Court of Delhi at New Delhi in EXFA No. 23 of 2010.

Rajesh Kumar (for Bhaskar Y. Kulkarni) for the Appellant. D

K. Krishna Kumar (for M.A. Krishna Moorthy) for the Respondent.

The Judgments of the Court was delivered by

**K.S. RADHAKRISHNAN, J.** 1. Leave granted. E

2. The appellant herein filed an Objection Petition under Order 21 Rule 58 CPC, when the decree obtained by the respondent in Civil Suit No.407 of 2007 was sought to be executed. Suit was filed for the recovery of an amount of Rs.3,40,000/- with interest, which was sought to be realized, on the property covered by an agreement for sale dated 3.11.2003 between the judgment debtor and decree holder. The appellant claimed that she became the absolute owner of the suit property by virtue of a registered General Power of Attorney dated 12.5.2006 and that she has been in actual physical possession of the suit property. The Petition was contested by the decree holder/respondent stating that the applicant/objector had no legal right, title or interest and that the execution of the General Power of Attorney and its registration would not confer any ownership right in favour of F  
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A the appellant/objector. Reliance was also placed on the judgment of this Court in *Suraj Lamp and Industries Private Limited Through Director v. State of Haryana & Anr.* (2009) 7 SCC 363. The Executing Court vide its order dated 23.7.2010 dismissed the Objection Petition filed by the appellant. Aggrieved by the same, the appellant preferred Execution First Appeal No.23 of 2010 before the High Court of Delhi at New Delhi. The High Court also placed reliance on the judgment of this Court in *Suraj Lamp and Industries Private Limited* (supra) and dismissed the appeal holding that the documents relied upon by the appellant would not confer ownership or possession over the property in her favour. The High Court also vide its order dated 24.1.2011 upheld the order of the Executing Court. Aggrieved by the same, this appeal has been preferred by the appellant. C

D 3. Shri Rajesh Kumar, learned counsel appearing for the appellant submitted that the ratio laid down by this Court in *Suraj Lamp and Industries Private Limited* (supra) was wrongly applied by the Executing Court as well as the High Court. Learned counsel submitted that in the final judgment which is reported in *Suraj Lamp and Industries Private Limited (2) Through Director v. State of Haryana & Anr.* (2012) 1 SCC 656, this Court has clarified the position that the judgment would not affect the validity of sale agreements and powers of attorney executed in genuine transactions and that the judgment would operate only prospectively. Learned counsel also submitted that the alleged agreement executed between the respondent and one Prem Chand Verma on 3.11.2003 was a collusive one, subsequently created, to get over the registered Power of Attorney executed on 3.6.1982 between the appellant and wife of Prem Chand Verma, viz. Nirmal Verma. Learned counsel also pointed out that Civil Suit No.407 of 2007 was preferred by the respondent herein against Prem Chand Verma based on the deed of agreement dated 3.11.2003 created for the said purpose. Referring to the above-mentioned judgment, learned counsel further pointed out that Prem Chand Verma did not contest the Suit and he was declared H

was passed in favour of the respondent. Learned counsel pointed out that the decree was obtained by collusion and practicing fraud on the Court and the Executing Court has committed an error in rejecting the Objection filed by the appellant herein, so also by the High Court by not appreciating the facts in the correct perspective.

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4. Shri K. Krishna Kumar, learned counsel for the respondent, submitted that both the Executing Court and High Court have correctly applied the principles laid down in *Suraj Lamp and Industries Private Limited* (supra). Learned counsel pointed out that any process which interferes with regular transfers under deeds of conveyance properly stamped, registered and recorded in the registers of the Registration Department, is to be discouraged and deprecated and the Executing Court has rightly declined to give its seal of approval to General Power of Attorney, Agreement for Sale, etc. dated 12.5.2006.

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5. I am of the view that the Executing Court as well as High Court have committed a grave error in not properly appreciating the objections filed by the Appellant. We are in this case concerned with the question whether we must give credibility to the registered General Power of Attorney executed on 12.5.2006 between Nirmal Verma and the appellant or on the alleged Agreement for Sale executed on 3.11.2003 between the respondent and Prem Chand Verma, husband of Nirmal Verma. Further, we have to examine the manner in which Civil Suit No.407 of 2007 was decreed without contest by Prem Chand Verma, husband of Nirmal Verma.

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6. The registered Power of Attorney was executed by none other than the wife of Prem Chand Verma and the appellant herein on 12.5.2006 in respect of the property in question for a sale consideration of Rs.70,000/-, which was received by Nirmal Verma in cash in advance and she acknowledged the same before the Sub-Registrar, Delhi. On the same day, Nirmal Verma, wife of Prem Chand Verma. handed over physical vacant possession of the land and building situated thereon and

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A from 12th May, 2006 onwards, the appellant is in possession of the above-mentioned property.

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7. We are, in this case, therefore, concerned with the legal validity of a General Power of Attorney executed by none other than the wife of Prem Chand Verma against whom a decree has been obtained by the respondent without any proper contest and the court proceeded against him ex-parte. These facts speak for itself. Evidently, the collusive decree was obtained by the respondent to get over the registered Power of Attorney executed in favour of the appellant and, it is in this perspective, we have to understand and apply the ratio laid down by this Court in *Suraj Lamp and Industries Private Limited* (2) (supra).

8. Paragraph 27 of the judgment of this Court in *Suraj Lamp and Industries Private Limited* (2) (supra) reads as follows :

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"27. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a power of attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding "SA/GPA/will transactions" are not intended to apply to such bona fide/genuine transactions."

9. In the above judgment, it has been stated that the observations made by the Court are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. I am of the view that the Power of Attorney executed on 12.5.2006 in favour of the Appellant by the wife of Prem Chand Verma is a genuine transaction executed years before the judgment of this Court. Facts will clearly indicate that the Agreement for Sale dated 3.11.2003 was created by none other than the husband of Nirmal Verma, who had executed the General Power of Attorney and possession was handed over to the Appellant. That being the fact situation, in my view, the Objection filed by the Appellant under Order 21 Rule 58 in execution has to be allowed. I, therefore, hold that the Executing Court can execute the decree in Civil Suit No.407 of 2007, but without proceeding against the property referred to in registered Power of Attorney dated 12.5.2006.

10. The appeal is allowed, as above, and the impugned orders are set aside. There shall, however, be no order as to costs.

**VIKRAMAJIT SEN, J.** 1. I have perused the judgment of my learned and esteemed Brother Radhakrishnan, and I entirely and respectfully agree with his conclusion that the appeal deserves to be allowed. My learned Brother has succinctly analysed the sterling judgment in *Suraj Lamp and Industries Private Limited vs State of Haryana* (2009) 7 SCC 363, which has been rendered by a Three-Judge Bench of this Court. I completely concur with the view that since General Power of Attorney (GPA) in favour of the Appellant was executed and registered on 12.05.2006, it could not be impacted or affected by the *Suraj Lamp dicta*. Furthermore, a reading of the order of the Executing Court as well as of the High Court makes it palpably clear that both the Courts had applied the disqualification and illegality imposed upon GPAs by *Suraj Lamp*, without keeping in mind that the operation of that judgment was pointedly and poignantly prospective. This

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A question has been dealt with by my esteemed Brother most comprehensively.

2. What strikes us as a perverse, certainly misplaced or inconsistent approach, is that if the Appellant does not possess any title to the property predicated on the GPA executed in her favour by Smt. Nirmal Verma (the wife of the Judgment Debtor Shri Prem Chand Verma), this legal infirmity would inexorably invalidate the title of Smt. Nirmal Verma herself, thereby denuding any titular claim of her husband, the Judgment Debtor, and rendering the property impervious to the subject execution proceedings. Additionally, there is not even a semblance of a right in favour of the Judgment Debtor whose wife was not even impleaded in the suit or in the execution. The impugned judgment notes this contention but fails to address it. The evidence of the Decree Holder has not been filed and therefore the judicial records were summoned from the High Court.

3. The Statement of the Respondent/Decree Holder reads thus:-

"Ex. No. 224/2009

DHW-1: Sh.Lalta Prasad, S/o Sh. Naubat Ram, aged 58 years, R/o 1908, Gali Mata Wali, Chandni Chowk, Delhi-6.

ON S.A.

I, hereby, tender my affidavit in my evidence. The same be read as part and parcel of my statement. My affidavit is Ex. DHW-1/A(running in 2 pages) which bears my signatures at point A and B on page 1 & 2.

XXXXXX by Sh. Pradeep Chaudhary Adv. for objector.

I have passed 11th standard. The affidavit Ex. DHW-1/A was prepared in the office of my counsel. My counsel has explained me contents of the same to me before I signed the same. Whatever I stated

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A incorporated in Ex. DHW-1/A. The Agreement with Prem Chand Verma was entered on 11.11.2003. I had seen original documents of the property at that time in possession of Prem Chand Verma. He also gave me some copies of the same.

B Remaining cross-examination of the witness is deferred till 12.00 P.M.

RO&AC

C BRIJESH KUMAR GARG  
ADJ CENTRAL-18  
DELHI/ 29.01.10

DHW-1: Sh.Lalta Prasad, recalled for his further cross-examination at 12.50 P.M.

ON S.A.

XXXXXX by Sh. Pradeep Chaudhary Adv. for objector.

E I have no knowledge that Smt. Maya Devi had purchased the suit property from Smt. Nirmal Verma. The documents filed by the objectors are forged and fabricated documents. I have no knowledge that Smt. Nirmal Verma purchased the suit property from one Sh. Rajender Kumar.

F Sh. Prem Chand Verma was my friend for the last about 30 years. It is correct that Sh. Prem Chand Verma had already expired on 7.10.2008. It is wrong to suggest that Sh. Rajender Kumar was the owner of the property and he sold the property to Nirmal Verma from whom Smt. Maya Devi purchased the suit property. It is wrong to suggest that Sh. Prem Chand Verma was never the owner G of the suit property. It is wrong to suggest that I have filed a false affidavit and I am deposing falsely in the court today.

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A RO&AC

BRIJESH KUMAR GARG  
ADJ CENTRAL-18  
DELHI/ 29.01.10"

B It discloses that the Decree Holder has failed altogether to disprove the title of the Appellant, and he has maintained that the Defendant/Judgment Debtor was the owner, which is admittedly not the actual legal position. If the Decree Holder has been defrauded by the Defendant/Judgment Debtor, largely C because of the former's careless disregard to conduct a title-search, he must face the legal consequences; they cannot be transferred/imposed upon a third party to its detriment. In the wake of the Decree Holder/Plaintiff denying the title of Smt. Nirmal Verma, the Courts below erred in proceeding against her property.

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4. Both the Courts below have preferred the view that the Appellant, who has been in possession from the date of the execution of the registered GPA in her favour, has been introduced into the scene in order to defeat the interests of the Respondent, which is a perverse approach for reasons that shall be presently explained. The documents purportedly in favour of the Respondent/Decree Holder are unregistered and the alleged payment made by him to Shri Prem Chand Verma is in cash. Therefore, there is no justification for favouring the view that the alleged transaction between Shri Prem Chand Verma and the Respondent/Decree Holder was genuinely prior in time to the execution of the registered Power of Attorney in favour of the Appellant Smt. Maya Devi by Smt. Nirmal Verma, and the former simultaneously and contemporaneously was put into possession of the property by the latter.

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5. There can be no gainsaying that when the probative value of documents is to be assessed, specially those dealing with the creation of any interest in property or its transfer, of a value exceeding Rs.100/-, obviously documents which have been duly registered regardless of wh

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legally mandatory, would score over others. A perusal of the judgment shows that whether the sum of Rs.1,70,000/- allegedly paid by the Plaintiff in Suit No.407 of 2007, namely, Shri Lalta Prasad to Shri Prem Chand Verma was in cash or through a traceable Bank transaction or through a registered acknowledgment has not been cogitated upon. Proof of payment by the Plaintiff to the Defendant/husband of the previous owner of the property has not been adjudicated upon. It is not controverted that the Appellant Smt. Maya Devi has been in possession of the property in question from May, 2006. A reading of the judgment by which the Suit was decreed for a sum of Rs.3,40,000/- does not shed any light on the circumstances which made the Plaintiff wait to initiate legal action till after the property was sold and its possession delivered to the Appellant. I, therefore, disbelieve the genuineness of the so-called "Deed of Agreement for Earnest Money" allegedly executed almost three years earlier on 03.11.2003. And, I would rather discount the veracity of the document dated 3.11.2003, then looking upon the Power of Attorney and other documents executed in favour of the Appellant Smt. Maya Devi by Smt. Nirmal Verma as mala fide. What is important is that it is not disputed that the title and possession of the property which has been brought within the sweep of the execution proceedings, was never held in any capacity by the Defendant/Shri Prem Chand Verma, but by his wife, Smt. Nirmal Verma. To give even a semblance of a case to the Plaintiff Lalta Prasad, the Deed of Agreement for Earnest Money should have been between the Plaintiff/Decree Holder/Respondent and Smt. Nirmal Verma.

6. The Trial Court had framed the following issues in Suit No.407/2007, from which subject of proceedings emanates:

"(1) Whether the plaintiff is entitled for the suit amount? If so to what sum? OPP

(2) Whether the plaintiff is entitled for the interest? If so at what rate and for which period? OPP

A (3) Relief."

The Trial Court having accepted the payment of Rs.1,70,000/- without insisting on any proof, did not go into the question whether a covenant stipulating that double the amount of earnest money would be payable in the event the contract was not performed, is legal in terms of the Indian Contract Act. The imposition and the recovery of penalty on breach of a contract is legally impermissible under the Indian Contract Act. As regards liquidated damages, the Court would have to scrutinize the pleadings as well as evidence in proof thereof, in order to determine that they are not in the nature of a penalty, but rather as a fair pre-estimate of what the damages are likely to arise in case of breach of the contract. No evidence whatsoever has been led by the Plaintiff to prove that the claim for twice the amount of earnest money was a fair measure or pre-estimate of damages.

7. The pronouncements of the Constitution Bench in *Sir Chunilal V. Mehta & Sons Ltd. vs Century Spinning and Manufacturing Co. Ltd.* AIR 1962 SC 1314, and later in *Fateh Chand vs Balkishan Dass* AIR 1963 SC 1405, hold the field, making it unnecessary to refer to any other precedent for an enunciation of the law, except to appreciate the manner in which the opinion of the Constitution Benches have been applied to the factual matrix in later cases. With the number and volume of precedents increasing exponentially each year, reference to all decisions make arguments excruciatingly lengthy and judgments avoidably prolix. The first important judgment of this Court on the question of Sections 73 and 74 of the Contract Act is that of the Constitution Bench in *Chunilal V. Mehta*. The two significant issues which arose were firstly, as to what would constitute a substantial question of law requiring the grant by the High Court of a Certificate to appeal to this Court, and secondly, the quantum of damages that can be awarded in that case owing to the breach of the subject contract. It is the second question which is relevant for the present purposes. The admitted position was that the contract

A breached by the Defendant. A clause in the compact between  
the parties stipulated that in these circumstances, the Plaintiff  
would be entitled to receive from the Defendant "as  
compensation or liquidated damages for the loss of such  
appointment a sum equal to the aggregate amount of the  
monthly salary of not less than Rs.6000/- which the Firm would  
have been entitled to receive from the Company, for and during  
the whole of the then unexpired portion of the said period of  
21 years if the said Agency of the Firm had not been  
determined." The Plaintiff had initially claimed a sum of Rs.50  
Lakhs which was subsequently reduced by way of amendment  
of the plaint to Rs.28,26,804/-. The Constitution Bench opined  
that "when parties name a sum of money to be paid as  
liquidated damages they must be deemed to exclude the right  
to claim an unascertained sum of money as damages. ....  
Again the right to claim liquidated damages is enforceable  
under S. 74 of the Contract Act and where such a right is found  
to exist no question of ascertaining damages really arises.  
Where the parties have deliberately specified the amount of  
liquidated damages there can be no presumption that they, at  
the same time, intended to allow the party who has suffered by  
the breach to give a go-by to the sum specified and claim  
instead a sum of money which was not ascertained or  
ascertainable at the date of the breach". This precedent  
prescribes that if a liquidated sum has been mentioned in a  
contract to be payable on its breach, then if damages have  
actually been suffered, the said liquidated amount would be the  
maximum and upper limit of damages awardable by the Trial  
Court.

8. The judgment of the Constitution Bench one year later,  
in *Fateh Chand* concerns award of damages of the 'liquidated'  
sum even though actual damages may have been less. In that  
respect it is the converse of the factual matrix that existed before  
the earlier Constitution Bench in *Chunilal V. Mehta*. J.C. Shah,  
J (who authored *Fateh Chand*) along with Chief Justice B.P.  
Sinha were members of both Constitution Benches. Whilst the  
aspect of the liquidated damages being in the nature of a

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A penalty or in *terrorem* did not arise in *Chunilal V. Mehta*, It did  
so in *Fateh Chand* where the complaint was that the Plaintiff,  
namely, Fateh Chand had agreed to sell an immovable property  
for Rs.1,12,500/- of which Rs.1000/- had been received/paid  
as earnest money. The Agreement envisaged payment of a  
further sum of Rs.24,000/- and it stipulated that if the vendee  
failed to get the Sale Deed registered thereafter, then the sum  
received i.e. Rs.25,000/- would stand forfeited. Fateh Chand  
alleging a breach of the Agreement, sought to forfeit the sum  
of Rs.25,000/- which was found to be impermissible in law. It  
was in those circumstances that the Constitution Bench opined  
as follows:

"10. Section 74 of the Indian Contract Act deals with the  
measure of damages in two classes of cases (i) where the  
contract names a sum to be paid in case of breach and  
(ii) where the contract contains any other stipulation by way  
of penalty. We are in the present case not concerned to  
decide whether a contract containing a covenant of  
forfeiture of deposit for due performance of a contract falls  
within the first class. The measure of damages in the case  
of breach of a stipulation by way of penalty is by S. 74  
reasonable compensation not exceeding the penalty  
stipulated for. In assessing damages the Court has, subject  
to the limit of the penalty stipulated, jurisdiction to award  
such compensation as it deems reasonable having regard  
to all the circumstances of tile case. Jurisdiction of the  
Court to award compensation in case of breach of contract  
is unqualified except as to the maximum stipulated; but  
compensation has to be reasonable, and that imposes  
upon the Court duty to award compensation according to  
settled principles. The section undoubtedly says that the  
aggrieved party is entitled to receive compensation from  
the party who has broken the contract whether or not actual  
damage or loss is proved to have been caused by the  
breach. Thereby it merely dispenses with proof of "actual  
loss or damage"; it does not justify the award of  
compensation when in consequence

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legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

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11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether S. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that S. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by S. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

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After reading the entire evidence that had been recorded, the Constitution Bench found that the value of the property had not depreciated and, therefore, no damages could be awarded.

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9. This is also the manner in which this facet of the law has been enunciated in England, as is evident from the following passage from Halsbury's Laws of England (4th edn Reissue, 1998) Vol 12(1), para 1065 which reads as follows:-

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"1065. Liquidated damages distinguished from penalties.-

The parties to a contract may agree at the time of contracting that, in the event of a breach, the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called 'liquidated damages', and it is recoverable without the necessity of proving the actual loss suffered. If, however, the stipulated sum is not a genuine pre-estimate of the loss but is in the nature of a penalty intended to secure performance of the contract, then it is not recoverable, and the plaintiff must prove what damages he can. The operation of the rule against penalties does not depend on the discretion of the court, or on improper conduct, or on circumstances of disadvantage or ascendancy, or on the general character or relationship of the parties. The rule is one of public policy and appears to be sui generis. Its absolute nature inclines the courts to invoke the jurisdiction sparingly. The burden of proving that a payment obligation is penal rests on the party who is sued on the obligation".

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10. The position that obtains in the United States, obviously because of its Common Law origins and adherence, is essentially identical as is evident from these extracted paragraphs of Corpus Juris Secundum, Volume 25A (2012):

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192- Liquidated damages are a specific sum stipulated to and agreed upon by the parties in advance or when they enter into a contract to be paid to compensate for injuries in the event of a breach or nonperformance of the contract. 196-In examining whether a liquidated-damages provision is enforceable, courts consider whether the damages stemming from a breach are difficult or impossible to estimate or calculate when the cor

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whether the amount stipulated bears a reasonable relation to the damages reasonably anticipated. 198-Liquidated damages must bear a reasonable relationship to actual damages, and a liquidated-damages clause is invalid when the stipulated amount is out of all proportion to the actual damages. 200- A penalty is in effect a security for performance, while a provision for liquidated damages is for a sum to be paid in lieu of performance. A term in a contract calling for the imposition of a penalty for the breach of the contract is contrary to public policy and invalid. This position also finds elucidation in the following paragraph from American Restatement (Second) of Contracts 1981:-

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"356. LIQUIDATED DAMAGE AND PENALTIES

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof or loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

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11. Returning to the facts of the present case, the so called Deed of Agreement for Earnest Money inasmuch as it postulates the payment of twice the sum received ought not to have been decreed as firstly, the contract itself could not have been specifically enforced since the Defendant was devoid of title; and secondly, the Plaintiff had not proved that he had suffered any damages and facially the stipulated sum was in the nature of a penalty.

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12. In *Phulchand Exports Limited Vs O.O.O. Patriot* 2011(10)SCC 300, the Appellant (Seller) entered into a contract with the Respondent (Buyer) relating to the sale/purchase of 1000 MT of Indian polished rice for a total consideration of INR 12,450,000/-. The Seller loaded the rice 16 days late and the Vessel freighted by the Sellers left port (Kandla) 38 days later than the contractually stipulated time of

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A departure. The specified destination, the port of Novorossiysk, Russia, was to be the first port of discharge, and even in this regard there is a finding that the Vessel on which the shipment had been consigned was not sailing directly to the said port, leave aside Novorossiysk being its first port of call. The ship suffered an engine failure which resulted in its requiring salvage operations near Turkey, and the entire cargo on board, including the subject consignment of rice was sold pursuant to Admiralty proceedings to compensate the cost of the rescue of the Vessel. The Insurance Company maintained that the lien of the cargo to compensate the costs of the rescue of the Vessel was not covered in the policy. Arbitration proceedings under the aegis of the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation culminated in the passing of an Award which directed the sharing of the price of the rice consignment equally between the parties. In the Award it has been opined that the Buyer had failed to forward the shipping documents and the Insurance Certificate to the Seller and thus was equally blameworthy. The defence of the Seller was that the goods had passed to the Buyer, who had already paid the entire sale price on negotiation of documents by the Seller with the concerned Bank. This Court held that despite the fact that it was a CIF contract, the consignment having been belatedly boarded on the Vessel, which Vessel thereafter sailed later than the time agreed upon by the parties, and which Vessel did not have the contracted destination Novorossiysk as the first port of call, could not have been in conformity with the contract, and hence the goods could not be viewed as having passed to the Buyer thereby shifting to it the liability of the lost shipment. The other question that was raised was whether the stipulation in the contract envisaging the reimbursement of the consideration received by the Seller in the event of non-performance of the contract was in the nature of a penalty. It was in this context that Sections 73 and 74 of the Contract Act came to be considered. This Court held that the clause requiring the refund of the price of the Rice consignment could not be viewed as a penalty which is not legally recoverable in India and th

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impervious to jural interference as it was not against the public policy of India even in terms of the interpretation given in *ONGC Ltd. vs Saw Pipes Ltd.* (2003) 5 SCC 705.

13. After recording that the opinion of the two Constitution Benches still hold the field, I have nevertheless mentioned *Phulchand Exports* only for adverting/clarifying that views of this Court have remained constant till now. I must immediately clarify that it would require a Bench larger than a Five-Judge Bench to alter the legal position from what has been enunciated in *Chunilal V. Mehta* and *Fateh Chand*. The decisions of smaller Benches are relevant only for the purpose of analysing the verdict in a particular case on the predication of the elucidation of the law laid down by the Constitution Benches. This would include an oft-quoted decision in *Maula Bux vs Union of India*, 1969(2)SCC 554, as well as *UOI vs Raman Iron Foundry*, 1974(2)SCC 231, and *BSNL vs Reliance Communication Ltd.*, 2011(1) SCC 394, etc.

14. Now I come to the next aspect of the case. The Execution proceedings were initiated by the Respondent/Decree holder on 27.10.2007 under Order XXI Rule 11 of the Code of Civil Procedure ('CPC' hereinafter). It transpired that Attachment Orders came to be passed. The application dated 3.7.2008, being Objections under Order XXI Rule 58 read with Section 151 CPC was preferred by the Appellant Smt. Maya Devi pleading, inter alia, that the Decree Holder had wrongly scheduled her property in the Execution Application; that she was the absolute and real owner thereof having purchased it on 12.05.2006 from Smt. Nirmal Verma, wife of Prem Chand Verma (Judgment Debtor); that she has no other connection or concern with the Judgment Debtor or with his wife in any manner whatsoever. The Appellant, therefore, respectfully prayed that her aforesaid property may kindly be released from the Schedule. Plaintiff/Decree Holder Shri Lalta Prasad, Respondent before us, countered by pleading that the Objections had been filed at the behest of the Judgment Debtor to avoid the satisfaction of the decree; that the Appellant/

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A Objector was not the absolute and real owner of the suit property; that the duly registered General Power of Attorney executed by Smt. Nirmal Verma was forged and fabricated; that Smt. Nirmal Verma was none else than the wife of the Judgment Debtor. The Appellant has supported her stance by filing her own affidavit. In the Execution proceedings, the Plaintiff/Decree Holder/Respondent in cross-examination of the Appellant has only suggested that the documents were fabricated in collusion with Smt. Nirmal Verma. How this was possible, since they are duly registered documents, is difficult to comprehend. The other question put in cross-examination was that Smt. Nirmal Verma was never the owner of the property; and that Smt. Maya Devi's Objections were filed at the behest of Smt. Nirmal Verma. All these suggestions had been denied. If Smt. Nirmal Verma had no title, the consequence would be that the property would revert to her predecessor-in- title, thereby placing the property beyond the pale of the Execution proceedings.

15. The following issues were framed in the Execution proceedings:-

- E (i) Whether the objector/applicant Smt. Maya Devi is the absolute owner of the disputed property No.X-20, Gali No.5, Brahampuri, Delhi? If so its effect? OP Applicant.
- F (ii) Whether the judgment and decree dated 6.10.2007 are executable against the objector Smt. Maya Devi? OP DH."
- G Smt. Nirmal Verma had also participated in the Execution proceedings and had filed her affidavit dated 22.10.2008 by way of evidence, asseverating therein that she had sold the property to Smt. Maya Devi by executing a registered General Power of Attorney, Agreement to Sell, Affidavit, Receipt, Possession Letter, Will Deed, which w
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12.05.2006. She further stated that she had purchased the property from Shri Rajinder Parshad by means of similar documentation all of which were handed over by her to Smt. Maya Devi at the time of selling of the said property. Very significantly, she stated that her husband Prem Chand Verma/ Judgment Debtor had expired on 8.10.2008.

16. In this backdrop, it needs to be kept in prospective that Order XXI Rule 97 to Rule 101 of CPC envisage the determination of all questions in Execution proceedings and not by way of an independent suit. The Executing Court, therefore, was duty bound to consider and decide the Objections filed by the Appellant with complete care and circumspection. I regret to record that this has not been done. The Objections came to be dismissed on 23.7.2010 with brevity bordering on dereliction of duty, in the following manner:-

".... It has been submitted by the counsel for the objector that the applicant is the absolute owner of the suit property by virtue of General Power of Attorney which was registered on 12.5.2006 and she is in actual physical possession of the suit property but the counsel for the DH has stated that the objector has no legal right, title or interest as the execution of the General Power of Attorney and its registration does not confer any ownership right in favour of the applicant/objector. The counsel for DH has also relied upon the judgment of the Hon'ble Supreme Court in case titled as *Suraj Lamp and Industries Private Limited Vs State of Haryana and Another* reported as (2009) 7 Supreme Court Cases 363."

17. A perusal of the above will show that the Executing Court ignored and overlooked the important submission of the Appellant stating that she was the absolute owner of the suit property and that she had no truck whatsoever either with the Judgment Debtor Shri Prem Chand Verma or his wife Smt. Nirmal Verma beyond purchasing the subject property from the latter. What has also escaped the attention of the Court is that Suraj Lamp has prospective operation, thereby rendering it

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A inapplicable to the subject 2006 transaction. Secondly, if the General Power of Attorney in favour of the Appellant Smt. Maya Devi was bereft of legal efficacy, the ownership of Smt. Nirmal Verma would also be invalid, and sequentially the property would have no connection whatsoever with the Judgment Debtor since he had purportedly derived title only through a Will. Unfortunately, this is also the approach which has been preferred by the High Court in terms of the impugned order. The High Court has also wrongly applied *Suraj Lamp* and has also neglected to reflect upon the Appellant's plea that she is (i) the actual owner of the suit property having purchased it for valuable consideration, and (ii) being a third party not connected in any mala fide manner with the Judgment Debtor, and (iii) not having received prior notice of any action of late Shri Prem Chand Verma, was imperious to Execution proceedings. A miscarriage of justice, of monumental proportions, has taken place on an un-substantiated presumption that one of the assets of the Judgment Debtor had been illegally transferred to defeat the decree. The Appellant before us had no other recourse than to file Objections under Order XXI Rule 58 CPC.

E 18. Finally another aspect which has come to the fore, is the approach of the Trial Court in the adjudication of the suit. The plaint contains an averment that the suit property had already been sold. The Defendant Shri Prem Chand Verma, (his wife Smt. Nirmal Verma was not impleaded) had appeared in the Trial Court and filed his Written Statement in which, whilst admitting the documentation executed between the parties, he had denied that he had been served with any legal notice and set up the defence that he was entitled to forfeit the amount received by him because the Plaintiff/Decree Holder had failed to pay the balance sale consideration as envisaged in the Deed of Agreement for Earnest Money. After filing his Written Statement he stopped appearing, and the suit proceeded ex-parte. Significantly, the Deed of Agreement for Earnest Money as well as the Written Statement predicate Defendant's title on a Will, and in this context there is no evidence on record that it had taken effect because of the death

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event, as is to be expected, no appeal against the judgment and decree came to be filed, and, therefore, the decision was not tested before or scrutinized by the Appellate Court. The absence of the Defendant does not absolve the Trial Court from fully satisfying itself of the factual and legal veracity of the Plaintiff's claim; nay, this feature of the litigation casts a greater responsibility and onerous obligation on the Trial Court as well as the Executing Court to be fully satisfied that the claim has been proved and substantiated to the hilt by the Plaintiff. Reference to *Shantilal Gulabchand Mutha vs Tata Engineering and Locomotive Company Limited*, (2013) 4 SCC 396, will be sufficient. The failure to file a Written Statement, thereby bringing Order VIII Rule 10 of the CPC into operation, or the factum of Defendant having been set ex parte, does not invite a punishment in the form of an automatic decree. Both under Order VIII Rule 10 CPC and on the invocation of Order IX of the CPC, the Court is nevertheless duty-bound to diligently ensure that the plaint stands proved and the prayers therein are worthy of being granted. .

19. I am fully mindful of the fact that the Appellant has not taken any steps for setting aside the ex parte decree against late Shri Prem Chand Verma. This is only to be expected since the Appellant/Objector has no reason to evince or harbour any interest in the inter se dispute between the Decree Holder and the Judgment Debtor. Indeed, if the Appellant had made any endeavour to assail or nullify the decree, it would be fair to conclude that she had been put up by the Judgment Debtor in an endeavour to defeat the decree. In these circumstances, my in-depth analysis of the law pertaining to decreeing what is essentially a penalty clause may, on a perfunctory or superficial reading, be viewed as non essential to the context. This, however, is not so. On a conjoint reading of Order XXI Rule 58 CPC and the fasciculus of Order XXI comprising Rules 97 to 104, it becomes clear that all questions raised by the Objector have to be comprehensively considered on their merits. In the case in hand, the decree from which the Execution proceedings emanate is not one for delivery of possession, but is a simple

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A money decree. Order XXI proscribes the filing of a separate suit and prescribes that all relevant questions shall be determined by the Court. Objection under Order XXI should be meaningfully heard so as to avoid the possibility of any miscarriage of justice. It is significant in this regard that Rule 103 ordains that where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise, as if it were a decree. I shall only advert to the decisions of this Court in *Brahmdeo Chaudhary vs Rishikesh Prasad Jaiswal*, (1997) 3 SCC 694, *Shreenath vs Rajesh*, (1998) 4 SCC 543, and *Tanzeem-e-sufia vs Bibi Haliman*, (2002) 7 SCC 50, where proceedings were under the aforesaid fasciculus of Order XXI comprising Rules 97 to 104, in which the Objectors had set up a title distinct or different from that of the Judgment Debtor and the Court had protected their interest. The Appellant before us is a third party and has been brought into the lis by a side wind in that her property is sought to be attached with the intention of satisfying a decree in which she was not directly or intrinsically concerned.

E The Appellant/Objector who has approached the Court under Order XXI Rule 58 is more advantageously or favourably placed inasmuch as she is a third party so far as the decree is concerned, and her property is not the subject-matter of the decree. It is thus clear to me that the Courts below have in a hurried, if not prejudiced manner, rejected the Objections merely because of some sympathy towards the Decree Holder. The Objections deserved to be allowed without disturbing the decree, leaving all other remedies open to the Decree Holder/ Respondent, including proceedings against the Estate of the Judgment Debtor.

G 20. I respectfully agree with my learned Brother that the Appeal deserves to be allowed and the impugned orders require to be set aside.

D.G.

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Appeal allowed.

